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Francis S. L'Abbate

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RECOVERY UNDER THE IMPLIED WARRANTY OF HABITABILITY

I. Introduction

The real property and tort law principles which until recently governed the legal relationship between landlord and tenant left tenants with no recourse against landlords who provided uninhabitable premises.¹ Gradually, courts began to relieve the harsh consequences of this rule by implying a warranty of habitability in residential leases. The New York State legislature codified the implied warranty of habitability² in Real Property Law section 235-b,³ but failed to specify the remedies available for a breach. As a result, courts have been forced to decide issues relating to recovery without statutory

1. This issue has been discussed widely elsewhere. See, e.g., Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 U. KAN. L. REV. 369 (1961); Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19 [hereinafter cited as Love]; Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Comment, *Tenant Remedies—The Implied Warranty of Fitness and Habitability*, 16 VILL. L. REV. 710 (1971). In this Note, the definition of "habitability" is taken from the New York implied warranty of habitability. N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981-82). For the text of this provision, see note 3 *infra*.

2. A warranty promises indemnity against defects in an article for sale. *Joseph v. Sears Roebuck & Co.*, 224 S.C. 105, 77 S.E.2d 583 (1953). It is a statement of something which, though collateral to the contract, forms a part of it, and it may be express or implied. *Fairbank Canning Co. v. Metzger*, 118 N.Y. 260, 23 N.E. 372 (1890).

3. Section 235-b provides:

1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

3. In determining the amount of damages sustained by a tenant as a result of a breach of the warranty set forth in this section, the court need not require any expert testimony.

N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981-82). Subsection 3 was added to the implied warranty in 1976.

guidance. Open questions include: whether strict liability should be imposed, the extent to which third parties should be able to recover, and the propriety of punitive damages.⁴

This Note examines the development of the implied warranty of habitability as a basis for expanding a landlord's liability for failure to provide habitable premises and discusses problems relating to recovery for breach of the implied warranty which have arisen in New York courts. It argues that, although principles of strict liability should be imposed within the context of the implied warranty, recovery should be limited to tenants and intended third party occupants. In addition, punitive damages should not be awarded under a strict liability theory unless malice is established. The added protection which strict liability provides must be limited to the landlord-tenant relationship.

II. The Evolution of Landlord-Tenant Law

Under traditional principles of real property law⁵ a lease was considered a conveyance of real property for a specified period of time⁶ and landlords were held to a minimal duty—to deliver possession and warrant quiet enjoyment.⁷ Landlord liability was not necessary because structures were of secondary importance,⁸ and tenants, for the

4. In view of the dearth of meaningful legislative history to supplement the language of the statute, courts have relied on the policies expressed in the New York Court of Appeals' decision, *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied*, 444 U.S. 992 (1979), to construct broad rules of law.

5. American landlord-tenant law is derived from the feudal property law of England. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 323, 391 N.E.2d 1288, 1291, 418 N.Y.S.2d 310, 313 (1979). American colonists were reluctant to adopt the English common law. 1 R. POWELL, *THE LAW OF REAL PROPERTY* § 45 (1977); 1 G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 12 (1980); 1 *AMERICAN LAW OF PROPERTY* § 1.40, at 55 (A. J. Casner ed. 1952). Forty-nine states, however, have accepted the common law by statute, constitution, or judicial decision. Louisiana has adopted the common law in some areas. 1 G. THOMPSON, *supra*, § 13.

6. *Marini v. Ireland*, 56 N.J. 130, 141, 265 A.2d 526, 532 (1970); *see generally* Lesar, *supra* note 1, at 371.

7. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d at 322, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313. This was suitable to the agrarian landlord-tenant relationship because a lease was often a transfer of land for agricultural purposes to one who cultivated the land and paid rent from the proceeds. Thus, courts would not imply a covenant of fitness for intended use, nor would the landlord be liable for maintenance of the premises. *See* notes 8-14 *infra* and accompanying text. Love, *supra* note 1, at 26.

8. *Id.* *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1074; *Park West Management Corp. v. Mitchell*, 47 N.Y.2d at 323, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313.

most part, had the skill, time and financial resources to make necessary repairs.⁹ Courts applied the doctrine of *caveat emptor*¹⁰ to the landlord-tenant relationship¹¹ and interpreted lease instruments as reflecting the entire agreement of the parties because prospective tenants could examine the premises and exact express warranties.¹² Pursuant to this doctrine which became known as "*caveat lessee*" courts refused to require that premises be adapted to the purposes for which they were rented at the commencement of the lease term.¹³ Furthermore, they declined to hold landlords to a duty to maintain the premises in a habitable condition during the period of the lease.¹⁴

The shift of population from rural settings to large metropolises¹⁵ has dramatically altered the desires, needs and expectations of the

9. Love, *supra* note 1, at 28.

10. Although courts originally applied the doctrine of *caveat emptor* to the sale of chattels, they sought to protect the legitimate expectations of the buyer and therefore expanded the seller's responsibilities by implying warranties of merchantability and fitness for use into contracts for sale. See generally Note, *Lessor's Duty to Repair: Tort Liability to Persons Injured on the Premises*, 62 HARV. L. REV. 669, 678-79 (1949). A warranty of merchantability "require[s] that the goods should be saleable as goods of the general kind which they were described or supposed to be when purchased, or reasonably suitable for the ordinary uses for which they were manufactured." Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493, 504 (1962). See, e.g., N.Y. U.C.C. § 2-314 (McKinney 1964). A warranty of fitness for use requires that a chattel be fit for the purpose for which the goods are to be used by the buyer. See Jaeger, *supra*, at 506-07. See, e.g., N.Y. U.C.C. § 2-315 (McKinney 1964).

11. *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 451, 251 A.2d 268, 272 (1969); *Michaels v. Brookchester, Inc.*, 26 N.J. 379, 382, 140 A.2d 199, 201 (1958); 1 AMERICAN LAW OF PROPERTY, *supra* note 5, § 3.45; TIFFANY, LANDLORD AND TENANT § 86 (1912) [hereinafter cited as TIFFANY]; Grimes, *Caveat Lessee*, 2 VAL. U. L. REV. 189 (1968); Love, *supra* note 1, at 28. "Since rules of property law solidified before the development of mutually dependent covenants in contract law, theoretically once an estate was leased, there were no further unexecuted acts to be performed by the landlord and there could be no failure of consideration." *Lemle v. Breeden*, 51 HAWAII 426, 429, 462 P.2d 470, 472 (1969), citing 6 WILLISTON, CONTRACTS § 890 (3d ed. 1962).

12. *Edwards v. McLean*, 122 N.Y. 302, 25 N.E. 483 (1890); *Franklin v. Brown*, 118 N.Y. 110, 23 N.E. 126 (1889); *Jaffe v. Harteau*, 56 N.Y. 398 (1874). See generally 1 AMERICAN LAW OF PROPERTY, *supra* note 5, § 3.45; Comment, *Tenant Remedies—The Implied Warranty of Fitness and Habitability*, 16 VILL. L. REV. 710, 711 (1971).

13. *Doyle v. Union P. Ry.*, 147 U.S. 413, 423 (1893); *Daly v. Wise*, 132 N.Y. 306, 30 N.E. 837 (1892); *Edwards v. New York and Harlem R.R.*, 98 N.Y. 245 (1885). The tenant did have the right to inspect the premises or secure express covenants. 1 AMERICAN LAW OF PROPERTY, *supra* note 1, § 3.45.

14. *Daly v. Wise*, 132 N.Y. 306, 30 N.E. 837 (1892).

tenant, most notably the residential tenant.¹⁶ Moreover, the rising significance of structures on leased land signalled a necessary departure from feudal real property law.¹⁷ Leases began to assume the appearance of a contract¹⁸ as comparatively complex leases, with an

15. The following table illustrates this shift.

URBAN POPULATION GROWTH IN THE UNITED STATES (in millions)

Year	Urban population	Rural population	Urban as a percent of total population
1790	.2	3.7	5
1810	.5	6.7	7
1830	1.1	11.7	9
1850	3.5	19.6	15
1870	9.9	28.7	25
1890	22.1	40.8	35
1910	42.0	50.0	46
1930	69.0	53.8	56
1950	96.5	54.2	64
1970	149.8	53.9	73
1980	197.0	53.0	79

"Urban areas" are defined by the Census Bureau as cities and other incorporated places which have 2,500 or more inhabitants.

United States Bureau of the Census *cited in* C. McCONNELL, *ECONOMICS—PRINCIPLES, PROBLEMS, AND POLICIES* 707 (6th ed. 1975).

16. "When American city dwellers, both rich and poor, seek 'shelter' today, they 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." *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1074 (footnote omitted). *See also* *Park West Management Corp. v. Mitchell*, 47 N.Y.2d at 323, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313.

17. Comment, *The Modern Lease—An Estate in Land or a Contract*, 16 TEX. L. REV. 47 (1937). "While the English tenant was primarily interested in the use of the land, from which the rent was said to 'issue,' the modern urban lessee is most vitally interested in the buildings thereon." *Id.* at 47 (footnote omitted). *See also* 2 R. POWELL, *supra* note 5, § 221[1].

18. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d at 324, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314. One commentator has described the nature of the real property lease as changing from "status to contract to property to modern contract." Lesar, *supra* note 1, at 377. According to early English feudal law, the "tenant in villeinage" was a tenant as long as the lord allowed him to remain. *Id.* at 369. Thus, he had status but no contract or property rights. Subsequently, agrarian leases developed into contracts which "connoted the unimportance of buildings, gave rise to the concept of rent as 'issuing out of the land,' and, in general, caused the lease to have primarily a contractual significance . . ." 2 R. POWELL, *supra* note 5, § 221[1]. Since the sixteenth century, however, the lessee's rights have been as fully protected as one having a possessory interest. 1 AMERICAN LAW OF PROPERTY, *supra* note 5, § 3.11. Thus, the lease came to be considered a conveyance of real property. TIFFANY, *supra* note 11, § 16.

increased number of lease covenants,¹⁹ evolved in order to delineate the landlords' obligations and liabilities. Courts and legislative bodies in recent years, however, have sought to protect tenants by implying a warranty of habitability in residential leases because many tenants are uneducated and unaware of the necessity of obtaining express warranties from landlords.²⁰ This implied warranty operates independently of any express warranties agreed to by the parties and shifted the law of landlord-tenant from *caveat lessee* to *caveat lessor*.²¹

Growing dissatisfaction with *caveat lessee* became evident as more and more jurisdictions created exceptions to the doctrine.²² The first

19. 2 R. POWELL, *supra* note 5, § 221[1]. Courts have acknowledged recently that in modern times a tenant seeks a combination of goods and services, giving the lease more the appearance of a contract.

20. *See, e.g.*, Park West Management Corp. v. Mitchell, 47 N.Y.2d at 324-25, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314.

21. This shift has been noted elsewhere. *See* Note, Fakhoury v. Magner: *From Caveat Emptor to Caveat Lessor—Strict Liability and the Landlord*, 9 CALIF. W.L. REV. 547 (1973).

22. Smith v. Marrable, 152 Eng. Rep. 693 (1843) (implied condition in the lease of a furnished house that it be reasonably fit for habitation); 1 AMERICAN LAW OF PROPERTY, *supra* note 5, § 3.45; Love, *supra* note 1, at 29-31; Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant*, 40 FORDHAM L. REV. 123 (1971) (discussing another mitigating doctrine, constructive eviction).

Despite the contrivance of carving exceptions to feudal principles, courts were reluctant to abandon common law principles. The most common exception relied upon by the courts was given for a short term lease for a furnished house. *See, e.g.*, Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). The Massachusetts court reasoned that:

[o]ne who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind.

Id. at 350, 31 N.E. at 286. Other exceptions included the lease of a building to be used for a particular purpose when the structure is still under construction at the commencement of the lease, *see, e.g.*, J. D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. Civ. App. 1930), *rev'd on other grounds*, 66 S.W.2d 676 (1933) (because construction had not progressed to a point at which the appellant could inspect the building, it cannot be said that he took the building at his own risk); and when the landlord knew of a defect and failed to disclose it to the tenant, *see, e.g.*, Gamble-Robinson Co. v. Buzzard, 65 F.2d 950 (8th Cir. 1933). The defect had to be non-discoverable upon an ordinary inspection by the tenant. Love, *supra* note 1, at 31. In some jurisdictions constructive notice to the landlord was insufficient. *Id.* For

major departure²³ from principles which favored landlords was a

example, in *Zatloff v. Winkleman*, 90 R.I. 403, 158 A.2d 874 (1960), the court refused to imply a warranty even in a short term lease. The court therefore held that no liability should result where there is no warrant because liability is based on contract. One commentator has noted, "Most courts refuse to alter the common law, stating that any contrary doctrine must come from the legislative body." 1 G. THOMPSON, *supra* note 5, § 12. *But see* *Lemle v. Breeden*, 51 Hawaii 426, 432, 462 P.2d 470, 473 (1969) (rejecting *caveat lessee* and stating that the exceptions to the doctrine are artificial); *State v. Esser*, 16 Wis. 2d 567, 583, 115 N.W.2d 505, 514 (1962) ("[E]stablished common law rules will be followed unless after thorough consideration the court is convinced that new circumstances and needs of our society require a change. . . .").

23. Several early decisions modified the traditional role of non-liability for failure to repair. In *Bowles v. Mahoney*, 202 F.2d 320 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 935 (1953), the court refused to find a landlord liable for injuries sustained by a tenant due to a defect which arose during the term of the lease in the absence of fraud, concealment, or an agreement to repair. *Id.* at 324. The dissent, however, noted the complete eradication of *caveat emptor* with respect to the sale of chattels and the partial eradication of *caveat lessee* with respect to the duty of a landlord to disclose dangerous defects present at the commencement of the lease term of which the landlord had knowledge. The dissent advocated a complete abandonment of *caveat lessee*, reasoning that

[i]n order to keep pace, the law should recognize that when one pays for the temporary use of a dwelling, the parties contemplate that insofar as reasonable care on the part of the owner can assure it, the dwelling will be safe and habitable, not only at the time of possession is delivered [sic] but throughout the period for which payment is made.

