
Christine Hagan
“WARRANTY OF SECURITY” IN NEW YORK: A LANDLORD’S DUTY TO PROVIDE SECURITY PRECAUTIONS IN RESIDENTIAL BUILDINGS UNDER THE IMPLIED WARRANTY OF HABITABILITY

I. Introduction

Section 235-b of the New York Real Property Law\(^1\) was enacted on August 1, 1975. This statute codified existing case law that recognized an implied warranty of habitability\(^2\) in residential leases.\(^3\)

3. The statute reads as follows:
   In every written or oral lease . . . for residential premises the landlord . . . shall be deemed to . . . warrant that the premises so leased . . . and all areas used in connection therewith in common with other tenants . . . 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 . . . .

   Indeed, a majority of jurisdictions in the United States has now codified the landlord’s implied warranty that the leased premises are habitable for their intended purposes. See, e.g., ARIZ. REV. STAT. ANN. § 33-1324 (1974 & Supp. 1986); FLA. STAT. ANN. § 83.51 (West 1987); MICH. COMP. LAWS ANN. § 554.139 (West Supp. 1987); OR. REV. STAT. ANN. § 91.770 (1984); VA. CODE § 55-248.13 (1986 & Supp. 1987); see also RESTATEMENT (SECOND) OF PROPERTY §§ 5.4 - 5.5 (1977). See generally Hudson, Expanding the Scope of the Implied Warranty of Habitability: A Landlord’s Duty to Protect Tenants from Foreseeable Criminal Activity, 33 VAND. L. REV. 1493, 1493 n.1 (1980) [hereinafter Hudson].

The concept of a warranty of habitability departs radically from the historical "caveat emptor" approach of landlord-tenant law, and defines the lease as a contract with mutually dependent covenants under which the tenant's obligation to pay rent is based on the landlord's duty to provide a habitable premises.

In the past, the warranty of habitability was viewed as covering structural aspects of the premises not specifically referred to in the lease. Those facilities considered vital to habitability included adequate plumbing, heating, sanitation and maintenance. Recently, however, several jurisdictions—including New York—have extended the implied warranty to include a landlord's responsibility to provide security precautions.

4. Under common law, a lease was viewed as a conveyance of an interest in real property and the doctrine of "caveat emptor" (let the buyer beware) applied. 1 AMERICAN LAW OF PROPERTY § 3.45, at 267 (A. Casner ed. 1952). Absent an express agreement to the contrary or a misrepresentation by the lessor, the tenant took the premises "as is." Id. In short, the landlord had no duty to repair or otherwise maintain the premises. See Bowles v. Mahoney, 202 F.2d 320 (D.C. Cir. 1952), cert. denied, 344 U.S. 935 (1953).

5. See Javins, 428 F.2d at 1075; Marini, 56 N.J. at 141, 145, 265 A.2d at 532, 534.

6. One court defined the warranty in the following terms:

[A warranty is a] covenant that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage . . . [and that the] facilities will remain in usable condition during the entire term of the lease.


Although New York lower courts have held that security precautions are an essential element in making an apartment habitable, the New York Court of Appeals has not yet spoken on this issue. Therefore, in the absence of legislative clarification, the extent of security mandated under New York's warranty of habitability remains uncertain.

Part II of this Note examines the development of the warranty of habitability to include security precautions. Part III discusses the status of a ‘‘warranty of security’’ in New York. Part IV proposes guidelines to determine whether a New York landlord has breached a duty to provide adequate security under section 235-b of the Real Property Law.

II. Development of the Warranty of Habitability to Include Security Precautions

A. Landlord Liability Based on Tort Theory

Traditionally, a landlord had no affirmative duty to protect a tenant from the criminal acts of third parties. Because a landlord

28, 152 Cal. Rptr. 342 (1978) (landlord's duty to provide security measures to protect tenants against crime can be part of implied warranty of habitability).

