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Landlord-Tenant - Repairs - Landlord Could be Liable Under Covenant to Repair for Injuries to Tenant's Invitees Caused by Breach of Such Agreement

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Abstract

Can a landlord be held liable under a covenant to repair for injuries to his tenant's invitees caused by the landlord's failure to repair? The new rule in New York answers yes. This case note examines the new rule in New York as held in the New York Court of Appeals' decision in *Putnam v. Stout*, 38 N.Y.2d 607 (1976). The *Putnam* decision indicates that once a landlord covenants to keep the premises in a safe condition and has received notice of the need for repairs, the landlord will be liable in tort for his breach of the covenant to repair and will no longer be able to immunize himself from tort liability by failing to repair. The case note suggests that New York's new rule goes as far as is currently advisable, in contrast to other jurisdictions where a landlord may be held liable even without a covenant to repair or retention of control of the premises by the landlord.

KEYWORDS: landlord, tenant, invitees, breach, liability

LANDLORD-TENANT—Repairs—Landlord Could Be Liable Under Covenant To Repair for Injuries to Tenant's Invitees Caused by Breach of Such Agreement. *Putnam v. Stout*, 38 N.Y.2d 607, 345 N.E.2d 319, 381 N.Y.S.2d 848 (1976).

Plaintiff, a shopper at defendant Grand Union Supermarket, was injured as a result of the unrepaired condition of the supermarket's driveway.¹ The store's employees had placed an obstruction upon the sidewalk, forcing plaintiff to walk on the driveway.² Defendant Grand Union leased the store and the adjoining parking lot from defendant Richard Steigler,³ who had agreed to keep the driveway in good repair.⁴

The question before the New York Court of Appeals⁵ was whether a landlord could be liable under a covenant to repair for injuries to his tenant's invitees caused by the landlord's failure to repair. In an unanimous decision, the court, in addition to affirming the tenant's liability, held that the landlord could be held liable solely on the basis of his breach of the covenant to repair.⁶

The modern trend of the law is toward holding the landlord responsible to the tenant or his invitees for injuries which result from the landlord's breach of a covenant to repair⁷ and for injuries which occur on the leased premises.⁸ Previously, the courts often held that

1. 38 N.Y.2d 607, 345 N.E.2d 319, 381 N.Y.S.2d 848 (1976).

2. Plaintiff fell when her shoe became caught in a hole, as she stepped off the sidewalk and onto the driveway. Evidence showed that the area around which plaintiff fell had been in a state of disrepair for at least ten days, and that Grand Union used the driveway regularly. *Id.* at 611, 345 N.E.2d at 321, 381 N.Y.S.2d at 850.

3. The landlord, Richard Steigler, died before commencement of the trial and his executors were substituted as parties. *Id.* at 609 n.1, 345 N.E.2d at 321 n.1, 381 N.Y.S.2d at 849 n.1.

4. *Putnam v. Stout*, 46 App. Div. 2d 812, 813, 361 N.Y.S.2d 205, 208 (2d Dep't 1974), *aff'd* 38 N.Y.2d 607, 345 N.E.2d 319, 381 N.Y.S.2d 848 (1976).

5. At trial in Westchester County, judgment was entered against both defendants. The liability was apportioned 25 percent against Grand Union and 75 percent against the estate of the landlord. The appellate division affirmed in a memorandum decision. *Id.*

6. 38 N.Y.2d at 611, 345 N.E.2d at 321, 381 N.Y.S.2d at 849.

7. *Id.* at 616, 345 N.E.2d at 324, 381 N.Y.S.2d at 853. In a footnote the court cites those jurisdictions which have adopted the modern rule. *Id.* at 616-17 n.6, 345 N.E.2d at 325 n.6, 381 N.Y.S.2d at 853 n.6.

8. For a discussion of the current changes in the present status of the landlord in relation to the tenant, see Note, *Lessor's Duty to Repair: Tort Liability to Persons Injured on the Premises*, 62 HARV. L. REV. 669 (1949); Note, *Lessor's Obligation to Maintain a Habitable Dwelling: Enforcement by Lessee and Retaliatory Action by Lessor*, 36 LA. L. REV. 813 (1976); Comment, *The Landlord's Tort Liability for Injuries Caused by Defects Upon the Demised*

a landlord was not liable in tort because the common law viewed a lease as the sale of an interest in land.⁹ Moreover, some courts reasoned that a violation of the covenant to repair was not tortious since the landlord's duty to repair arose from an agreement between the parties rather than from a common law duty.¹⁰ Thus, the covenant created a purely contractual obligation.¹¹