202 F.2d at 326 (Bazelon, J., dissenting). In *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961), tenants entered into a one-year lease of a furnished house without inspecting the premises, having been assured that the house would be cleaned and repaired before the period covered by the lease commenced. When that time arrived, the tenants discovered the existence of several building code violations. The court recited the common law rule of *caveat lessee* and the furnished house exception, *see* note 22 *supra*. Rather than relying on the well-established exception, the court posited that the legislature, by enacting building codes and health regulations, had made a policy judgment that rendered *caveat lessee* obsolete. *Id.* at ___, 111 N.W.2d at 412-13. Thus, the building code violations breached a warranty of habitability which should be implied into the lease. The court ruled that the tenants' covenant to pay rent and the landlord's covenant to provide a habitable dwelling were mutually dependent. *Id.* at ___, 111 N.W.2d at 413. Therefore, the tenants were absolved from liability to pay rent. *See generally* Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 9 (1979). *But see* *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970) (holding, without mentioning the *Pines* decision, that the legislature did not intend to give tenants a private remedy for housing code violations). Occasionally, a court has recognized the implied warranty of habitability to be coextensive with the common law doctrine of constructive eviction. A constructive eviction occurs when the tenant elects to surrender possession because of a disturbance by the landlord whereby the premises are rendered unfit for human habitation, in whole or in part, for the purposes for which they are leased. *Murry v. Merchants S.W. Transfer & Storage Co.*, 98 Okl. 270, 272, 225 P. 547, 549 (1924). In *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969), a commercial tenant vacated his premises after rain leakage caused severe flooding. The court upheld the constructive eviction of the tenant on the grounds of a breach of the common law covenant of quiet enjoyment. *Id.* at 458, 251 A.2d at 275. *See* note 7 *supra* and accompanying text. In dicta, the court also indicated that it would

decision by the United States Court of Appeals for the District of Columbia which ruled that leases are contracts rather than conveyances of real property.²⁴ The court reasoned that, according to contract principles, the tenant's obligation to pay rent was dependent upon the landlord's performance of his duties.²⁵ Most importantly, however, the court held that housing regulations should be implied into housing contracts and considered a contractual obligation of the landlord.²⁶

In adopting the implied warranty of habitability, courts and legislative bodies use a variety of rationales.²⁷ Some view the enactment of housing codes as a policy judgment by the legislature that landlords must keep their premises habitable,²⁸ while others emphasize changing conditions of society which led to housing shortages and an inequality in bargaining power between landlord and tenant.²⁹ An-

recognize an implied warranty against latent defects in leases of commercial premises. 53 N.J. at 451-53, 251 A.2d at 272. In *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969), the Supreme Court of Hawaii did not consider the finding of the trial court that a constructive eviction had occurred when a tenant vacated the apartment when he discovered severe rat infestation,

in light of the decision of this court that there was an implied warranty of habitability in this case. The doctrine of constructive eviction, as an admitted judicial fiction designed to operate as though there were a substantial breach of a material covenant in a bilateral contract, no longer serves its purpose when the more flexible concept of implied warranty of habitability is legally available.

Id. at 434, 462 P.2d at 475. See also *Lund v. MacArthur*, 51 Hawaii 473, 475-76, 462 P.2d 482, 483 (1969) (extension of implied warranty of habitability to cover unfurnished as well as furnished dwellings "because [t]he common law distinction on this ground is not in accord with the current realities of life in Hawaii"). The remedy for a constructive eviction is suspension of rent. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d at 324, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314. Courts, however, consider the remedy to be ineffectual in urban areas because: (1) the tenant has to abandon the premises; (2) the justifiability of a tenant's abandonment is subject to judicial determination, and if a court decides it to be unreasonable, the tenant is liable for the unpaid rent; and (3) in a market where the demand for housing far exceeds the supply, mere rescission of a lease provides little incentive for a landlord to make repairs. *Id.*

24. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

25. The case was remanded to determine if the tenant was liable for all or part of the rent. *Id.* at 1083.

26. "We believe, in any event, that the District's housing code requires that a warranty of habitability be implied in the leases of all housing that it covers." *Id.* at 1080.

27. 2 R. POWELL, *supra* note 5, § 225 [2], at 256.

28. *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1080; *Pines v. Perssion*, 14 Wis. 2d at ___, 111 N.W.2d at 412. *But see Dapkunas v. Cagle*, 42 Ill. App. 3d 644, 356 N.E.2d 575 (1976).

29. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied*, 444 U.S. 992 (1979).

other approach has been to analogize the landlord-tenant relationship to the field of products liability where warranties are implied in contracts for the sale of goods.³⁰ At least forty jurisdictions have recognized the implied warranty of habitability either at common law³¹ or by statute.³²

The transformation of the nature of the housing market occasioned by rapid urbanization and population growth was further impetus for the change. Well-documented shortages of low- and middle-income housing in many of our urban centers has [sic] placed landlords in a vastly superior bargaining position, leaving tenants virtually powerless to compel the performance of essential services. Because there is but a minimal threat of vacancies, the landlord has little incentive to voluntarily make repairs or ensure the performance of essential services.

Id. at 324-25, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314.

30. See note 62 *infra* and accompanying text.

31. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897 (1979); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 166 (1973); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). *But see* *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

32. Some jurisdictions have passed statutes which actually imply warranties or covenants of habitability into leases. IDAHO CODE § 6-320 (1979); ME. REV. STAT. ANN. tit. 14, § 6021 (1980); MICH. COMP. LAWS ANN. § 554.139 (Supp. 1981); MINN. STAT. ANN. § 504.18 (West Supp. 1981); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981-82). Other jurisdictions merely provide that the premises shall be maintained by the landlord so that they are fit for human habitation or that conditions hazardous to the health and safety of the tenant shall not exist. MD. REAL PROP. CODE ANN. § 8-211 (Supp. 1980); S.D. COMP. LAWS ANN. § 43-32-8 (Supp. 1981); TEX. REV. CIV. STAT. ANN. art. 5236f (Vernon Supp. 1980); W. VA. CODE § 37-6-30 (Supp. 1981); WIS. STAT. ANN. § 704.07 (West 1981). Several states have adopted, often with modifications, the Model Residential Landlord-Tenant Code or the Uniform Residential Landlord and Tenant Act, which require the landlord to do whatever is necessary to put and keep the premises in a fit and habitable condition. Alaska: ALASKA STAT. § 34.03.100 (1975); Arizona: ARIZ. REV. STAT. ANN. § 33-1324 (1974); Connecticut: CONN. GEN. STAT. ANN. § 47a-7 (West Supp. 1981); Delaware: DEL. CODE ANN. tit. 25, § 5303 (1975); Florida: FLA. STAT. ANN. § 83.51 (West Supp. 1981); Hawaii: HAWAII REV. STAT. § 521-42 (1977); Iowa: IOWA CODE ANN. § 562A.15 (West Supp. 1981); Kansas: KAN. STAT. ANN. § 58-2553 (1976); Kentucky: KY. REV. STAT. § 383.595 (Supp. 1980); Montana: MONT. REV. CODES ANN. § 42-420 (Supp. 1977); Nebraska: NEB. REV. STAT. § 76-1419 (1976); Nevada: NEV. REV. STAT. § 118A.290 (1979); New Mexico: N.M. STAT. ANN. § 47-8-20 (1978); North Dakota: N.D. CENT. CODE § 47-16-13.1 (1978); Ohio: OHIO REV. CODE ANN. § 5321.04 (Page 1981); Oklahoma: OKLA. STAT. ANN. tit. 41, § 117 (West Supp. 1980); Oregon: OR. REV. STAT. § 91.770 (1979); Tennessee: TENN. CODE ANN. § 64-2824 (1976); Virginia: VA. CODE § 55-248.13 (1981); Washington: WASH. REV. CODE ANN. § 59.18.060 (Supp. 1981). Other states have enacted statutes which are based on

Landlord immunity under real property law was mirrored in tort. At common law, an owner of premises was only held liable³³ for injuries to a tenant due to a defect in the premises if there had been a failure to perform some duty owed to the injured tenant.³⁴ As a result, the landlord bore no duty whatsoever with respect to the upkeep of the land from the time possession and control of the premises was surrendered to the tenant until the expiration of the lease term.³⁵ Common law exceptions³⁶ and statutory provisions, how-

housing codes, Rhode Island: R.I. GEN. LAWS, § 34-18-16 (1970) (landlords covenant to comply with minimum housing codes), often giving the tenant a private remedy for the landlord's violation of the code. Massachusetts: MASS. ANN. LAWS ch. 111, § 127c ff., ch. 239, § 8A (Michie/Law. Co-op. Supp. 1981); Missouri: MO. ANN. STAT. § 441.510 (Vernon Supp. 1981); New Hampshire: N.H. REV. STAT. ANN. § 540:13-d (Supp. 1979); Pennsylvania: PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977).

33. Indeed, in feudal times the ownership of land was a sacred right and it classified one as an exclusive and dominant member of society. *Scurti v. City of New York*, 40 N.Y.2d 433, 439, 354 N.E.2d 794, 796, 387 N.Y.S.2d 55, 57 (1976), *citing* 2 HARPER & JAMES, THE LAW OF TORTS § 27.3, at 1438 (1956). *Cf. McGuinness v. Jakubiak*, 106 Misc. 2d 317, 431 N.Y.S.2d 755 (Sup. Ct. Kings County 1980) (imposition of strict liability); *Kaplan v. Coulston*, 85 Misc. 2d 745, 381 N.Y.S.2d 634 (Civ. Ct. Bronx County 1976) (imposition of strict liability).

34. *Bowles v. Mahoney*, 202 F.2d 320, 323 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 935 (1953).

35. Under the warranty of quiet enjoyment, the landlord relinquished even the right to enter the premises. *See* note 7 *supra*. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 63 (4th ed. 1971). A landlord's non-liability in tort flowed logically from the concept of *caveat emptor*. At common law, a vendor of real estate was not liable for personal injury caused by a defect in the premises existing at the time of transfer of possession. *Kilmer v. White*, 254 N.Y. 64, 171 N.E. 908 (1930). *See generally* Love, *supra* note 1, at 118. Unless a tenant obtained an express warranty from the landlord, he took the land as he found it, i.e., there were no implied warranties. *Trustees of the Village of Canandaigua v. Foster*, 156 N.Y. 354, 360, 50 N.E. 971, 972 (1898); Love, *supra* note 1, at 112. *See* note 11 *supra* and accompanying text.

36. These exceptions included: (1) dangerous defects known to the lessor at the time of the leasing and concealed from the tenant, *Dunson v. Friedlander Realty*, 369 So. 2d 792 (Ala. 1979); *Edwards v. New York and H.R.R.*, 98 N.Y. 245 (1885); *Potter v. New York, O. & W. Ry.*, 233 A.D. 578, 253 N.Y.S. 394 (1931); RESTATEMENT (SECOND) OF TORTS § 358 (1965); (2) conditions dangerous to those outside the premises, *Whalen v. Shivek*, 326 Mass. 142, 93 N.E.2d 393 (1950) (stone block falling from parapet); *Wells v. Ballou*, 201 Mass. 244, 87 N.E. 576 (1909) (hole in sidewalk); *but see Appel v. Muller*, 262 N.Y. 278, 186 N.E. 785 (1933) (holding that a landlord is liable to persons injured outside the premises only if he has reserved the right to re-enter the premises for the purpose of making repairs); (3) injuries received on premises leased for admission of the public, *Junkermann v. Tilyou Realty Co.*, 213 N.Y. 404, 108 N.E. 190 (1915); *Marshall v. Mastodon, Inc.*, 51 A.D.2d 21, 379 N.Y.S.2d 177 (3d Dep't 1976); (4) injuries received on parts of premises which remain under the control of the landlord, (common hallways, approaches, etc.); *Cruz v. Drezek*, 175 Conn. 230, 397 A.2d 1335 (1978); *Harrington v. 615 West Corp.*, 2 N.Y.2d 476, 141 N.E.2d 602, 161 N.Y.S.2d 106 (1957); *Loucks v. Dolan*, 211 N.Y. 237, 105 N.E. 411 (1914); *Dollard v. Roberts*, 130 N.Y. 269, 29 N.E. 104

ever, have expanded landlord tort liability.³⁷ In some jurisdictions statutes determine landlord liability for the condition of the prem-

(1891); (5) injuries due to lessor's breach of an express agreement to repair, *Mobil Oil Corp. v. Thorn*, 401 Mich. 306, 258 N.W.2d 30 (1977); *Michaels v. Brockchester Inc.*, 26 N.J. 379, 140 A.2d 199 (1958); *Putnam v. Stout*, 38 N.Y.2d 607, 345 N.E.2d 319, 381 N.Y.S.2d 848 (1976); and (6) injuries caused by the landlord's negligent repairs, whether or not he was bound to make such repairs, *Brewer v. Bankord*, 69 Ill. App. 3d 196, 387 N.E.2d 344 (1979); *Marks v. Nambil Realty Co.*, 245 N.Y. 256, 157 N.E. 129 (1927); RESTATEMENT (SECOND) OF TORTS § 362 (1965). If the facts of a particular case did not fit any of these exceptions, courts declined to hold the landlord liable because he had surrendered control over the area where the injury occurred. *Dick v. Sunbright Steam Laundry Corp.*, 307 N.Y. 422, 121 N.E.2d 399 (1954).

Courts, however, are growing dissatisfied with the common law exceptions and are increasingly relegating them "to the history books where [they] more properly belong." *Sargent v. Ross*, 113 N.H. 388, 396, 308 A.2d 528, 533 (1973) (calling the general rule of landlord tort immunity an "anomaly," and the standard exceptions to the rule too inflexible). *Id.* at 393, 308 A.2d at 532. In *Chrysler Corp. v. M. Present Co.*, 491 F.2d 320 (7th Cir. 1974), the court held that property which was open to the public for storage of goods was within the public use exception to the general rule of a landlord's tort immunity. The court remarked: "although the observed trend seems almost always to involve cases of risk to bodily security, we think the trend also makes less credible any prediction that exceptions to the rule of landlord nonliability will be closely confined." *Id.* at 325.