12. See infra notes 61-75 and accompanying text.


At common law, no individual had a duty to protect another from criminal attack absent some “special relationship” between the parties in which one party placed himself under the control and protection of another party, thereby sacrificing his ability to protect himself. See 1 AMERICAN LAW OF PROPERTY § 3.37, at 251 (A. Casner ed. 1952); RESTATEMENT (SECOND) OF TORTS § 315 (1965). Such relationships included, for example, common carrier-passenger, innkeeper-guest and custodian-ward associations. W. PROSSER, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 383 (5th ed. 1984); see also RESTATEMENT (SECOND) OF TORTS §§ 314A, 320 (1965).

Recently, some courts and commentators have contended that this “special relationship” rationale applies equally to the landlord-tenant situation. See Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477, 482-83 (D.C. Cir. 1970) (analogizing
was merely required to exercise reasonable care for the safety of his or her tenants in the common areas of the premises,\textsuperscript{14} liability for crime-related property loss or personal injury was generally based solely on traditional negligence principles.\textsuperscript{15} Predicating liability upon negligence theory, however, implicates difficult issues of foreseeability\textsuperscript{16} and proximate cause,\textsuperscript{17} which often represent barriers to recovery by aggrieved tenants.\textsuperscript{18}

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landlord's duty to innkeeper's duty); Comment, \textit{Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue}, 59 Geo. L.J. 1153, 1162 (1971) (liability for failure to provide protection from criminal activity should include any social relationship in which a party's capacity to protect himself has been restricted by control of another party) [hereinafter \textit{Duty to Protect}]; Note, \textit{Security: A New Standard For Habitability}, 42 U. Pitt. L. Rev. 415, 429-30 (1981) (courts recognize special relationship between landlord and tenant by extending warranty of habitability to include security) [hereinafter \textit{A New Standard for Habitability}].


16. "Foreseeability" is the ability to know in advance; hence, the reasonable anticipation that harm or injury is a likely result of acts or omissions. See \textit{W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS} 315 (7th ed. 1982).

17. "Proximate cause" is the impetus which, in a continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred. See id. at 298.


Moreover, other factors including: (1) deference to traditional common law concepts of the landlord-tenant relationship;\(^{19}\) (2) practical considerations of defining standards which the landlord must meet;\(^{20}\) (3) the economic consequences of the imposition of such a duty;\(^{21}\) and (4) established public policy allocating the duty of protecting citizens to the state,\(^{22}\) have contributed to the courts' reluctance to hold residential landlords liable for the criminal acts of third parties.

Faced with skyrocketing crime rates\(^ {23}\) and low-income housing shortages,\(^ {24}\) however, courts have increasingly strained to circumvent the strict requirements of negligence law in an effort to protect low-income tenants and hold landlords accountable for crimes committed in inadequately secured buildings.\(^ {25}\)

**B. The Duty to Maintain Existing Security Levels**

In *Kline v. 1500 Massachusetts Avenue Apartment Corp.*\(^ {26}\), the United States Court of Appeals for the District of Columbia rejected

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19. *Kline*, 439 F.2d at 481. See supra note 4 for a discussion of these common law concepts.

20. *Kline*, 439 F.2d at 481.

21. *Id.*

22. *Id.*


24. See Note, *Emerging Landlord Liability: A Judicial Reevaluation of Tenant Remedies*, 37 *Brooklyn L. Rev.* 387, 387 (1971). The New York State Legislature has found a "serious public emergency" in housing across the state. See N.Y. UNCONSOL. LAWS § 8622 (McKinney 1987). A local housing emergency can exist only if the vacancy rate is less than 5%. *Id.* § 8623(a) (McKinney 1987). New York City's vacancy rate is estimated to be below 3%. Interview with Paul A. Crotty, former Commissioner of the New York Department of Housing Preservation and Development (June 18, 1988).


the proposition that a landlord had no duty to protect tenants from criminal conduct, 27 noting that such a rule "falters when it is applied to the conditions of modern day urban apartment living." 28

Thus, the Kline court held that a landlord has a duty to provide adequate security measures to protect tenants from the foreseeable criminal acts of third parties. 29 Predicating its decision on public policy grounds, the court reasoned that the landlord—and not the tenant—has the resources and the actual control over the premises to provide adequate security devices. 30

Moreover, the court drew strong support from what it viewed as the landlord's implied contract 31 to maintain those protective measures which were already in effect at the beginning of the lease term. 32 Indeed, subsequent courts and commentators have interpreted Kline as extending the implied warranty of habitability to include a warranty of security. 33

27. Id. at 481. See supra notes 4, 13-22 and accompanying text for a discussion of this "old rationale."

28. 439 F.2d at 481.