In *Cullings v. Goetz*,¹² a 1931 New York case similar to *Putnam v. Stout*, the landlord covenanted to repair certain leased premises and subsequently failed to perform his obligation. The court stated that the landlord was not liable in tort, and that plaintiff's only cause of action was in contract.¹³

This old New York rule, which other jurisdictions have followed, allowed the tenant to recover damages from the landlord under the contract measure of damages (*i.e.*, the difference between the rental value of the premises with the necessary repairs and the rental value without repairs).¹⁴ Under this measure a tenant could not recover for special damages that were too remote and not within the contemplation of the parties at the time of the agreement.¹⁵

Premises, 3 PEPPERDINE L. REV. 132 (1975); Note, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729 (1976); Comment, *Changing Notions of a Landlord's Tort Liability to His Tenant: Re-evaluating the Control Doctrine*, 9 URBAN L. ANN. 259 (1975).

9. Thus the principle of *caveat emptor* was carried over to the demise of land to a tenant and the rule developed that a lessor was not liable for injuries to the lessee or those upon the premises with the lessee's permission caused by a condition of disrepair or danger existing when the lessee took possession. *Campbell v. Elsie S. Holding Co.*, 251 N.Y. 446, 448, 167 N.E. 582 (1929). In *Campbell* the landlord leased a building as a warehouse. As a result of its improper construction, there was an 18 inch open space at the eighth floor level between the edge of the freight elevator and the hall. The elevator was opened and unguarded when an employee of the lessee fell through the opening and was killed. The court held that the landlord was not liable. *Accord*, *Williams v. Saratoga County Agricultural Soc'y*, 277 App. Div. 742, 103 N.Y.S.2d 363 (3d Dep't 1951).

10. Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 383, 393 (1928).

11. Bohlen, *Landlord and Tenant*, 35 HARV. L. REV. 633, 638 (1922).

12. 256 N.Y. 287, 176 N.E. 397 (1931).

13. *Id.* at 290, 176 N.E. at 398.

14. *Thomson-Houston Elec. Co. v. Durant Land Improvement Co.*, 144 N.Y. 34, 47, 39 N.E. 7, 10 (1894). If the repairs are minor, the tenant himself may make them and charge the cost to the landlord. *Cook v. Soule*, 56 N.Y. 420, 423-24 (1874). If after notice of the need for repairs, the landlord indicates that he has no intention of performing them, the tenant may make the repairs. *Warner Bros. Pictures v. Southern Tier Theatre Co.*, 279 App. Div. 309, 314, 109 N.Y.S.2d 781, 786 (3d Dep't 1952). But the tenant may not recover both damages and reimbursement for the repairs he has made. He may act on only one of the two theories. 2 J. RASCH, *NEW YORK LANDLORD AND TENANT* § 594 (1971).

15. Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 383, 392 (1928).

The rule had a harsh effect on the tenant, since he could never recover for injuries caused by the landlord's failure to make repairs.¹⁶ However, the courts and legislatures developed several theories which allowed tenants and third parties to recover in tort¹⁷ in limited circumstances.

New York¹⁸ and other states¹⁹ passed legislation which made landlords liable for the safety of their apartment dwellers. Courts held the landlord liable for the condition of the common areas of the demised premises.²⁰ Some courts also sought to hold the landlord liable in tort under the "public use" theory. Under this theory, if a landlord leased his property for a public use with the knowledge that it was unfit and dangerous, he would be guilty of negligence and responsible for the injuries of those properly using the facilities.²¹ Though the courts were liberal in finding "public use,"²² the nature

16. Yet even under this strict rule, if the landlord undertook to repair the premises for the tenant, and did so negligently (misfeasance), then the tenant could sue in tort. Otherwise mere inaction on the part of the landlord (nonfeasance) was not enough to support such an action. *Rampone v. Wanskunk Bldgs.*, 102 R.I. 30, 32, 227 A.2d 586, 587 (1967). But in New York this could be scant protection for the tenant. In *Wynne v. Haight*, 27 App. Div. 7, 50 N.Y.S. 187 (1st Dep't 1898) the landlord was not held liable when a ceiling which she had repaired fell and injured her tenant, since the repairing had nothing to do with the later collapse of the ceiling. The court said:

It is not the landlord's negligence in the sense in which that word is commonly used, which makes him liable—that is, in not fully doing what he has voluntarily promised to do, but his active and direct negligence with regard to the subject-matter of his undertaking.