37. See generally W. PROSSER, *supra* note 35, § 63. Some courts, unwilling to abandon *caveat* lessee with respect to the contractual relationship of the parties, were willing to abolish the tort immunity of landlords. In 1898, the Supreme Court of Tennessee drew a distinction between tort and contract liability of a landlord, conceding immunity with regard to the latter while maintaining that there is a ground of liability in tort for defects in existence at the beginning of the lease term:

It may be conceded that no ground of liability arises out of the contract between the landlord and tenant in the absence of fraud or [express] warranty, but a great number of cases in which the question has been considered hold that there is an independent ground of liability, arising out of the delictum or wrong of the landlord in leasing premises dangerous at the time, and there is not necessarily any conflict between the two classes of cases when properly understood.

Wilcox v. Hines, 100 Tenn. 538, 545-46, 46 S.W. 297, 299 (1898). The court characterized the responsibility of landlords in such a situation as that of an "ordinary care" of liability. *Id.* at 549, 46 S.W. at 299. Some courts extended the common law exceptions to general landlord tort immunity to cover other situations. In *Cummings v. Prater*, 95 Ariz. 20, 386 P.2d 27 (1963), the Supreme Court of Arizona modified the obligations of a landlord to warn the tenant of dangerous defects known to the lessor. See note 36 *supra* and accompanying text. The court held that the landlord is not only under a duty to warn the tenant of defects of which he has actual knowledge, but he also has a duty of ordinary care to inspect the premises if he has reason to suspect defects existing at the time of the taking of the tenancy and to either repair them or warn the tenant. Thus, the landlord was held to a standard of a "reasonably prudent man under similar circumstances." 95 Ariz. at ___, 386 P.2d at 31. See Note, *Sargent v. Ross*, 2 FORDHAM URB. L. J. 647, 653 (1974). Once the landlord inspected and found a defect, however, his duty would have been fulfilled by a mere warning to the tenant.

ises.³⁸ Certain of these statutes expressly create a right to sue in tort.³⁹ Others create a duty on the part of the landlord to repair the premises, the breach of which may create tort liability.⁴⁰

In the landmark decision of *Sargent v. Ross*,⁴¹ landlord immunity in tort was abandoned. A tenant sued her landlord for negligent construction and maintenance when her daughter fell to her death from

38. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Altz v. Lieberman*, 233 N.Y. 16, 134 N.E. 703 (1922); *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

39. See GA. CODE ANN. §§ 61-111, 61-112 (1979).

40. See LA. CIV. CODE ANN. arts. 2322, 2693, 2694, 2695 (West 1979); N.Y. MULT. DWELL. LAW § 78 (McKinney 1974) and notes 52-59 *infra* and accompanying text; WIS. STAT. ANN. § 704.07 (West 1981). But see *Thrash v. Hill*, 63 Ohio St. 2d 178, 407 N.E.2d 495 (1980), holding that the Ohio Landlord and Tenant Act, OHIO REV. CODE ANN. § 5321.04 (Page 1981), which creates a duty to repair in the landlord, does not create landlord tort liability. The dissent, however, argued that "although the General Assembly may not have expressly abrogated the landlord's common law tort immunity, it has certainly stripped away the underpinnings upon which it is dependent." *Id.* at 186, 407 N.E.2d at 500. Early decisions used housing codes as a basis for holding landlords liable in tort, see, e.g., *Pharm v. Lituchy*, 283 N.Y. 130, 27 N.E.2d 811, 20 N.Y.S.2d 132 (1940), and as a basis for implying a warranty of habitability in residential leases. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

In addition to imposing liability, repair statutes may provide for private remedies. See, e.g., LA. CIV. CODE ANN. arts. 2322, 2695 (West 1979). One view is that the omission of a private remedy by the legislature indicates that no such action was intended. *Feuerstein & Shestack, Landlord and Tenant—The Statutory Duty to Repair*, 45 ILL. L. REV. 205, 209 (1950). The other view is that the legislature did not address the issue, and therefore has not precluded a private right. *Id.* In New York, for example, the only entity able to commence a criminal proceeding for violations of the New York Multiple Dwelling Law is the agency responsible for enforcement of the statute. *City of New Rochelle v. Beckwith*, 268 N.Y. 315, 197 N.E. 295 (1935). Although a tenant who is physically injured as a result of a landlord's failure to comply with the Multiple Dwelling Law may bring an action in civil court based on negligence, he may not seek criminal enforcement of the provision itself. *Altz v. Lieberman*, 233 N.Y. 16, 134 N.E. 703 (1922). Tenants are not able to recover compensatory damages for a landlord's violation of the law. *Davar Holdings, Inc. v. Cohen*, 255 A.D. 445, 7 N.Y.S.2d 911, *aff'd*, 280 N.Y. 828, 21 N.E.2d 882 (1939). "It is, we believe, often assumed that a tenant denied the amenities [sic] of decent living may have a direct cause of action against his landlord for the damages suffered. The assumption is, however, false in this State." MEMORANDUM OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON HOUSING AND URBAN DEVELOPMENT, 1965 N.Y. LEGIS. ANN. 345, 352 [hereinafter cited as COMMITTEE ON HOUSING AND URBAN DEVELOPMENT]. In 1965, the Committee on Housing and Urban Development, recognizing the inadequacy of remedies which do not create a private remedy for the tenant, recommended the enactment of § 302-a of the Multiple Dwelling Law providing for the abatement of rent in the case of serious violations. *Id.* at 353-55.

41. 113 N.H. 388, 308 A.2d 528 (1973). See generally *Love, supra* note 1, at 112-14; Note, *Sargent v. Ross*, 2 FORDHAM URB. L. J. 647 (1974).

an outdoor stairway.⁴² On appeal from a jury award for the plaintiff, the Supreme Court of New Hampshire considered the propriety of two common law exceptions to the theory of landlord tort immunity: whether the injuries were received in a common area under the control of the landlord⁴³ and whether the negligent repairs exception applied to negligent construction.⁴⁴ Rather than strain the "control test"⁴⁵ or broaden the "negligent repairs" exception to include the negligent construction of improvements,⁴⁶ the court considered it "more realistic" to abandon the general rule of nonliability.⁴⁷ The court also recognized that the landlord-tenant relationship is governed by both real property and tort principles. Once the legislature adopted the implied warranty of habitability eliminating *caveat lessee*, the court reasoned, "the very legal foundation and justification for the landlord's immunity in tort"⁴⁸ was discarded.

42. 113 N.H. at 389, 308 A.2d at 529-30. Defendant landlord had constructed the stairway approximately eight years prior to the incident.

43. See note 36 *supra* and accompanying text.

44. *Id.*

45. 113 N.H. at 393, 308 A.2d at 532.

46. *Id.* at 395, 308 A.2d at 533. The court recognized that this "would be no great leap in logic." *Id.*

47. *Id.*

48. *Id.* at 397, 308 A.2d at 534. The Supreme Court of New Hampshire stated that the abolition of tort immunity flows "naturally and inexorably" from its decision in *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971), which recognized an implied warranty of habitability in an apartment lease transaction. 113 N.H. at 396, 308 A.2d at 533. Similarly, one commentator observed, "The policy considerations that dictated the adoption of the implied warranty of habitability in the first place also dictate the imposition of a duty to use reasonable care." Love, *supra* note 1, at 116. See also *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), where the court discussed the legal rights and duties created by housing regulations which were enforceable in tort by private parties. The only logical reason for the continued existence of landlord tort immunity is an evident reluctance of the courts to break with established law and precedent. The court criticized the "somnolence" of the courts in perpetuating common law landlord tort immunity. Searching for exceptions, the *Sargent* court reasoned, would only serve to perpetuate fictions and hamper the development of preferable alternatives. 113 N.H. at 395, 308 A.2d at 533.

The abiding respect of this court for precedent and stability in the law is balanced by an appreciation of the need for responsible growth and change in rules that have failed to keep pace with modern developments in social and juridical thought. . . . "Finding no supportable rationale upon which this judicially created exception to the ordinary rules of liability can be predicated, justice demands and reason dictates that a change be made from the previous holding in such a situation."

Id. at 398, 308 A.2d at 534-35, quoting *Dean v. Smith*, 106 N.H. 314, 318, 211 A.2d 410, 413 (1965). Moreover, the court noted that abolishing landlord tort immunity would be consistent with the trend that has eradicated immunity previously afforded

III. The Implied Warranty of Habitability in New York

In 1929, the New York State Legislature mitigated the harsh consequences of landlord tort immunity by enacting section 78 of the Multiple Dwelling Law⁴⁹ which imposed a duty to repair on the landlord.⁵⁰ Courts, however, did not construe the statute as creating an action independent of negligence⁵¹ and required actual or constructive notice to the landlord of the defective condition.⁵² As a result of the inadequacy⁵³ of existing statutory penalties⁵⁴ for housing

government entities, charitable organizations, family members, and landowners or occupiers. *Sargent v. Ross*, 113 N.H. at 396, 308 A.2d at 533. *See also Old Town Dev. Co. v. Langford*, 349 N.E.2d 744, 762 (Ind. App. 1976). *See generally* 2 HARPER & JAMES, *supra* note 33, § 27.16, at 1508 (1956); Love, *supra* note 1, at 117-18.

49. N.Y. MULT. DWELL. LAW § 78 (McKinney 1974). The Multiple Dwelling Law applies to buildings with three or more units in cities with a population of 325,000 or more. *Id.* §§ 3(1), 4(7), 8 (McKinney Supp. 1981-82). It superseded the Tenement House Law of 1909. N.Y. MULT. DWELL. LAW §§ 365-66(6) (McKinney 1974). The Multiple Residence Law applies to buildings of three or more rental units in cities, towns, and villages of less than 400,000 persons, N.Y. MULT. RESID. LAW §§ 3(1), 4(33), 8 (McKinney Supp. 1981-82), and also establishes minimum housing requirements.

The owner shall keep all and every part of a dwelling and the lot on which it is situated in good repair, clean and free from vermin, rodents, dirt, filth, garbage or other thing or matter dangerous to life or health; but the tenant shall also be liable if a violation is caused by his own wilful act, assistance or negligence or that of any member of his family or household or his guests.

Id. § 174.

The Multiple Residence Law, unlike the Multiple Dwelling Law, imposes a duty to inspect multiple dwellings depending upon the needs of the particular community, thus providing a more flexible system. *Id.* § 303.

50. "Every multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair." *Id.* § 78(1). *See* notes 38-40 *supra* and accompanying text.

51. *Pagan v. Goldberger*, 51 A.D.2d 508, 382 N.Y.S.2d 549 (1976). *See also Davar Holdings, Inc. v. Cohen*, 255 A.D. 445, 7 N.Y.S.2d, *aff'd*, 280 N.Y. 828, 21 N.E. 2d 882, 10 N.Y.S. 2d ___ (1939) ("outside of the penalties fixed by the [Multiple Dwelling Law], . . . liability . . . has been enlarged only to the extent of subjecting [the landlord] to additional liabilities, not in contract, but in tort, with respect to the tenant and others").

52. *Altz v. Leiberson*, 233 N.Y. 16, 134 N.E. 703 (1922); *Becker v. Manufacturers Trust Co.*, 262 A.D. 525 (1941) (need for notice implied).

53. *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 19, 318 N.Y.S.2d 11, 17 (Civ. Ct. 1971).

54. Penalties for violation of certain provisions constituted a misdemeanor and led to a \$500 fine, imprisonment up to 30 days, or both, for the first offense; \$1000 fine, imprisonment up to 60 days, or both, for subsequent offenses. N.Y. MULT. DWELL. LAW § 304(1) (McKinney 1974). Penalties for specified lesser non-criminal offenses were \$50 for the first offense, \$250 for a second offense or failure to remove, and \$500 for subsequent offenses. *Id.* § 304(1-a). Violation of the Multiple Residence Law is a

code violations,⁵⁵ courts began to imply a warranty of habitability into residential leases in order to afford tenants a defense to nonpayment eviction proceedings⁵⁶ and actions for unpaid rent.⁵⁷

The common law rule⁵⁸ of the implied warranty of habitability was codified in section 235-b of the Real Property Law in 1975,⁵⁹ but

misdeemeanor punishable by a fine of up to \$500 or imprisonment up to one year or both. N.Y. MULT. RESID. LAW § 304 (McKinney Supp. 1981). See generally, Note, *New York's Search for an Effective Implied Warranty of Habitability in Residential Leases*, 43 ALB. L. REV. 661, 672-75, 683-89 (1979), for a discussion of the Multiple Residence Law, the Multiple Dwelling Law, and tort liability thereunder.

55. The New York state legislature has made apparent its increasing recognition of the inadequacy of penal remedies through the enactment of various statutes. In 1962, it passed § 755 of the Real Property Actions and Proceedings Law, N.Y. REAL PROP. ACTS. LAW § 755 (McKinney 1979), 1962 N.Y. Laws ch. 312, which provides for a stay of proceeding or action for rent when the landlord has failed to repair a condition which is "or is likely to become, dangerous to life, health, or safety. . . ." N.Y. REAL PROP. ACTS. LAW § 755(1)(a) (McKinney 1979).

In 1965, the legislature added § 302-a to the Multiple Dwelling Law, N.Y. MULT. DWELL. LAW § 302-a (McKinney 1974), 1965 N.Y. Laws ch. 911, which provides for the abatement of rent in the case of serious violations which are allowed to exist for more than six months.

56. *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 19, 318 N.Y.S.2d 11, 17 (Civ. Ct. 1971).

57. *Cosmopolitan Assoc. v. Ortega*, 90 Misc. 2d 437, 395 N.Y.S.2d 358 (Civ. Ct. 1977); *Barasch v. Goldbetter*, N.Y.L.J., Apr. 15, 1975, at 17, col. 3 (Civ. Ct.) (discharge of duty to pay rent because of landlord's willful failure to keep roof in repair); *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (Civ. Ct. 1973) (tenant allowed a setoff of 50% of rent due). In *Cosmopolitan Assoc. v. Ortega*, the lease contained a provision in which the tenant waived his right to assert counterclaims in any proceedings brought by the landlord. On the landlord's motion, the court severed the tenant's counterclaim which was based on negligence, but refused to sever the counterclaim based on the warranty of habitability.