29. Id. at 483. Accordingly, the court affirmed the landlord's liability for the injuries sustained by a tenant who was assaulted and robbed in the common hallway of the landlord's apartment building. Id. at 478.

30. Id. at 484; see also Trentacost v. Brussel, 82 N.J. 214, 226, 412 A.2d 436, 442 (D.C. Cir. 1980) ("maintaining minimum conditions of habitability, including security, is beyond an individual tenant's control"). See infra notes 39-47 and accompanying text for a discussion of this case.

31. An "implied contract" is a contract not formed by explicit and direct words, but by implication or necessary deduction from the circumstances, the general language or the conduct of the parties. See J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 1-12, at 19 (2d ed. 1977).

32. See Kline, 439 F.2d at 485. The evidence in Kline showed that although substantial security precautions had existed when the tenant signed the lease, they had deteriorated markedly during the seven years preceding her attack. When the tenant signed her lease, a round-the-clock doorman was stationed at the main entrance, another employee sat at the lobby desk, two garage attendants were stationed at the entrance-ways to the building and parking garage, and a side entrance was locked at 9:00 p.m. By the time of the assault, however, there was no doorman, the front desk was usually unattended, and the side entrances were usually unguarded and unlocked. Id. at 479.

Similarly, in Braitman v. Overlook Terrace Corp., the New Jersey Supreme Court held a landlord liable for the burglary of a tenant’s apartment after the landlord failed to repair a defective apartment door lock. Three justices emphasized that in modern society adequate shelter must include secure windows and doors sufficient to safeguard tenants and their possessions. “Suitable locks and sufficiently sturdy doors are as necessary to protect the person and property of tenants as are adequate light, plumbing, heating, sanitation and maintenance.”

In light of rising crime rates and the increase in multi-family dwellings, the court acknowledged that “it may . . . soon be necessary to impose upon the landlord the contractual duty of taking reasonable precautions to safeguard . . . tenants from crimes committed in . . . apartment buildings.”

C. A Contractual Duty to Provide “Reasonable” Security Measures

The judicial trend to hold landlords liable to tenants for crimes committed in inadequately secured buildings gained added momentum once courts began to hold that security precautions are covered by the implied warranty of habitability. In Trentacost v.

34. 68 N.J. 368, 346 A.2d 76 (1975).
35. Id. at 382, 346 A.2d at 84. The court reasoned that in view of prior break-ins in the vicinity and the landlord's notice of the broken lock, the tenant's loss was a foreseeable consequence of the landlord's neglect. Id. No longer quick to identify the criminal act as a superseding cause—which would sever the proximate cause connection between the injury and the landlord's conduct—the court concluded that the landlord's failure to repair “unreasonably enhanced the risk of theft” and therefore, he should not be able to “exculpate [himself] on the theory that the theft was not proximately caused by [his] conduct.” Id.
36. Id. at 387, 346 A.2d at 86.
37. Id.
38. Id. at 387-88, 346 A.2d at 86-87 (emphasis added). Three justices emphasized that such a development would obviate the necessity of “resorting to . . . negligence concepts” to hold the landlord liable for failing to provide adequate security. Id.
40. See Powell, supra note 33, § 234[2], at 370.115. See infra notes 41-48, 61-75 and accompanying text for a discussion of cases holding security precautions within the warranty.
Brussel, for example, a tenant sued her landlord in negligence for his failure to maintain the safety of the common areas of the building. The New Jersey Supreme Court upheld the duty of the residential landlord to protect his tenant under the negligence theory, but added that the plaintiff could have recovered under the implied warranty of habitability as well. Thus, the court clarified the scope of a residential landlord's duty:

Present-day landlords do not furnish merely four walls, a floor and a ceiling. They have come to supply, and tenants now expect, the physical requisites of a home. An apartment today consists of a variety of goods and services. At a minimum, the necessities of a habitable residence include sufficient heat and ventilation, adequate light, plumbing and sanitation and proper security and maintenance.