Id. at 10, 50 N.Y.S. at 189. *Accord*, *Marston v. Frisbie*, 168 App. Div. 666, 154 N.Y.S. 367 (1st Dep't 1915). *But see* *Marks v. Nambil Realty Co.*, 245 N.Y. 256, 157 N.E. 129 (1927).

17. The common law distinguished between the covenant to repair under discussion and the covenant to make such repairs as are necessary to prevent the premises from becoming a nuisance (*i.e.*, falling into a condition likely to do harm to persons and property outside the boundaries of the premises). In *Payne v. Rogers*, 126 Eng. Rep. 590 (C.P. 1794) the English Court of Common Pleas held the landlord, and not the tenant who was in possession, liable under such a covenant for any injury to persons and property sustained outside of the premises in the public way. *Cf.* *Appel v. Muller*, 262 N.Y. 278, 283-84, 186 N.E. 785, 787 (1933); *Zolezzi v. Bruce-Brown*, 243 N.Y. 490, 498, 154 N.E. 535, 537 (1926).

18. N.Y. MULT. DWELL. LAW § 78(1) (McKinney 1974); N.Y. MULT. RESID. LAW § 174 (McKinney 1952).

19. *See, e.g.*, GA. CODE ANN. §§ 61-112 (1966); LA. CIV. CODE ANN. arts. 2692-93, 2695 (West 1952).

20. *Harrington v. 615 West Corp.*, 2 N.Y.2d 476, 481, 141 N.E.2d 602, 604, 161 N.Y.S.2d 106, 108 (1957); *Dollard v. Roberts*, 130 N.Y. 269, 273, 29 N.E. 104, 104-05 (1891); *Levine v. Baldwin*, 87 App. Div. 150, 154, 84 N.Y.S. 92, 94 (1st Dep't 1903).

21. *Barrett v. Lake Ontario Beach Improvement Co.*, 174 N.Y. 310, 314, 66 N.E. 968, 969-70 (1903).

22. Landlords under this theory were held liable for injuries resulting on the leased prem-

of this theory prevented its wide application.²³

In *Cullings v. Goetz*,²⁴ a falling garage door injured plaintiff and he sued both the lessee and the lessor of the garage. The New York Court of Appeals concluded that the suit against the lessor was untenable, since "a covenant to repair does not impose upon the lessor a liability in tort at the suit of the lessee or of others lawfully on the land in the right of the lessee."²⁵

The court exempted the lessor from liability in tort since the lessor did not occupy or control the premises. An agreement to repair does not reserve either of these powers to the lessor.²⁶ Quoting an earlier English case,²⁷ Chief Judge Cardozo defined the power of control necessary to find a lessor liable as "the right to admit people to the premises and to exclude people from them."²⁸ Thus, *Cullings v. Goetz* established that a landlord is not liable for injuries caused to third parties who enter upon the demised property with the tenant's permission.

The rule of *Cullings* had wide ramifications in landlord-tenant and negligence law. In cases of negligence brought against a landlord for a defective condition on the demised property, liability was held not to attach once the landlord had surrendered control to the tenant.²⁹ The covenant to repair without a reservation of the right

ises which they knew to be unsuited for the intended use of the tenant. *Junkermann v. Tilyou Realty Co.*, 213 N.Y. 404, 108 N.E. 190 (1915) (a defective boardwalk in an amusement park); *Barrett v. Lake Ontario Beach Improvement Co.*, 174 N.Y. 310, 66 N.E. 968 (1903) (a defective toboggan slide); *Swords v. Edgar*, 59 N.Y. 28 (1874) (a defective dock); *Warner v. Lucey*, 207 App. Div. 241, 201 N.Y.S. 658 (3d Dep't 1923), *aff'd*, 238 N.Y. 638, 144 N.E. 924 (1924) (a defective elevator in a garage); *Lusk v. Peck*, 132 App. Div. 426, 116 N.Y.S. 1051 (4th Dep't 1909), *aff'd*, 199 N.Y. 546, 93 N.E. 377 (1910); *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N.Y.S. 788 (4th Dep't 1897), *aff'd*, 163 N.Y. 559, 57 N.E. 1109 (1900) (defective grandstands in athletic parks).