Courts, however, have upheld waivers of jury trials in actions based on the warranty of habitability. *Pierre v. Williams*, 106 Misc. 2d 81, 431 N.Y.S.2d 249 (Civ. Ct. 1980); *Beach Haven Apts. No. 1, Inc. v. Isenberg*, N.Y.L.J., Aug. 7, 1978, at 18, col. 1 (Civ. Ct.). But see *Dunbar Assoc. v. Mulzac*, 93 Misc. 2d 870, 403 N.Y.S.2d 846 (Civ. Ct. 1978), holding that a waiver of a jury trial in a lease does not apply to rights acquired after the enactment of § 235-b.

58. In a 1975 decision, *Tonetti v. Penati*, 48 A.D.2d 25, 367 N.Y.S.2d 804 (2d Dep't 1975), the Appellate Division of the Supreme Court of New York adopted the implied warranty of habitability. The tenant had signed a three-year lease for the rental of a private house where many dogs had been kept. When the tenant objected to the lingering odor, the landlord assured him that it would be eliminated. When it was not, the tenant decided to leave five days after he moved in. The landlord sought to collect eight months rent, the period of time it took to re-rent the premises, plus maintenance expenses. Affirming the decision of the supreme court, the appellate division held that the defendant's liability for rent terminated when he quit the premises because they were uninhabitable. 48 A.D.2d at 30, 367 N.Y.S.2d at 808. Analogizing to products liability law and the implied warranty of fitness for use, *id.* at 29, 367 N.Y.S.2d at 807, the court expressly adopted the implied warranty of habitability, declining to utilize the common law theory of constructive eviction. *Id.* at 26, 367 N.Y.S.2d at 805; see note 23 *supra* for a discussion of constructive eviction.

enforcement provisions were not adopted in order to allow the courts the freedom to fashion remedies they deem appropriate.⁶⁰ In the only New York Court of Appeals decision to interpret the implied warranty, the court indicated that only serious impairment of habitability should result in the finding of a breach.

In *Park West Management Corp. v. Mitchell*,⁶¹ the landlord commenced a summary proceeding for nonpayment of rent when tenants

Recent lower court decisions have not reconciled § 235-b with the doctrine of constructive eviction. In *Popack v. D'Aguilar*, N.Y.L.J., Nov. 28, 1975, at 11, col. 2 (Civ. Ct), the court seemed to view the tenant's decision not to abandon the premises as evidence of the habitability of the dwelling. The court ruled that the tenant failed to sustain a claim for breach of § 235-b because she neither surrendered possession nor was deprived of the use of any part of the rented unit. In *Cohen v. Werner*, 82 Misc. 2d 295, 368 N.Y.S.2d 1005 (Civ. Ct. 1975), the Civil Court of Queens County relied on the implied warranty of habitability to terminate a tenant's liability for rent. But the court relied on a recent case with similar facts, *Rockrose Assoc. v. Peters*, 81 Misc.2d 971, 366 N.Y.S.2d 567 (Civ. Ct. N.Y. County 1975), which held that a constructive eviction had occurred. 82 Misc. 2d at 298, 368 N.Y.S.2d at 1008. By contrast, the supreme court in affirming the civil court decision held that the tenant had sustained his claim of a constructive eviction without even mentioning the implied warranty of habitability. *Cohen v. Werner*, 85 Misc. 2d 341, 378 N.Y.S.2d 868 (Sup. Ct. 1975). *But see* 401 Boardwalk Corp. v. Gutzwiller, 82 Misc. 2d 84, 368 N.Y.S.2d 122 (City Ct. Long Beach 1975). Although this case was decided before adoption of the implied warranty of habitability, the City of Long Beach had an ordinance providing for the warranty. The court stated that recovery under the warranty did not require abandonment.

59. N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981-82). The rule that any agreement waiving the warranty is void as contrary to public policy did not exist at common law. *See* note 57 *supra*. Section 3 was added in 1976. *See* note 3 *supra* for text of § 235-b.

60. "Many agreed that describing in detail the procedural matters only served to raise a number of issues that could be better handled by the courts." Speech by Senator H. Douglas Barclay, the principal sponsor of the bill, to the New York Senate at 2 (June 17, 1975), *cited in* Note, *New York's Search for an Effective Implied Warranty of Habitability in Residential Leases*, 43 ALB. L. REV. 661, 664-65 n.21 (1979). "We wish to leave the greatest degree of flexibility to the courts to fashion an appropriate remedy in each case." *Id.* at 665 n.29.

It may have been possible to expressly provide for procedures and remedies. However, the circumstances and situations in which tenants will be seeking to enforce the warranty will take many forms. Tenants have utilized the doctrine affirmatively as well as defensively; as a counterclaim, set-off, and defense in non-payment of rent proceedings. The remedies have been complete or partial abatement of rent and reimbursement for repairs made by tenants themselves. It will be the courts' function to fashion remedies appropriate to the facts of each case.

Governor's Memorandum of Approval, 1975 N.Y. LAWS 1761 (McKinney). The principal sponsor of the bill, Senator H. Douglas Barclay, characterized it as "consumer-oriented legislation"—a bill which will encourage landlords to maintain their premises in a safe and sanitary condition. Memorandum of Senator H. Douglas Barclay, 1975 N.Y. LEGIS. ANN. 315.

61. 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied*, 444 U.S. 992 (1979).

withheld a month's rent in reaction to a strike by the building's entire maintenance and janitorial staff. The New York sanitation department refused to cross the picket lines and uncollected refuse accumulated as high as the first floor windows of the building causing the New York City Department of Health to declare a health emergency at the apartment complex.⁶² The tenants employed section 235-b in two ways: first, as an affirmative defense, alleging that the landlord failed to provide essential services and allowed unhealthy conditions to exist on the premises;⁶³ and second, as a basis for a counterclaim for damages.⁶⁴ In *Park West Management Corp. v. Mitchell*, the court held that the alleged conditions breached the warranty and set forth the test as being whether conditions that "materially affect" the tenant's health and safety exist.⁶⁵ It emphasized, however, that violations of housing codes do not establish *per se* breaches of the implied warranty.⁶⁶

As noted in *Park West*, there are myriad situations under which a breach may occur.⁶⁷ Decisions following *Park West* have been inconsistent as to the degree of uninhabitability required to constitute a breach of section 235-b, and no clear trend has emerged. For example, courts have held inadequate security to be a breach of the warranty where the landlord assumed the duty to provide protection and obtained a rental increase for this purpose.⁶⁸ Loud and excessive

62. As a result of the third-party strike, there were noxious odors, rats, roaches and vermin. The New York City Civil Court determined that these conditions violated the warranty and granted a 10% abatement of the month's rent to the tenants. *Park West Management Corp. v. Mitchell*, N.Y.L.J., Jan. 20, 1977, at 10, col. 3 (Civ. Ct.). Both the Appellate Term of the Supreme Court, *id.* at 11, col. 1, and the appellate division, 62 A.D.2d 291, 404 N.Y.S.2d 115 (1978), affirmed the judgment. The appellate division gave three bases for its decision: first, the analogy of a lease to a contract to purchase shelter and services suggests that a warranty of habitability should be implied, just as a contract for sale requires an implied warranty of fitness, 47 N.Y.2d at 324, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314; second, the landlord has a superior bargaining position; and, third, a private remedy is necessary to compel the landlord's compliance with housing codes and repair statutes. *Id.* at 325, 391 N.E.2d at 1292, 418 N.Y.S. 2d at 314.

63. 47 N.Y.2d at 326, 391 N.E.2d at 1293, 418 N.Y.S.2d at 315.

64. 62 A.D.2d at 293, 404 N.Y.S.2d at 116.

65. 47 N.Y.2d at 328-29, 391 N.E.2d at 1294-95, 418 N.Y.S.2d at 317.

66. 47 N.Y.2d at 328, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316. "[N]o one will dispute that health and safety are adversely affected by insect or rodent infestation, insufficient heat and plumbing facilities, significantly dangerous electrical outlets or wiring, [and] inadequate sanitation facilities. . . ." *Id.* at 328, 391 N.E.2d at 1294, 418 N.Y.S.2d at 317.

67. 47 N.Y.2d at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316.

68. *Brownstein v. Edison*, 103 Misc. 2d 316, 425 N.Y.S.2d 773 (Sup. Ct. 1980). The court emphasized that the landlord is not liable for all criminal acts committed by an intruder within the apartment building. *Id.* at 318, 425 N.Y.S.2d at 774-75.

noise also may constitute a breach of the warranty.⁶⁹ Courts have even allowed rent abatements for a nonfunctioning stove,⁷⁰ defective air conditioning,⁷¹ and where it was alleged that a landlord's failure to repair leaks, exterminate rodents, and provide heat had an "adverse impact" on a tenant's life.⁷² From these varied court decisions, it is unclear whether the breach must pose a serious threat to the health and safety of the tenant or represent a mere reduction in services.

A. Strict Liability Under Section 235-b

New York courts, once a breach of the implied warranty has been found, have allowed injured parties to recover in tort.⁷³ They have been split, however, on the issue of whether strict liability⁷⁴ should be used as a theory⁷⁵ of tort recovery in the absence of a statutory

See also Notre Dame Leasing Corp. v. Banzali, N.Y.L.J., Dec. 28, 1976, at 15, col. 6 (Dist. Ct.).

69. *Hohenberg v. 77 West 55th St. Assoc.*, N.Y.L.J., Aug. 26, 1981, at 7, col. 3 (Trial Term); *Kalikow Properties, Inc. v. Modny*, N.Y.L.J., May 2, 1978, at 5, col. 1 (App. Term); *McQuade v. Metropolitan Life Ins. Co.*, N.Y.L.J., Apr. 22, 1981, at 11, col. 2 (Civ. Ct.); *Central Park Gardens, Inc. v. Klein*, N.Y.L.J., Feb. 5, 1981, at 10, col. 3 (Civ. Ct.); *Mantica R Corp. NV v. Malone*, N.Y.L.J., Oct. 15, 1980, at 12, col. 5 (Civ. Ct.) (liability), 106 Misc. 2d 953, 436 N.Y.S.2d 797 (Civ. Ct. 1981) (damages).

70. *Hilary Gardens v. Dutcher*, N.Y.L.J., Nov. 15, 1976, at 14, col. 2 (Civ. Ct.).

71. *Devine v. Cirillo*, N.Y.L.J., June 22, 1977, at 16, col. 1 (Sup. Ct.). The court in *Devine* stated that it was not even necessary that the provision of air conditioning be specified in the lease. *Cf. Levine v. Ehrenberg*, N.Y.L.J., June 11, 1973, at 18, col. 2 (App. Term), a case decided before the adoption of § 235-b. The court allowed a rent abatement for lack of elevator service, although it appears that such service was provided for in the lease.

72. *Blatt v. Fishkin*, 101 Misc. 2d 888, 422 N.Y.S.2d 283 (Civ. Ct. 1979). The court sustained the allegation as sufficient to withstand a motion to dismiss for failure to state a cause of action. The court held that these words were substantially equivalent to the statutory phrase "conditions . . . detrimental to life." *Id.* at 889, 422 N.Y.S.2d at 284.

73. *See, e.g., Putnam v. Stout*, 38 N.Y.2d 607, 345 N.E.2d 319, 381 N.Y.S.2d 848 (1976); *Kaplan v. Coulston*, 85 Misc. 2d 745, 381 N.Y.S.2d 634 (Civ. Ct. 1976).

74. For strict liability: *McBride v. 218 E. 70th St. Assoc.*, 102 Misc. 2d 279, 425 N.Y.S.2d 910 (App. Term 1979); *McGuinness v. Jakubiak*, 106 Misc. 2d 317, 431 N.Y.S.2d 755 (Sup. Ct. Kings County 1980); *Kaplan v. Coulston*, 85 Misc. 2d 745, 381 N.Y.S.2d 634 (Civ. Ct. Bronx County 1976).

Against strict liability: *Curry v. New York City Hous. Auth.*, 77 A.D.2d 534, 430 N.Y.S.2d 305 (1st. Dep't. 1980); *Villa Victoria Realty Co. v. Glass*, N.Y.L.J., July 1, 1981, at 10, col. 6 (App. Term); *N. Town Roosevelt Ass'n v. Muller*, N.Y.L.J., Oct. 27, 1980, at 6, col. 4 (App. Term). *Segal v. Justice Court Mut. Hous. Co-op, Inc.*, 105 Misc. 2d 453, 432 N.Y.S.2d 463 (Civ. Ct. Queens County 1980); *Zarlin Realty Co. v. Napolitano*, N.Y.L.J., Apr. 27, 1977, at 11, col. 3 (Civ. Ct.).

75.

There is a strong and growing tendency, where there is no blame on either side, to ask, in view of the exigencies of social justice who can best bear the

provision.⁷⁶

While *Park West* did not involve a question of landlord tort liability, dictum in the decision suggests that strict liability may be an appropriate theory of recovery:

The scope of the warranty includes . . . conditions caused by both latent and patent defects existing at the inception of and throughout the tenancy. However, as the statute places an *unqualified* obligation on the landlord to keep the premises habitable, conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disaster are within the scope of the warranty as well.⁷⁷

Despite this language, no clear rule has emerged. One early section 235-b decision expressly approved the strict liability theory of recovery.⁷⁸ In *Kaplan v. Coulston*,⁷⁹ a plaintiff was injured when a

loss, and hence to shift the loss by creating liability where there has been no fault.

Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 233 (1914). This policy forms the basis for imposing strict liability on a defendant who is engaged in abnormally dangerous and ultrahazardous activities which threaten unduly the safety of others, regardless of the precautions taken by the defendant. W. PROSSER, *supra* note 35, § 75, at 494.

76. Strict liability has been used in the area of products liability law as one theory of recovery for several reasons. First, consumers of goods rely on the expertise of the seller or manufacturer who is in a superior position to discover defects. *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973); *Cintrone v. Hertz Truck Leasing and Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965). Courts require that a products liability defendant be in the business of selling before imposing strict liability. W. PROSSER, *supra* note 35, § 98; RESTATEMENT (SECOND) OF TORTS § 402 A (1965). In addition, the manufacturer is in a better position to bear the losses by distributing among the public through insurance. *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). Finally, the plaintiff's burden of proving negligence is removed. It may be difficult for a plaintiff to prove negligence when he was not present at the time the duty of reasonable care was breached. *Love, supra* note 1, at 136.

Other grounds of recovery in products liability law include negligence and breach of warranty. *See, e.g., Codling v. Paglia*, 32 N.Y.2d 330, 335, 298 N.E.2d 622, 624, 345 N.Y.S.2d 461, 463-64 (1973). A smaller number of cases involve fraud or deceit, *Kuelling v. Roderick Lean Mfg. Co.*, 183 N.Y. 78, 75 N.E. 1098 (1905), and misrepresentation, *Sell v. Volkswagen of Am., Inc.*, 505 F.2d 953 (6th Cir. 1974).

77. 47 N.Y.2d at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316 (emphasis added).

78. Strict liability has been imposed for breach of implied warranties of habitability in few jurisdictions. In *Fakhoury v. Magner*, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972), a lessee of a furnished apartment was injured when a couch in the apartment collapsed due to defective supporting wires. The California court held the landlord strictly liable, not as lessor of premises but as a lessor of defective furniture, noting that the landlord, having leased five other furnished apartments with the same type of couch, was in the business of leasing. 25 Cal. App. 3d at 64, 101 Cal. Rptr. at 476. The court posited that the same rationale used in holding lessors of personal property strictly liable applied here. "[T]he injured persons are virtually powerless to protect themselves; the lessor can recover the cost of protection by

kitchen cabinet fell and struck her. The civil court, analogizing the landlord-tenant relationship to a merchant-consumer transaction,⁸⁰ cited several policies militating for strict liability:⁸¹ first, a landlord is

charging for it in his business; and he has a better opportunity than does the injured person of recouping from anyone primarily responsible for the defect." *Id.* at 64, 101 Cal. Rptr. at 477. For an extensive discussion of this decision, see Note, Fakhoury v. Magner: *From Caveat Emptor to Caveat Lessor—Strict Liability and the Landlord*, 9 CALIF. W. L. REV. 547 (1973).

By contrast, in *Dwyer v. Skyline Apts., Inc.*, 123 N.J. Super. 48, 51, 301 A.2d 463, 464 *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973), the New Jersey Superior Court declined to extend the same reasoning to hold a landlord strictly liable for a tenant's personal injuries caused by a latent defect.

Such a landlord is not engaged in mass production whereby he places his product—the apartment—in a stream of commerce exposing it to a large number of consumers. He has not created the product with a defect which is preventable by greater care at the time of manufacture or assembly. He does not have the expertise to know and correct the condition, so as to be saddled with responsibility for a defect regardless of negligence.

Id. at 55, 301 A.2d at 467. The court rejected the plaintiff's argument that New Jersey's adoption of the implied warranty of habitability, *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970), created landlord tort liability. The court instead limited application of the warranty to defenses in actions of eviction. 123 N.J. Super. at 54, 301 A.2d at 466. See generally Note, *Dwyer v. Skyline Apts., Inc.*, 5 SETON HALL L. REV. 409 (1974).

79. 85 Misc. 2d 745, 381 N.Y.S.2d 634 (Civ. Ct. N.Y. County 1976).

80. Influential in determining whether strict liability should be allowed has been the close relationship between section 235-b and the New York Uniform Commercial Code implied warranty of merchantability for sale of goods. Notably, both provisions contain language warranting that the subject of the contract is fit for use. Section 235-b warrants fitness of the premises for "uses reasonably intended by the parties," N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981-82), while the U.C.C. warrants that goods for sale are "fit for the ordinary purposes for which such goods are used." N.Y. U.C.C. § 2-314 (McKinney 1964). The court of appeals has remarked, [s]ince a lease is more akin to a purchase of shelter and services rather than a conveyance of an estate, the law of sales, with its implied warranty of fitness (Uniform Commercial Code, § 2-314) provides a ready analogy that is better suited than the outdated law of property to determine the respective obligations of landlord and tenant.

Park West Management Corp. v. Mitchell, 47 N.Y.2d at 324, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314. "We agree that the language of warranty in § 235-b was adapted from the law of sales, with its implied warranty of fitness (Uniform Commercial Code § 2-314). . . ." *Curry v. New York City Hous. Auth.*, 77 A.D.2d 534, 535, 430 N.Y.S.2d 305, 307 (1980). See also *McGuinness v. Jakubiak*, 106 Misc. 2d 317, 322-23, 431 N.Y.S.2d 755, 759 (Sup. Ct. 1980).

81. The court also examined policies against strict liability: (1) a lease is not a sale of a product; (2) an apartment may be very old; (3) defects may arise after the letting; (4) in old buildings the landlord will not have recourse against the manufacturer or contractor; (5) a landlord should not be held liable if he was not on notice of the defect. *Id.* at 748, 381 N.Y.S.2d at 636. The court also cited the reasons given by the New Jersey Superior Court in *Dwyer v. Skyline Apts., Inc.*, 123 N.J. Super. 48, 301 A.2d 463, *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973), in refusing to hold the landlord strictly liable. 85 Misc. 2d at 748-49, 381 N.Y.S.2d at 636-37. See note 78 *supra*.

in a superior position to prevent defects, as is a merchant; second, the tenant, like the consumer, relies on the skill of the other party to the transaction;⁸² third, a landlord, like the products liability defendant, is in a position to spread his losses;⁸³ and, finally, adoption of the theory relieves the tenant of the difficulty of proving negligence.⁸⁴ Similarly, the appellate term in *McBride v. 218 E. 70th St. Assoc.*, found a landlord liable for property damages caused by flooding.⁸⁵ The managing agent testified that the damage was caused by occurrences out of the control of the landlord.⁸⁶ Nevertheless, the court held the landlord liable, stating that there “need be no showing that the landlord acted in bad faith or contributed to the condition of the premises.”⁸⁷ They required no proof that the landlord contributed to the defective condition of the premises and cited the reasoning in *Kaplan*⁸⁸ with approval.⁸⁹ Finally, in *McGuinness v. Jakubiak*,⁹⁰ a great rainstorm caused the tenant’s apartment to be flooded with water. The tenants tried, but were unable to save their furniture and possessions. As a result, the tenants incurred extensive property damage and were forced to vacate, thereby incurring extra living expenses.⁹¹ The court, citing *Kaplan* and *McBride*, held the landlord liable despite lack of notice of the condition.⁹² It characterized *Park West*’s approach to a landlord’s liability for breach of section 235-b as “expansive rather than restrictive.”⁹³

Despite these strong policies in favor of strict liability, most New York courts have declined to impose strict liability for several reasons.

82. 85 Misc. 2d at 750, 381 N.Y.S.2d at 638.

83. *Id.*

84. *Id.* at 750-51, 381 N.Y.S.2d at 638. Moreover, noted the court, it “would best serve the interests of justice” to impose strict liability on the landlord. *Id.* at 752, 381 N.Y.S.2d at 638.

85. *McBride v. 218 E. 70th St. Assoc.*, 102 Misc. 2d 279, 425 N.Y.S.2d 910 (App. Term 1979).

86. First, that the tenant’s apartment was “below grade”; second, that the damage was caused by unusually heavy rainstorms coupled with an inadequate city sewer system. *Id.* at 280-81, 425 N.Y.S.2d at 911.

87. *Id.* at 283, 425 N.Y.S.2d at 912. It may, however, be of some significance that the court noted that the landlord installed a “sump pump” after the events at issue had occurred. *Id.* at 283, 425 N.Y.S.2d at 913.

88. See notes 79-84 *supra* and accompanying text.

89. 102 Misc. 2d at 282, 425 N.Y.S.2d at 912.

90. 106 Misc. 2d 317, 431 N.Y.S.2d 755 (Sup. Ct. 1980).

91. 106 Misc. 2d at 318, 431 N.Y.S.2d at 756.

92. The court noted that the landlord had purchased the property with knowledge of some roof leakage, although the tenants in this case had not complained of roof leaks with respect to their apartment. *Id.* The court asserted that the dictum in *Park West* was consistent with *Kaplan* and indicated that the New York Court of Appeals would rule in favor of strict liability. *Id.* at 324 n.5, 431 N.Y.S.2d at 760 n.5.

93. *Id.* at 324, 431 N.Y.S.2d at 760.

First, because section 78 of the Multiple Dwelling Law has not been repealed, and the precedents requiring notice under that section⁹⁴ still stand, a conflict would result if strict liability were imposed for breach of section 235-b.⁹⁵ Second, imposition of such liability would send high rents even higher due to the increase in insurance rates.⁹⁶ Third, the legislature did not intend to impose strict tort liability on the landlord but merely wished to provide tenants with "a direct and expeditious method" of enforcing their rights.⁹⁷

One decision which rejected the applicability of strict liability was *Curry v. New York City Housing Authority*.⁹⁸ Although the observations of the supreme court, appellate division, constituted dicta, the court's evident disapproval of such a theory of recovery nevertheless has been influential.⁹⁹ In *Curry*, a two-year old plaintiff fell out of a window of an apartment owned by the defendant and alleged that his injuries resulted from a defective window. The plaintiff brought three causes of action: common law negligence, violation of section 235-b, and violation of a health code regulation requiring window guards. The court dismissed this last cause of action because the provision had been legally ineffective on the date of the injury and, therefore, also dismissed the negligence allegation. As for the section 235-b cause of action, while the court declined to determine whether the implied warranty imposed strict liability on the landlord,¹⁰⁰ it observed:

94. As a general rule, proof of notice is not required in a strict tort liability action. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Love*, *supra* note 1, at 150.

95. *Segal v. Justice Court Mut. Hous. Co-op.*, 105 Misc. 2d 453, 432 N.Y.S.2d 463 (Civ. Ct. N.Y. County 1980); *Zarlin Realty Co. v. Napolitano*, N.Y.L.J., Apr. 27, 1977, at 11, col. 3 (Civ. Ct. N.Y. County).

96. 105 Misc. 2d at 458, 432 N.Y.S.2d at 466-67; *Zarlin Realty Co. v. Napolitano*, N.Y.L.J., Apr. 27, 1977, at 11, col. 5. However, a comparison between the insurance rates in Louisiana, which has had strict liability imposed on landlords for over a century, LA. CIV. CODE ANN. art. 2695 (West 1952), does not reveal a drastic rise in the rates. *Love*, *supra* note 1, at 135 n.662.

97. Governor's Memorandum of Approval, 1975 N.Y. Laws 1760-61 *quoted in* *Hamel v. Schmidt*, 106 Misc. 2d 315, 431 N.Y.S.2d 770 (Sup. Ct. 1980). "And since section 235-b RPL does not expressly address the tort liability to which a landlord's statutory duty to repair gives rise, should legislative silence be treated as a mandate to the courts to expand 235-b into a statute of strict liability?" *Mahlmann v. Yelverton*, 109 Misc. 2d 127, 130, 439 N.Y.S.2d 568, 570 (Civ. Ct. 1980). *See generally* Note, *New York's Search for an Effective Implied Warranty of Habitability in Residential Leases*, 43 ALB. L. REV. 661 (1979).

98. 77 A.D.2d 534, 430 N.Y.S.2d 305 (1980) (mem.). The court of appeals, however, has not yet squarely faced the issue.

99. *Villa Victoria Realty Co. v. Glass*, N.Y.L.J., July 1, 1981, at 10, col. 6 (App. Term); *Bay Park One Co. v. Crosby*, N.Y.L.J., Apr. 23, 1981, at 11, col. 5 (App. Term); *N Town Roosevelt Assoc. v. Muller*, N.Y.L.J., Oct. 27, 1980, at 6, col. 4 (App. Term).

100. 77 A.D.2d at 536, 430 N.Y.S.2d at 308.

We agree that the language of warranty in § 235-b was adapted from the law of sales, with its implied warranty of fitness (Uniform Commercial Code, § 2-314), where it was the subject of a well-known legal development in which strict liability was imposed on those who manufacture or sell defective goods and products to the public. However, a study of the section's legislative history makes it quite improbable that the authors contemplated extension of the principle of strict liability to landlords. . . .¹⁰¹

The court noted that enactment of the section was the result of the legislature's desire to codify decisions¹⁰² such as *Javins* which had implied warranties of habitability in leases based on policy considerations of the lease as a contract;¹⁰³ such considerations should not necessarily result in strict liability in tort.¹⁰⁴ Indeed, *Curry* seemed to refuse to read even the broad language of *Park West*¹⁰⁵ as requiring such liability.¹⁰⁶

Considering the plight of modern day tenants and the traditionally superior bargaining position of the landlord, it is only fair that, when neither the landlord nor the tenant is at fault, the burden of loss should fall upon the one who is best able to bear it. The landlord who is in the business of renting should make it his business to learn the nature of his premises and prevent his rental units from deteriorating to a point such that the tenant is no longer getting what he bargained for—habitable living space. Simple notions of justice and fairness would seem to dictate that, under appropriate circumstances, *Kaplan* and *McBride* should be followed, not *Curry*, and strict liability should be imposed.

B. Third Party Recovery

New York courts that allow recovery in tort for breach of section 235-b under a strict liability theory—recovery which has not been foreclosed by *Park West*—will be faced with the additional question of whether third parties should be allowed to recover.¹⁰⁷ In view of

101. *Id.* at 535, 430 N.Y.S.2d at 307.

102. *Id.*

103. *Id.* at 536, 430 N.Y.S.2d at 307. See notes 24-26 *supra* and accompanying text for discussion of *Javins*.

104. *Id.*

105. See note 88 *supra* and accompanying text.

106. 77 A.D.2d at 536, 430 N.Y.S.2d at 307. *Curry* cited *Park West* but did not comment on the implications of the court of appeals' description of the landlord's obligation as "unqualified."