23. The New York courts denied recovery where the premises leased were a warehouse because there was no evidence as to whether the building was to be used to store goods for public hire and charge or merely to store the merchandise of the lessee. *Campbell v. Elsie S. Holding Co.*, 251 N.Y. 446, 449, 167 N.E. 582, 583 (1929). Again, in the case of a worker injured on a defective pier, the court held that the part of the pier in question was private and not leased for the purpose of being used as a public place. Rather, it was leased with the understanding that the general public would be excluded. *Lafredo v. Bush Terminal Co.*, 261 N.Y. 323, 327, 185 N.E. 398, 399 (1933).

24. 256 N.Y. 287, 176 N.E. 397 (1931).

25. *Id.* at 290, 176 N.E. at 397.

26. *Id.*, 176 N.E. at 398.

27. *Cavalier v. Pope*, [1906] A.C. 428.

28. 256 N.Y. at 290, 176 N.E. at 398.

29. *Roark v. Hunting*, 24 N.Y.2d 470, 248 N.E.2d 896, 301 N.Y.S.2d 59 (1969); *Solomon*

of entry precluded a finding of sufficient control to hold the landlord liable for the injury of the tenant or his invitees.³⁰ Also, the covenant to repair alone, without a right of entry in favor of the landlord, would exempt him from liability to the tenant.³¹

*Noble v. Marx*³² and *De Clara v. Barber Steamship Lines*³³ limited the broad application of the *Cullings* holding. In *Noble*, faulty flooring in plaintiff's apartment caused her injury. The landlord had promised to fix the flooring under a covenant to repair in the lease, and he did repair the flooring three days after the plaintiff's accident.³⁴ The court held that this established the type of control the *Cullings* rule required for holding the landlord liable in tort.³⁵

In *De Clara* the malfunctioning of a sliding door on a pier killed plaintiff's husband.³⁶ The lease agreement expressly provided that the landlord had the right "at any time or times" to examine the premises and make necessary repairs or alterations.³⁷ The New York Court of Appeals construed the lease as prohibiting any repairs by the tenant.³⁸ Also, the landlord employed twenty men to inspect and repair the premises without notice to the tenant.³⁹ On the basis of this evidence, the court determined that the landlord shared control with the tenant,⁴⁰ and could be liable in tort.⁴¹

v. Brooklyn Cornell Util., Inc., 291 N.Y. 593, 50 N.E.2d 1008 (1943); *Lafredo v. Bush Terminal Co.*, 261 N.Y. 323, 185 N.E. 398 (1933); *Jankowski v. Crestburn Corp.*, 23 App. Div. 2d 783, 258 N.Y.S.2d 733 (2d Dep't 1965), *aff'd*, 17 N.Y.2d 514, 214 N.E.2d 790, 267 N.Y.S.2d 513 (1966).

30. *Dick v. Sunbright Steam Laundry Corp.*, 307 N.Y. 422, 121 N.E.2d 399 (1954); *Appel v. Muller*, 262 N.Y. 278, 186 N.E. 785 (1933).

31. *Cinat v. Great Atl. & Pac. Tea Co.*, 2 App. Div. 2d 859, 155 N.Y.S.2d 956 (2d Dep't 1956); *Moreno v. Relkin*, 24 Misc. 2d 230, 197 N.Y.S.2d 293 (Bronx Munic. Ct. 1960).

32. 298 N.Y. 106, 81 N.E.2d 40 (1948).

33. 309 N.Y. 620, 132 N.E.2d 871 (1956).

34. 298 N.Y. at 110, 81 N.E.2d at 41.

Thus, subsequent repairs are admissible as evidence of control, the inference being that the duty to make repairs rested upon the one who actually made them.

RICHARDSON ON EVIDENCE § 168 (10th ed. J. Prince 1973).

35. 298 N.Y. at 111, 81 N.E.2d at 42.

36. 309 N.Y. at 625, 132 N.E.2d at 873.

37. *Id.* at 626, 132 N.E.2d at 874.

38. *Id.* at 629, 132 N.E.2d at 876.

39. *Id.* at 626, 132 N.E.2d at 874.