107. This problem has faced the courts in Louisiana, a jurisdiction which enacted a strict liability-implied warranty of habitability statute during the nineteenth century. The provision states:

recent expansions in strict products liability¹⁰⁸ and landlord tort liability,¹⁰⁹ it is possible that courts will permit plaintiffs other than tenants to recover consequential damages. In so holding, courts may rely upon the similarity between section 235-b and the implied warranty of merchantability for the sale of goods, under which third parties have been permitted to recover consequential damages.¹¹⁰ Pursuant

The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.

LA. CIV. CODE art. 2695 (West 1952). For a discussion of the Louisiana provision, see Love, *supra* note 1, at 142-44. A few Louisiana courts have permitted recovery only by the lessee, the party to whom the warranty is made. See, e.g., Jordan v. Palm Apts., 353 So. 2d 1120, writ granted, 355 So. 2d 263 (1978) (tenant's wife considered to be a third party who could recover from the landlord only upon proof of negligence); Hurky v. J.C. Penney, 140 So. 2d 445 (1962) (wife of tenant considered a third party rather than a tenant); Duplain v. Wiltz, 194 So. 60 (1940) (obligation of the lessor under the statute runs only to lessee). By contrast, a few courts have permitted the tenant's immediate family to recover. See, e.g., Landry v. Bleu, 172 So. 19 (1941) (lessee contracted for a home for his wife and family so that they acquired an interest in the lease). Other third parties that are able to recover include sub-tenants, see Hughes v. Abate, 2 So. 2d 68 (1941) (landlord is an owner not a "lessor" vis-à-vis the subtenants); but see Cheatham v. Bohrer, 17 So. 2d 492 (1944) (statute does not run in favor of any third parties); and a tenant's invited guests, Ward v. Conn., 344 So. 2d 60 (1977) (same standard of strict liability for damages for personal injuries applies to third parties on lessor's premises, but court found for landlord because plaintiffs failed to prove existence of the defect). It seems that a tenant's employee is not able to recover under the statute. Quintanilla v. Chateau Louisiane, Inc., 392 F. Supp. 510 (E.D. La. 1975).

108. Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

109. The most notable example is Basso v. Miller, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976), in which the court of appeals abolished the traditional distinctions between an invitee, licensee and trespasser and imposed a single standard of reasonable care on owners and occupiers of land. At common law, the status of the plaintiff determined the duty owed by the landowner, and classification of the plaintiff was often difficult. 40 N.Y.2d at 239, 352 N.E.2d at 871, 386 N.Y.S.2d at 567. As the concurring opinion noted:

As the economy shifted from an agrarian to an industrial base . . . a corresponding change in social policy, one less favorable to the landowner or possessor occurred. No longer does the policy of unrestricted freedom to use one's land, which has usually meant no more than a desire to be free of the burden and expense of taking precautions, inevitably outweigh considerations of human safety. . . .

40 N.Y.2d at 246, 352 N.E.2d at 875, 386 N.Y.S.2d at 571 (Breitel, J., concurring) (citation omitted).

110. UNIFORM COMMERCIAL CODE § 2-318 (9th ed. West 1978). When the American Law Institute and the National Conference of Commissioners on Uniform State Laws drafted the Uniform Commercial Code, they drafted three alternatives with respect to third party beneficiaries of warranties:

to the implied warranty of habitability, recovery has been permitted under traditional contract theories where compensatory damages are

Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends. As amended 1966.

Id.

Recovery under a warranty theory (contract) as opposed to strict liability (tort) is a confusing area of the law. A characteristic of a warranty action is that culpability is irrelevant. W. PROSSER, *supra* note 35, at 636. However, conceptual problems are created when a plaintiff who is not a buyer (i.e., not in privity) is allowed to recover consequential damages (personal injury or property damage) for breach of the warranty. See Note, *Products Liability in New York: Section 2-318 of the U. C. C. — The Amendment Without a Cause*, 50 FORDHAM L. REV. 61, 67 (1981) [hereinafter cited as *Products Liability in New York*]. This is because traditionally there could be no warranty suit without privity. *Gimenez v. Great Atl. & Pac. Tea Co.*, 264 N.Y. 390, 191 N.E. 27 (1934). Thus, third party recovery was not a true sales warranty action but a new tort action. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Rather than recognize this, the New York Court of Appeals abolished the requirement of privity in a warranty suit, *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). Not until 1963 did that court recognize the new tort action (strict liability) while retaining the language of warranty. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

In 1962, when the New York State Legislature adopted the Uniform Commercial Code, ch. 553, 1962 N.Y. Laws 1687 (effective in 1964), it was clear that actions brought under the theory of breach of warranty were governed by the Uniform Commercial Code rather than by tort law. Differences include notice requirements, N.Y. U.C.C. § 2-607(3) (McKinney 1964), privity, *id.* § 2-318 (McKinney Supp. 1981), the effectiveness of disclaimers, *id.* § 2-316 (McKinney 1964), and the statute of limitations, *id.* § 2-725. *Products Liability in New York, supra*, at 63-64, 70-71.

New York courts, unwilling to hold personal injury plaintiffs to commercial standards, adopted a separate strict liability action in *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). *Products Liability in New York, supra*, at 71. Thus, there was a strict line of demarcation between strict liability and warranty actions. *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); *Products Liability in New York, supra*, at 72.

awarded¹¹¹ and under strict liability where consequential damages are awarded.¹¹² Because both theories are applied within the context of a single action, it is important to keep in mind the fundamental differences between the two theories. Although the recovery of compensatory damages is restricted by the contractual concept of privity,¹¹³ recovery under strict liability, if considered an independent action, would not be limited to any specific class of plaintiff. Recovery of consequential damages should be restricted in the same way as compensatory damages under contract theories, to tenants and intended third parties, because strict liability is a part of the implied warranty of habitability action.

There are other arguments which militate against third party recovery under the implied warranty of habitability. Most importantly, it is unlikely that the state legislature intended plaintiffs other than tenants to be able to sue under section 235-b. Although the legislative history of the provision¹¹⁴ neither advocates nor precludes third party recovery, the language of the statute itself strongly suggests that it should be barred—indeed the statute specifically utilizes the words “tenants,” “residents” and “occupants.”¹¹⁵ In employing such language, the legislature intended to put “the tenant in parity legally with the landlord.”¹¹⁶ Moreover, section 235-b and its legislative history speaks of remedies “available to a tenant”¹¹⁷ and states that “the occupants will not be subjected to any conditions which would be dangerous to their life, health or safety.”¹¹⁸ To impose an “unqualified obligation”¹¹⁹ on the landlord with respect to every person who comes on the premises would create an unduly harsh burden in view of the absence of a statutory mandate.

When the New York State Legislature amended U.C.C. § 2-318 in order to expand the scope of the warranty protection to third parties, *see* note 122 *infra*, the distinction between the two actions was again blurred. Thus, under present New York law, both causes of action are available to one injured by a defective product even though privity is lacking. *Products Liability in New York, supra*, at 74-75.

111. In *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied*, 444 U.S. 992 (1979), the court measured damages under contract theories, but did not preclude other standards.

112. *See, e.g., Kaplan v. Coulston*, 85 Misc. 2d 745, 381 N.Y.S.2d 634 (1976).

113. *See* note 110 *supra*.

114. *See* note 60 *supra* and notes 117-18 *infra*.

115. N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981-82). *See* note 3 *supra* for the text of § 235-b.

116. *Park West Management Corp. v. Mitchell*, 47 N.Y. 2d 316, 325, 391 N.E.2d 1288, 1293, 418 N.Y.S.2d 310, 315, *cert. denied*, 444 U.S. 992 (1979), *citing* 1975 SEN. J. 7766-76 (remarks of Sen. Barclay).

117. Memorandum of Sen. H. Douglas Barclay, 1975 N.Y. LEGIS. ANN. 315.

118. Governor's Memorandum of Approval, 1975 N.Y. LEGIS. ANN. 437.

119. 47 N.Y.2d at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316.

In a case of first impression, *Hard v. Alwält Realty Corp.*,¹²⁰ the supreme court, special term, addressed the question of legislative intent and refused to apply strict liability, thus denying third party recovery. In *Hard*, the plaintiff was injured when he stepped on a marble stair which cracked and fell. The court stated that even if *Kaplan* were the law in New York, third parties would not be able to recover consequential damages on a strict liability theory for breach of section 235-b.¹²¹

Where the New York State Legislature intended third parties to recover, it has enacted such a provision. As codified in New York, U.C.C. § 2-318 expressly states that a third party beneficiary of a warranty is any person who reasonably may be expected to be affected by the goods, absent any intent to benefit the injured party.¹²² Thus, although section 235-b allows the judiciary to fashion remedies of the *tenant*,¹²³ courts should not extend the warranty of habitability to protect other individuals. This is not to say, however, that the only persons protected by the warranty should be those whose names are on the lease. While a modern lease is a contract containing an implied

120. N.Y.L.J., Feb. 16, 1977, at 10, col. 4 (Sup. Ct. N.Y. County).

121. "Obviously, the policy considerations differ. The warranty arises from the landlord-tenant relationship." *Id.* The court in *Hard* failed to address the analogy to the law of sales. See *Curry v. New York City Hous. Auth.*, 77 A.D.2d at 535, 430 N.Y.S.2d at 307. See note 62 *supra* for policy considerations in implying a warranty of habitability.

Although the existence of an uninhabitable condition may affect others lawfully upon the property, as was the plaintiff here, there is no authority shown to impose strict or absolute liability on the landlord here. To do so would make the landlord an insurer of the safety of all persons in or passing through the building, and would make the landlord responsible in damages for any injury sustained as a result of any defect, whether or not he knew or should have known of the defect. . . . Whether the Legislature considered an extension of the warranty to apply to all persons lawfully on the premises does not appear, either from the legislative history or from the Governor's Memorandum approving the enactment. Although the Memorandum left to the courts the responsibility for furnishing appropriate remedies, it would appear that any further extension of liability is a matter for the Legislature, not for this court on motion to amend a complaint.

N.Y.L.J., Feb. 16, 1977, at 10, col. 4 (Sup. Ct. N.Y. County).

122. N.Y. U.C.C. § 2-318 (McKinney Supp. 1981-82).

A seller's warranty whether express or implied extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section. New York originally adopted Alternative A, see note 110 *supra*, but struck the words "who is in the family or household of his buyer or who is a guest in his home," 1975 N.Y. Laws ch. 774, and thereby essentially adopted Alternative B.

123. See note 60 *supra* and accompanying text.

warranty of habitability,¹²⁴ limiting recovery under strict liability to those actually in privity with the landlord would be unduly restrictive.

Recent products liability decisions¹²⁵ have dispensed with the traditional requirement of privity¹²⁶ and have allowed recovery on strict liability grounds under implied warranties of fitness or merchantability even by remote bystanders who were not users of the defective product.¹²⁷ Courts have advanced two reasons in particular for this expansion of liability: (1) the manufacturer invites reliance¹²⁸ on the fitness of the product through mass advertising;¹²⁹ and (2) given the system of mass production, imposition of the costs of expanded liability on the manufacturer who possesses greater financial resources is more equitable and encourages product safety.¹³⁰ Although these arguments are persuasive in the area of products liability law, they should not apply to third party recovery under section 235-b. First, in the context of a landlord-tenant relationship, it is unlikely that a third party, other than a co-occupant¹³¹ of the tenant, would rely on a landlord's representation to the tenant that the premises were fit for habitation—there is no mass advertising or labeling. The landlord's

124. 47 N.Y.2d at 324, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314.

125. See, e.g., *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

126. See, e.g., *Turner v. Edison Storage Battery Co.*, 248 N.Y. 73, 74, 161 N.E. 423, 424 (1928).

127. *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

128. *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 13, 181 N.E.2d 399, 402-03, 226 N.Y.S.2d 363, 368 (1962).

The manufacturer . . . unquestionably intends and expects that the product will be purchased and used in reliance upon his express assurance of its quality and, in fact, it is so purchased and used. Having invited and solicited the use, the manufacturer should not be permitted to avoid responsibility, when the expected use leads to injury and loss, by claiming that he made no contract directly with the user.

129.

The world of merchandising is, in brief, no longer a world of direct contract; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communications media and on labels (attached to the goods themselves) prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer's denial of liability on the sole ground of the absence of technical privity.

Id. at 12, 181 N.E.2d at 402, 226 N.Y.S.2d at 367.

130. *Codling v. Paglia*, 32 N.Y.2d at 341, 298 N.E.2d at 627-28, 345 N.Y.S.2d at 468.

131. A "co-occupant" as used in this Note is someone whose name does not appear on the lease but who nevertheless shares the apartment with a tenant promisee.

representation that the premises are habitable is a representation to the *tenant*. Thus, the duty should not extend to third parties. Moreover, due to the statutory ceiling imposed on the amount of rent recoverable by landlords under Rent Stabilization and Rent Control laws,¹³² the landlord would be penalized, having lost the right of transferring increased costs from expanded liability to the tenant.¹³³ Therefore, courts should restrict the class of plaintiffs permitted to recover under strict liability for breach of section 235-b.

The third party beneficiary theory developed in contract law provides that any person who would benefit by performance of the contract should be allowed to enforce it—even in the absence of privity¹³⁴—if there has been an “intent to benefit” him.¹³⁵ If applied in the context of the implied warranty of habitability, third party beneficiary principles would limit recovery according to the tenant’s intentions¹³⁶ in light of the terms of the lease and the circumstances surrounding it.¹³⁷ The test should be, whom did the tenant expect would occupy the premises at the time of the signing of the lease?¹³⁸ As courts have emphasized, the warranty arises out of the landlord-tenant relationship.¹³⁹ Therefore, only those intended to be benefited by the creation of this relationship and the lease agreement should

132. Rent Stabilization Law, NEW YORK, N.Y., ADMIN. CODE §§ YY51-1.0-70, *codified at* N.Y. UNCONSOL. LAWS (McKinney Supp. 1981-82); N.Y. City Rent and Rehabilitation Law, NEW YORK, N.Y., ADMIN. CODE § Y51-1.0, *codified at* N.Y. UNCONSOL. LAWS (McKinney Supp. 1981-82). Indeed, this distinction was noted by the *Kaplan* court. *Kaplan v. Coulston*, 85 Misc. 2d 745, 750, 381 N.Y.S.2d 634, 638 (Civ. Ct. Bronx County 1976).