40. *Id.* at 630, 132 N.E.2d at 876. In *Miller v. Morse*, 9 App. Div. 2d 188, 192 N.Y.S.2d 571 (4th Dep't 1959), the court stated:

. . . the promise of repair was coupled in this case with the making of actual repairs and with complete freedom of access on the part of the landlord. Upon a full develop-

With somewhat conflicting precedent, the court of appeals in *Putnam v. Stout* again faced the question of landlord tort liability. In *Putnam* the landlord had expressly agreed to keep the driveway in good repair.⁴² This agreement was subject to an earlier lease between the parties,⁴³ under which Grand Union had the right to make repairs. On the basis of this evidence, the court of appeals upheld the amount of damages apportioned against the supermarket since under "the express terms of the lease, Grand Union had the right and, perforce, the control necessary to effect repair of the driveway and, thus, was properly found liable."⁴⁴

The *Putnam* court then turned to the question of whether the supermarket's landlord was also liable for the injury to plaintiff. In deciding against the landlord, the court overruled *Cullings v. Goetz*⁴⁵ and expressly adopted the formulation of the Restatement of Torts:⁴⁶

A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if

ment of the facts, a jury could find that the landlord had in effect treated the premises as remaining under his control for the purpose of making such repairs as he wished to make, upon his own responsibility. This would be sufficient to distinguish this case from the *Cullings* case and to bring it within the principle of the *De Clara* case.
Id. at 193, 192 N.Y.S.2d at 576.

41. 309 N.Y. at 630, 132 N.E.2d at 876.

42. The agreement was as follows:

By a clause in the easement agreement the landlords of G.U. [*sic*] agreed to keep in repair and maintain "a free parking area, with rights of way . . . from and to the unnamed lane on the westerly side of said premises, for the use of owners and tenants, customers and visitors of the tenants and owners"

46 App. Div. 2d 812, 813, 361 N.Y.S.2d 205, 208 (2d Dep't 1974), *aff'd*, 38 N.Y.2d 607, 345 N.E.2d 319, 381 N.Y.S.2d 848 (1976).

43. This lease was first made in 1946 and later renewed by the parties in 1964 with no changes.

With respect to repairs, paragraph 3 thereof reads in pertinent part: "Should the Landlord neglect or refuse to make any such repairs . . . within a reasonable time after notice that the same are needed, the Tenant without liability or forfeiture of its terms hereby demised may have such repairs made at the expense of the Landlord and may deduct from the rent the cost thereof."

46 App. Div. 2d at 813, 361 N.Y.S.2d at 207-08.

44. 38 N.Y.2d at 613, 345 N.E.2d at 322, 381 N.Y.S.2d at 851.

45. *Id.* at 617, 345 N.E.2d at 325, 381 N.Y.S.2d at 854.

46. RESTATEMENT (SECOND) OF TORTS § 357 (1965).

- (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and
- (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and
- (c) the lessor fails to exercise reasonable care to perform his contract.

Plaintiff in *Putnam* argued that a tenant would rely on the promise of the landlord to keep the leased premises in repair.⁴⁷ The court noted three social factors of the present real property market which compel the adoption of the Restatement rule:⁴⁸ (1) tenants may be financially unable to make repairs; (2) the incentive of the tenants to make repairs is less than that of the landlords, because the possession of the tenants is for a limited term; and (3) the landlords should assume certain obligations for the safety of the tenants and his invitees, in return for the pecuniary benefit derived from the leasing relationship. For these reasons the *Putnam* court held the landlord liable for a proportional share of the damages to plaintiff⁴⁹ under the covenant to repair contained in the agreement between Grand Union and its lessor.⁵⁰

Although the court of appeals in *Putnam* distinguished *De Clara* on the facts,⁵¹ it nevertheless reduced the tort immunity of the landlord. In finding the landlord liable for the plaintiff's injuries, the court also overturned the rule of contractual privity as applied to the covenant to repair in a lease or contractual agreement.⁵²

47. 38 N.Y.2d at 617, 345 N.E.2d at 325-26, 381 N.Y.S.2d at 854. The court also noted that the landlord generally agrees to keep the premises in repair for consideration and that the landlord retains a reversionary interest in the land and may be regarded as retaining responsibility for keeping the premises in safe condition. *Id.*

48. *Id.* at 617-18, 345 N.E.2d at 326, 381 N.Y.S.2d at 854.

49. The court stated:

[I]t is clear that the landlord is also liable to plaintiff. It is undisputed, of course, that plaintiff was on the land with the permission of Grand Union, that Steigler covenanted to keep the driveway in repair, that the disrepair created an unreasonable risk of harm to plaintiff, which performance of the covenant would have prevented, and that since Steigler had not even attempted to repair the driveway, he failed to exercise reasonable care to perform his contract.

Id. at 618, 345 N.E.2d at 326, 381 N.Y.S.2d at 854.

50. *Id.* at 613, 345 N.E.2d at 322, 381 N.Y.S.2d at 851.