133. Increased costs borne by the manufacturer “will ultimately be passed on . . . to the purchasing users . . . [and] considerations of competitive disadvantage will delay or dilute automatic transferral of such added costs” which would result in higher prices to the consumer. 32 N.Y.2d at 341, 298 N.E.2d at 627-28, 345 N.Y.S.2d at 468. Such a curb on transferral of costs created through competition does not exist in the present tight rental housing market, however. For example, in Manhattan, the apartment vacancy rate south of 96th street is approximately 1%, far below the 5% figure considered desirable in urban areas with a healthy rental market. *Apartment Crush Alters Manhattan Living*, N.Y. Times, Jan. 21, 1980, at A1, col. 1.

134. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 17-1 (2d ed. 1977).

135. *Id.* § 17-2; *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307 (1927).

136. J. CALAMARI & J. PERILLO, *supra* note 134, § 17-2; *Hamill v. Maryland Cas. Co.*, 209 F.2d 338 (10th Cir. 1954); *McCulloch v. Canadian Pac. Ry. Co.*, 53 F. Supp. 534 (D.Minn. 1943).

137. J. CALAMARI & J. Perillo, *supra* note 134, § 17-2.

138. Certainly, a tenant intends to benefit his immediate family by the lease if he intends that they will occupy the same premises. *Cf. Landry v. Le Bleu*, 172 So. 19 (1941), where lessee contracted for a home for his family, and the Louisiana court ruled that the family could recover.

139. *Hard v. Alwalt Realty Corp.*, N.Y.L.J., Feb. 16, 1977, at 10, col. 4 (Sup. Ct. N.Y. County).

be protected in strict liability by section 235-b. Reasonable limits must be placed on the liability of the landlord who, nevertheless, owes a strong duty to his tenants.¹⁴⁰

C. Remedies for Breach of Section 235-b

The imposition of strict liability for injuries caused by breach of section 235-b and the possibility that third parties may be able to recover under the theory both raise the question of the propriety of certain remedies. Although the state legislature expressly left open the kinds of relief available to tenants in order to allow for flexibility,¹⁴¹ the availability of certain remedies coupled with an expansion in the

140. The extension of protection afforded by the New York Rent Control provisions can be applied by analogy to determine who shall be able to recover consequential damages on a strict liability theory for breach of the warranty of habitability. Section 56(d) of the City Rent and Eviction Regulations, passed by the N.Y.C. Housing and Development Administration pursuant to statutory authority, N.Y. CITY RENT AND EVICTION REGULATIONS § 56(d), *codified at* N.Y. UNCONSOL. LAWS (McKinney 1974), states that no "occupant of housing accommodations" shall be evicted from a rent controlled apartment where the occupant is either "the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who is living with him." (There is an identical provision in the State Rent and Eviction Regulations § 56(4), *codified at* N.Y. UNCONSOL. LAWS (McKinney 1974)). This language has been construed to preclude anyone who is not a spouse or a lineal descendant of the tenant, thereby precluding aunts, uncles, nieces, nephews, etc., from the protection of rent control. *Cesbron v. Reardon*, 73 Misc. 2d 715, 343 N.Y.S.2d 163 (Civ. Ct. N.Y. County 1973). However, other courts have construed the language to protect a tenant's parents, *Bierer v. Abrams*, 20 Misc. 2d 1085, 201 N.Y.S.2d 110 (Sup. Ct. Kings County 1956); a tenant's mother-in-law and sister-in-law, *Waitzman v. McGoldrick*, 20 Misc. 2d 1085, 121 N.Y.S.2d 515 (Sup. Ct. Kings County 1953); and a tenant's nephew, *Bistany v. Williams*, 83 Misc. 2d 228, 372 N.Y.S.2d 6 (City Ct. Yonkers 1975) (extending Rent Control protection beyond the tenant's "immediate family" to a group which also includes "not only the servants but also the head of the household and all persons in it related by blood or marriage," *id.* at 229, 372 N.Y.S.2d at 7). In each case, the person to whom protection was extended resided with the tenant. In *Zimmerman v. Burton*, 107 Misc. 2d 401, 434 N.Y.S.2d 127 (Civ. Ct. N.Y. County 1980), the court extended Rent Control protection to a person who cohabited with the tenant "for a significant period of time in a partnership closely akin to marriage." *Id.* at 402, 434 N.Y.S.2d at 128. Thus, it appears that the courts are moving toward a species of "intent to benefit" test to construe the Rent Control protection provisions. In each case, the person seeking protection lived with the tenant and was intended by the tenant to both live with the tenant and get the benefits of the lease. Recent expansion of landowner tort liability, *see* note 179 *infra*, should not result in an inconsistent application of the law or a resurrection of the common law distinctions eliminated by *Basso v. Miller* if limited third party recovery is permitted under a strict liability theory. This Note's proposal applies only to landlords who must conform to § 235-b—not to other landowners. Residential landlords are under a *statutory* duty to keep premises habitable, a duty not shared by other landowners.

141. *See* note 60 *supra* and accompanying text.

class of permitted plaintiffs may result in a heavy financial burden on the landlord.

The award of compensatory damages, the basic remedy available to the tenant for breach of section 235-b, will not impose a severe economic burden on landlords if courts permit limited third party recovery in strict liability.¹⁴² As the New York Court of Appeals

142. Compensatory damages compensate the wronged party or restore him to his original position, e.g., the reduction in rental value. *Reid v. Terwilliger*, 116 N.Y. 530, 22 N.E. 1091 (1889). A dispute arose in the courts with regard to the level of proof required to substantiate a claim for damages. In *Steinberg v. Carreras*, the appellate term rejected the opinion of the court as to the money valuation of the deprived services, based on the testimony of the tenant. *Steinberg v. Carreras*, 74 Misc. 2d 32, 344 N.Y.S.2d 136, *rev'd in part*, 77 Misc. 2d 774, 357 N.Y.S.2d 369 (App. Term 1974) (set off against rent in arrears). At least one court awarded only nominal damages on the constraint of this decision despite its observation that expert testimony was neither necessary nor practical. *Groner v. Lakeview Management Corp.*, 83 Misc. 2d 932, 373 N.Y.S.2d 807 (Civ. Ct. N.Y. County 1975). *See also* 631 Realty, Ltd. v. Harvey Greiff, Inc., N.Y.L.J., Oct. 27, 1975, at 9, col. 2 (Civ. Ct. Kings County). In response to *Steinberg*, the legislature amended the statute in 1976 to state expressly that the court need not require expert testimony. N.Y. REAL PROP. LAW § 235-b(3) (McKinney Supp. 1981-82). Opinions of the tenant and landlord now serve as competent evidence of the diminution in value due to the breach, *Park West Management Corp. v. Mitchell*, 47 N.Y.2d at 329-30, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317. The trial court determines the value of the services of which the tenant is deprived. *N Town Roosevelt Ass'n v. Muller*, N.Y.L.J., Oct. 27, 1980, at 6, col. 4 (App. Term). On the other hand, because mere temporary inconveniences and annoyances to the tenant will not constitute a breach of the warranty, damages may not be ascertained by mere conjecture or guess work. *Goldner v. Doknovitch*, 88 Misc. 2d 88, 388 N.Y.S.2d 504 (App. Term 1976) (retrial ordered due to inadequate proof of damages—tenants fixed no sum in their answer as to the amount claimed as a setoff, and they offered no testimony as to the reduced rental value of the premises); *see also* *Schwartz v. Jiminez*, N.Y.L.J., Nov. 3, 1976, at 14, col. 3 (Civ. Ct. N.Y. County); *Ocean Rock Assoc. v. Cruz*, 66 A.D.2d 878, 879, 411 N.Y.S.2d 663, 664 (2d Dep't 1978), *aff'd*, 51 N.Y.2d 1001, 417 N.E.2d 93, 435 N.Y.S.2d 981 (1980) (Martusello, J., dissenting). Absent some reasonable basis for determining damages, only nominal damages may be awarded. 88 Misc. 2d at 91, 388 N.Y.S.2d at 507. "Where it can reasonably be expected that evidence can be furnished from which reasonable men can derive substantial data for fixing the amount of damages, such evidence must be produced." *Id.* at 91, 388 N.Y.S.2d at 507. *See* *York, Implied Warranty of Habitability*, N.Y.L.J., May 12, 1976, at 1, col. 2. For example, some courts have held that the cost of repairs made by the tenant, after notice to the landlord, is a basis for determining damages. *But see* *Villa Victoria Realty Co. v. Glass*, N.Y.L.J., July 1, 1981, at 10, col. 6 (App. Term); *Kekllas v. Saddy*, 88 Misc. 2d 1042, 389 N.Y.S.2d 756 (Dist. Ct. Nassau County 1976); *Pantalis v. Archer*, 87 Misc. 2d 205, 384 N.Y.S.2d 678 (Dist. Ct. Suffolk County 1976). *See also* *Hilary Gardens v. Dutcher*, N.Y.L.J., Nov. 15, 1976, at 14, col. 2 (Civ. Ct.) (damages included additional costs tenant incurred eating at restaurants because of a defective stove); *Schwartz v. Jiminez*, N.Y.L.J., Nov. 3, 1976, at 14, col. 3 (Civ. Ct. N.Y. County) (fair market value of the premises is what the tenant could have charged to sublet). One court has viewed the inability to rely on the landlord's services as an independent factor in awarding damages. *111 East 88th Partners v. Simon*, 106 Misc. 2d 693, 434 N.Y.S.2d 886 (Civ. Ct. N.Y. County 1980).

stated in *Park West*, the measure of damages usually should be "the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach."¹⁴³ The rationale for such a measure of damages is premised upon the contract theory of leases: "the duty of the tenant to pay rent is coextensive with the landlord's duty to maintain the premises in habitable condition."¹⁴⁴ Under this theory, third parties should not be able to recover for diminished value to the property.

More problematic has been the issue of consequential damages¹⁴⁵ for either personal or property injury due to a breach of section 235-b. Several recent cases have denied the tenant recovery for consequential damages.¹⁴⁶ A few courts, however, have allowed consequential damages under warranty law.¹⁴⁷ For example, the Civil Court of New York County allowed damages for "disruption of daily living."¹⁴⁸

143. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 329, 391 N.E.2d 1288, 1295, 418 N.Y.S.2d 310, 317 (1979).

144. *Id.* at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317. The continued payment of rent is not an implied waiver of the right to damages for violation of the statute. *N Town Roosevelt Ass'n v. Muller*, N.Y.L.J., Oct. 27, 1980, at 6, col. 4 (App. Term); *Tidespy Corp. v. Third World Culture Cent.*, N.Y.L.J., March 23, 1979, at 6, col. 1 (App. Term); *Stahl v. A. M. & P. M. Products*, N.Y.L.J., March 1, 1979, at 7, col. 5 (App. Term); *350 Associates v. Feldman*, N.Y.L.J., Dec. 18, 1978, at 13, col. 6 (App. Term); *111 East 88th Partners v. Simon*, 106 Misc. 2d 693, 434 N.Y.S.2d 886 (Civ. Ct. N.Y. County 1980). *But see* *Cosmopolitan Assoc. v. Ortega*, 90 Misc. 2d 437, 395 N.Y.S.2d 358 (Civ. Ct. Queens County 1977).

145. Compensatory damages may be either general (damages which naturally and obviously flow from the breach) or consequential (not natural, but a necessary result of the wrong, i.e., they arise from the special circumstances of the case). *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854).

146. *Villa Victoria Realty Co. v. Glass*, N.Y.L.J., July 1, 1981, at 10, col. 5 (App. Term); *N Town Roosevelt Ass'n v. Muller*, N.Y.L.J., Oct. 27, 1980, at 6, col. 4 (App. Term). In *Bay Park One Co. v. Crosby*, 101 Misc. 2d 586, 421 N.Y.S.2d 529 (Civ. Ct. Kings County 1979), the court allowed the tenant to recover lost wages caused by his inability to leave the building due to a broken elevator. The appellate term, however, reversed, holding that no consequential damages are recoverable for breach of the warranty of habitability. *Bay Park One Co. v. Crosby*, N.Y.L.J., Apr. 23, 1981, at 11, col. 5 (App. Term).

In *N Town Roosevelt Ass'n v. Muller*, N.Y.L.J., Oct. 27, 1980, at 6, col. 4 (App. Term), the court relied on the *Park West* formula but ignored the New York Court of Appeals' express reservation that the formula should not foreclose other possible remedies. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317.

147. *McBride v. 218 E. 70th St. Assoc.*, 102 Misc. 2d 279, 425 N.Y.S.2d 910 (App. Term 1979); *McGuiness v. Jakubiak*, 106 Misc. 2d 317, 431 N.Y.S.2d 755 (Sup. Ct. Kings County 1980).

148. *Goodman v. Ramirez*, 100 Misc. 2d 881, 883, 420 N.Y.S.2d 185, 188 (Civ. Ct. N.Y. County 1979).

It reasoned that damages for breach of the implied warranty of fitness in the law of sales—which provides a ready analogy to the warranty of habitability—have exceeded mere reduction in rental value.¹⁴⁹ Breach of warranty, the court explained, has been regarded as a hybrid concept involving elements of both tort and contract for which foreseeable, consequential damages may be awarded.¹⁵⁰

For policy reasons, courts have allowed punitive damages¹⁵¹ for breach of the warranty of habitability under a negligence theory where there is evidence of actual malice or such wantonness or recklessness as to permit an inference of malice.¹⁵² By awarding punitive

149. *Id.* at 888, 420 N.Y.S.2d at 189.