51. The court of appeals stated:

However, Grand Union also had the *right* to make repairs, a right not given the *De Clara* tenant, and the record is barren of any evidence that the landlord regularly made inspections or repairs, as did the *De Clara* landlord. Thus, the case is also distinguishable from *De Clara*

Id. at 614, 345 N.E.2d at 323, 381 N.Y.S.2d at 851.

52. *Id.* at 615, 345 N.E.2d at 324, 381 N.Y.S.2d at 853.

New York has now abandoned the property control distinction⁵³ in cases dealing with covenants to repair. Where commercial property is involved, as in *Putnam v. Stout*, the situation usually does not allow the landlord to determine who may enter the premises. This is the type of power which the *Cullings* rule had indicated was necessary before the landlord could be held liable in tort. The *Putnam* decision removes the need for courts to invent new methods of circumventing the *Cullings* rule, as they did in *Noble v. Marx*⁵⁴ and *De Clara v. Barber Steamship Lines*.⁵⁵

The new rule in New York, and in an increasing number of American jurisdictions,⁵⁶ will have major implications in relations between landlord and tenant. By adopting the Restatement view in its entirety,⁵⁷ the New York Court of Appeals has indicated that landlords will be liable in tort for their breach of a covenant to repair and will not, as in the past, find it possible to immunize themselves from tort liability by failing to repair.⁵⁸ A tenant may now find his landlord more willing to make repairs on the leased premises under the covenant. If the landlord unreasonably delays, he may expect that courts, under the *Putnam* rationale, will apportion to him a large share of the damage award for injuries caused by the disrepair. Many landlords will thus find themselves compelled by the possibility of tort liability to incur the expenses of repairs on demised premises which they have covenanted or agreed to repair.

Putnam has not settled the question of the extent of the landlord's duty to repair.⁵⁹ In an effort to insure that the landlord exercises due care regarding the safety of his tenant, a New Hampshire court has held a landlord liable for injuries to his tenant when there was

53. *Id.* at 616, 345 N.E.2d at 324, 381 N.Y.S.2d at 853.

54. 298 N.Y. 106, 110, 81 N.E.2d 40, 41-42 (1948).

55. 309 N.Y. 620, 629, 132 N.E.2d 871, 875-76 (1956).

56. See text accompanying note 8 *supra*.

57. 38 N.Y.2d at 617, 345 N.E.2d at 325, 381 N.Y.S.2d at 853-54.

58. The landlord who does nothing and is in fact in breach of his covenant to repair would not be liable in tort under the old rule, whereas the conscientious landlord who acted under the covenant might be liable for negligence in his repairing. *Id.* at 616, 345 N.E.2d at 325, 381 N.Y.S.2d at 853.

59. Under the Restatement, the covenant defines the contractual duty of the landlord. A covenant to repair will not, unless expressly stated in the lease, impose on the landlord the duty to inspect the land to ascertain the need of repair. Rather, his duty is the exercise of reasonable diligence and care once he has notice of the need for the repairs. RESTATEMENT (SECOND) OF TORTS § 357, comment d at 242-43 (1965).

neither a covenant to repair nor retention of control by the landlord.⁶⁰ The New York courts do not appear to be proceeding in this direction.⁶¹

Under the new rule of *Putnam* New York has advanced as far as is now advisable. In New York once a landlord has covenanted to keep the premises in safe condition and has received notice of the need for repairs, he will be liable for injuries caused by the absence of repairs when he fails to exercise reasonable care.⁶²

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60. The New Hampshire court stated: "[T]he ordinary negligence standard should help insure that a landlord will take whatever precautions are reasonably necessary under the circumstances to reduce the likelihood of injuries from defects in his property." *Sargent v. Ross*, 113 N.H. 388, 399, 308 A.2d 528, 535 (1973) (a child of a tenant fell from an outside stairway. The evidence showed that the stairs were dangerously steep, but it was determined that they did not come under the common area liability of the landlord. Instead, the court based liability on a standard of reasonable care to keep the premises safe).

61. *Howell v. Gagliano*, 52 App. Div. 2d 1040, 384 N.Y.S.2d 576 (4th Dep't 1976).

62. There must of course be a breach for the *Putnam* rule to have effect. It does not apply where the landlord reserves the privilege to enter and make repairs, but does not actually contract to repair, or where there is only a gratuitous promise to repair made after the lessee has entered into possession. Yet the promise may be made after possession is transferred and therefore need not be contained in the lease. RESTATEMENT (SECOND) OF TORTS § 357, comment b(1) at 241-42 (1965).