150. Similarly, the dissent in *N Town Roosevelt Ass'n v. Muller*, N.Y.L.J., Oct. 27, 1980, at 6, col. 4, 5 (App. Term) (Asch, J., dissenting), explained why attempted distinctions between tort and contract are not valid. First, it is counterproductive to adhere compulsively to contract and tort distinctions. Categories are formulated to bring about socially appropriate legal ends, and they must yield ultimately to new configurations which are more appropriate for contemporary problems. *Id.* at col. 5. "Today the pressures for relevant legal remedies more attuned to the flux in our society are breaking down traditional boundaries between contract and tort law." *Id.* Second, contract and tort distinctions are irrelevant with respect to whether damages sustained by a tenant's property should be considered in determining the amount of rent abatement. *Id.* at col. 6. The dissent argued that recovery of consequential damages should be limited to the fair market value of the premises. This would not, however, preclude the tenant from bringing a separate action in tort. *Id.*

Despite the reasons for awarding consequential damages for breach of § 235-b, some courts, relying on *Curry v. New York City Hous. Auth.*, 77 A.D.2d 534, 430 N.Y.S.2d 305 (1st Dep't 1980), see notes 94-101 *supra* and accompanying text, have been reluctant to award them under a strict liability theory. See, e.g., *Villa Victoria Realty Co. v. Glass*, N.Y.L.J., July 1, 1981, at 10, col. 5 (Sup. Ct.); *Bay Park One Co. v. Crosby*, N.Y.L.J., Apr. 23, 1981, at 11, col. 5 (Sup. Ct.); *N Town Roosevelt Ass'n v. Muller*, N.Y.L.J., Oct. 27, 1980, at 6, col. 4 (Sup. Ct.). In *Mahlmann v. Yelverton*, 109 Misc. 2d 127, 439 N.Y.S.2d 568 (Civ. Ct. Queens County 1980), the court did not mention *Curry* in denying consequential damages, but rather relied on what it assessed to be the weight of legislative intent and case law precedents. *Id.* at 132, 439 N.Y.S.2d at 571. Strict liability can be applied to both compensatory and consequential damages, or to compensatory damages alone. See *N Town Roosevelt Ass'n v. Muller*, N.Y.L.J., Oct. 27, 1980, at 6, col. 4 (Sup. Ct.) (Asch, J., dissenting) (suggesting that strict liability be applied to compensatory damages arising from the landlord's breach of the warranty of habitability, but requiring a separate action in tort for consequential damages). See generally Newburgh, *Assessing Damages under the Warranty of Habitability*, N.Y.L.J., July 22, 1981, at 1, col. 2.

151. In the analogous area of products liability law, early court decisions declined to award punitive damages in suits brought under the warranty theory because punitive damages generally may not be awarded in contract actions. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICHIGAN L. REV. 1257, 1271 (1976) [hereinafter cited as Owen]. See generally J. CALAMARI & J. PERILLO, *supra* note 134, § 14-3, at 520.

152. *Hohenberg v. 77 West 55th St. Assoc.*, N.Y.L.J., Aug. 26, 1981, at 7, col. 3 (Sup. Ct.) (punitive damages for conduct which is morally culpable or activated by evil and reprehensible motives); *Century Apartments, Inc. v. Yalkowsky*, 106 Misc.

damages, courts seek to prevent the deterioration, neglect and abandonment of residential structures. Punitive damages accomplish this by punishing the landlord, deterring him from repeating the conduct,¹⁵³ and warning other landlords not to follow the same course of conduct.¹⁵⁴ For example, in *G. J. Eliza Realty Co. v. Mah*,¹⁵⁵ the Civil Court of New York County awarded compensatory damages to two tenants of \$200 each together with punitive damages of \$2,000 each.¹⁵⁶ In *Mah*, the plaintiffs alleged that the landlord had placed a device on the central heating system which was capable of causing the system to become inoperable;¹⁵⁷ apartment windows had been broken and never replaced;¹⁵⁸ plumbing, including a kitchen faucet and toilet, were not usable;¹⁵⁹ and one apartment was infested with rats and cockroaches because the tenant had never been notified of the availability of an exterminator.¹⁶⁰ The landlord had been informed of these conditions several times but refused to make the repairs, asserting to one tenant that she could move if she did not like the condition of the old building.¹⁶¹ The court applied the *Park West* reduced value test in fixing compensatory damages and noted that it was

2d 762, 435 N.Y.S.2d 627 (Civ. Ct. N.Y. County 1980) (deliberate delay in repairs); 111 East 88th Partners v. Simon, 106 Misc. 2d 693, 434 N.Y.S.2d 886 (Civ. Ct. N.Y. County 1980) (wanton disregard towards tenant's health and safety); 124-26 Mott Corp. v. Lum, N.Y.L.J., Oct. 15, 1979, at 6, col. 2 (Civ. Ct.) (rat and roach infestation, holes in walls, floor and ceilings; landlord allegedly wanted to force tenants out to avoid rent control); 88 Lex Co. v. Prieser, N.Y.L.J., Dec. 18, 1978, at 13, col. 5 (App. Term) (denying punitive damages absent proof of malice); 15 & 19 West 55th St. Realty Co. v. Mazzola, N.Y.L.J., Oct. 26, 1977, at 11, col. 2 (Civ. Ct. N.Y. County) (landlord unwilling to provide adequate heat and water, reduction of security and cleaning services, and a defective intercom system); Kipsborough Realty Corp. v. Goldbetter, 81 Misc. 2d 1054, 367 N.Y.S.2d 916 (Civ. Ct. N.Y. County 1975) (deliberate and persistent refusal of landlord for three years to comply with Multiple Dwelling Law and Administrative Code). See generally Muldoon, *Warranty of Habitability, Punitive Damages in New York*, N.Y.L.J., Sept. 30, 1981, at 1, col. 2.

153. One court stated it would measure punitive damages by an amount intended to deter others. 124-26 Mott Corp. v. Lum, N.Y.L.J., Oct. 15, 1979, at 6, col. 2 (Civ. Ct.).

154. Century Apartments, Inc. v. Yalkowsky, 106 Misc. 2d 762, 435 N.Y.S.2d 627 (Civ. Ct. N.Y. County 1980); 124-26 Mott Corp. v. Lum, N.Y.L.J., Oct. 15, 1979, at 6, col. 2 (Civ. Ct.); *G. J. Eliza Realty Co. v. Mah*, No. 87931/1980, Sept. 22, 1981 (Civ. Ct. N.Y. County).

155. No. 87931/1980, Sept. 22, 1981 (Civ. Ct. N.Y. County).

156. *Id.* at 7.

157. *Id.* at 2.

158. *Id.* at 2-3.

159. *Id.*

160. *Id.*

161. *Id.* at 3.

“shocked by the wanton disregard of the health and safety” of the tenants:¹⁶²

To deny punitive damages in this case would encourage serious violations of the warranty of habitability by assuring the landlord that its worst consequence of such violation would be an abatement of the rent which would merely reduce the lease rent to the proper rental value for the level of services actually provided.¹⁶³

Indeed, the court noted that a “pattern of inadequate essential services, alone” could be a sufficient basis for the award of punitive damages.¹⁶⁴

Similarly, the Civil Court of New York County awarded a tenant punitive damages in an amount equal to the rent demanded by the landlord, resulting in a complete setoff, because of the landlord’s willful failure to keep the roof in repair despite persistent complaints by the tenant over a three-year period.¹⁶⁵ The court noted that the landlord’s refusal to comply with the Multiple Dwelling Law and the Housing Maintenance Code evidenced a malicious, wanton and reckless disregard for the law.¹⁶⁶

Although decisions such as *Mah* and *Barasch* indicate a willingness to allow recovery of punitive damages where malicious conduct is shown, some commentators have observed the illogicality of awarding punitive damages where strict liability is imposed.¹⁶⁷ Such criticism has arisen in the context of products liability law:

where the plaintiff relies solely on strict liability, certain problems of logic . . . arise in regard to a claim for punitive damages. Under the theory of strict liability, all the plaintiff need show to succeed in his claim is that the defendant’s product was defective and that the injury was caused by this defect. Punitive damages, on the other hand, are reserved for situations where the defendant has done more than inflict injury on others by his negligence or intentional acts. He must have acted maliciously, or with such recklessness as to indicate an indifference to the safety of others, or have

162. *Id.*, at 5.

163. *Id.* at 5-6.

164. *Id.* at 6.

165. N.Y.L.J., Apr. 15, 1975, at 17, col. 3 (Civ. Ct. N.Y. County).

166. *Id.*

167. Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 MARQ. L. REV. 245 (1977); Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNS. J. 300 (1972); Note, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613 (1972); Comment, *Punitive Damages in Products Liability Cases*, 16 SANTA CLARA L. REV. 895 (1976); Note, *Punitive Damages in Products Liability Litigation: Macey v. Freightliner Corp.*, 33 Sw. L. J. 1117 (1979).

engaged in some other type of behavior which is regarded as so socially reprehensible as to justify the awarding of punitive damages. Therefore, such extraordinary damages should not be predicated on the mere showing that the plaintiff was injured due to a defective product which was manufactured or distributed by defendant.¹⁶⁸

Other commentators have refuted this argument that the theories of strict liability and punitive damages are incompatible on two bases:¹⁶⁹ first, the elimination of proof of fault is only relevant with respect to establishing liability for compensatory damages and does not preclude recovery upon proof of aggravated fault;¹⁷⁰ and, second, facts different from those supporting the underlying claim for compensatory damages might support the claim for punitive damages.¹⁷¹ Following this reasoning, several courts have awarded punitive damages in strict products liability cases because such sanctions serve as a "valuable and effective tool in deterring and punishing misconduct."¹⁷² These arguments, however, have been rejected in New York. The leading interpretation of the New York approach to punitive damages in products liability cases was set forth by the Second Circuit in *Roginsky v.*

168. Note, *Allowance of Punitive Damages in Products Liability Claims*, 6 GEORGIA L. REV. 613, 626-27 (1972).

169. See, e.g., Owen, *supra* note 151; Robinson & Kane, *Punitive Damages in Products Liability Cases*, 6 PEPPERDINE L. REV. 139 (1978).

170. Owen, *supra* note 151, at 1269.

171. *Id.* at 1269-70.

172. *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 308, 294 N.W.2d 437, 461 (1980). See also *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 46-47 (Alaska Sup. Ct. 1979) (punitive damages under strict liability theory where plaintiff was able to prove manufacturer knew that its product was defectively designed and that injuries and deaths had resulted from the defect but continued to market the product in reckless disregard of the public's safety); *Forrest City Mach. Works, Inc. v. Aderhold*, ___ Ark. ___, ___, 616 S.W.2d 720, 726 (1981) (court approved punitive damages theory, but denied recovery because proof not given to sustain finding of reckless disregard from which malice could be inferred); *Searle & Co. v. Superior Court of Sacramento County*, 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218, 225 (1975) ("We suggest *conscious* disregard of *safety* as an appropriate description of the *animus malus* which may justify an exemplary damage award when nondeliberate injury is alleged.") (emphasis in original); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 713, 60 Cal. Rptr. 398, 415 (1967) ("Where . . . there is evidence that the conduct in question is taken recklessly and without regard to its injurious consequences, the jury may find malice in fact."); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 732-33 (1980); *Rinker v. Ford Motor Co.*, 567 S.W.2d 655, 668 (1978) ("[g]iven the purpose of punitive damage to punish a defendant for an aggravated act of misconduct and to deter similar conduct in the future by the defendant and others, there is no fundamental reason for excluding [cases brought under negligence and strict liability theories] from the cases in which punitive damages may be recovered").

Richardson-Merrell, Inc.,¹⁷³ a case in which the plaintiffs alleged that use of a drug developed to lower blood cholesterol level caused cataracts. On its reading of New York State law, the Second Circuit denied punitive damages: the first punitive award could "exhaust . . . all claims for punitive damages and . . . preclude future judgments;"¹⁷⁴ governmental industry regulations, criminal penalties, and heavy compensatory damages should suffice to meet the goal of deterrence;¹⁷⁵ and, finally, the possibility exists that innocent shareholders could "suffer . . . extinction of their investments for a single management sin."¹⁷⁶

Although lower New York courts have allowed punitive damages to be recovered by *tenants* alleging breach of the implied warranty of habitability under certain circumstances,¹⁷⁷ recovery by third party plaintiffs under a strict liability theory should not be permitted. In view of the fact that the primary purpose of section 235-b is to insure habitability of premises,¹⁷⁸ limitless recovery by third parties under strict liability could very well deplete a landlord's resources to the detriment of tenants. In addition, the legislative history of the implied warranty indicates that the statute was never intended to punish landlords.¹⁷⁹ Finally, in light of the logical inconsistency between strict liability and the recovery of punitive damages,¹⁸⁰ no plaintiff, whether tenant or third party, should be allowed to recover punitive damages under this theory unless additional proof of malicious or wanton conduct is shown.¹⁸¹

IV. Conclusion

It is imperative that tenants be given effective legal rights to protect their health and safety and provide them with decent housing. The legislature itself has recognized this and, as a result, has enacted statutes which place more emphasis on the tenant's rights than on

173. 378 F.2d 832 (2d Cir. 1967).

174. *Id.* at 839. Several hundred claims arose because of the manufacture of this drug. *Id.* at 834. In three decisions alone, juries had awarded some \$2,030,000 in punitive and compensatory damages. *Id.* at 834 n.3.

175. *Id.* at 841.

176. *Id.*

177. See notes 151-66 *supra* and accompanying text.

178. "What the tenant wants is service, not vengeance. What the State and City want—or should want—is compliance not fines." COMMITTEE ON HOUSING AND URBAN DEVELOPMENT, *supra* note 40, 1965 N.Y. LEGIS. ANN. at 353.

179. See note 60 *supra* and accompanying text.

180. See notes 169-71 *supra* and accompanying text.

181. See note 152 *supra* and accompanying text.

punishing the landlord. Allowing tenants and intended third party occupants to recover compensatory and consequential damages in strict liability for breach of the implied warranty of habitability will give landlords incentive to maintain residential buildings in a reasonable fashion. New York courts should adopt a strict liability theory to enhance the efficacy of section 235-b, but should not allow recovery of punitive damages under that theory.

Francis S. L'Abbate