... Under modern living conditions, an apartment is clearly not habitable unless it provides a reasonable measure of security from the risk of criminal intrusion.

The New Jersey Supreme Court thus went beyond obligating landlords to merely "maintain" existing security precautions and imposed a new affirmative duty to provide a "reasonable" degree of security. Such a duty, moreover, exists independently of the landlord's knowledge of any risks. New York courts have likewise extended the reach of the warranty of habitability.

41. 82 N.J. 214, 412 A.2d 436 (1980).
42. Id. at 217-18, 412 A.2d at 438-39. The tenant was robbed and seriously assaulted in a common hallway of her building and claimed that the criminal attack could have been avoided if the landlord had installed a functional lock on the front door entrance. Id. at 218-19, 412 A.2d at 439. The jury found for the tenant and the intermediate appellate court affirmed on a negligence theory. Id. at 217, 412 A.2d at 438.
43. Id. at 225, 228, 412 A.2d at 441, 443. Since the court found liability under a negligence theory, this proposition is technically dictum.
44. Id. at 224, 412 A.2d at 441.
45. Id. at 225, 227, 412 A.2d at 442, 443 (emphasis added).
46. Id. at 228, 412 A.2d at 443.
47. Id. Thus, a judge or jury may find that the landlord breached his or her duty regardless of whether the landlord was on notice of a dangerous condition. Commentators, however, have criticized Trentacost as imposing a strict liability standard on landlords. See Hudson, supra note 3, at 1515-20; Note, Implied Warranty of Habitability and Security in Residential Leases: "Trentacost v. Brussel", B.Y.U. L. Rev. 684, 693-94 (1980) [hereinafter Warranty of Habitability and Security in Residential Leases]; A New Standard for Habitability, supra note 13, at 429 n.61. In fact, a recent New Jersey case indicates that some type of notice may be necessary. See Williams v. Gorman, 214 N.J. Super. 517, 523, 520 A.2d 761, 764-65 (App. Div. 1986).
48. See infra notes 61-75 and accompanying text.
III. A "Warranty of Security" in New York

Although the New York Court of Appeals has not yet addressed the issue of a landlord's duty to provide building security precautions under the implied warranty of habitability, the following factors strongly indicate that the court would impose such a duty. First, the court itself has clearly taken an expansive view of section 235-b of the Real Property Law (Warranty of Habitability).49 Second, the continuing scarcity of low-income housing, high crime rates in urban areas, and expanding sensitivity to tenants' rights have prompted New York's lower courts to hold security measures within the scope of the warranty.50 Finally, the expansion of the warranty of habitability to include security precautions is consistent with legislative concern for tenant security as expressed in New York's Multiple Dwelling Laws.51

A. The Court of Appeals Favors an Expansive Reading of Section 235-b

New York courts that have extended the warranty of habitability to include security measures have relied upon the reasoning of the state's highest court in Park West Management Corp. v. Mitchell.52 In Park West, the court of appeals examined the legislative intent underlying section 235-b of the New York Real Property Law53 which injects a statutory warranty of habitability into every residential lease.54

Commenting on section 235-b and its implications for the modern residential lease, the court stated:

50. See infra notes 61-75 and accompanying text.
51. See infra notes 76-82 and accompanying text.
53. See Park West, 47 N.Y.2d at 325, 327, 391 N.E.2d at 1292-94, 418 N.Y.S.2d at 315-16.
A residential lease is now effectively deemed a sale of shelter and services by the landlord who impliedly warrants: first, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parties; and third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety.

... If, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide, a breach of implied warranty of habitability has occurred.55

Thus, the court of appeals has construed section 235-b as establishing an implied contract between a landlord and a tenant, under which the law demands that the landlord provide premises suitable for human life. Moreover, the court of appeals has specified that "conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disaster are within the scope of the warranty."56

Such sweeping language demonstrates the court's determination to strictly enforce section 235-b's warranty of habitability by holding landlords to a broad legal duty.57 Indeed, although the intervening act of a third-party criminal has traditionally insulated the landlord from liability,58 the court of appeals did not allow the affirmative acts of third-party strikers to excuse the landlord from the obligations imposed by the warranty of habitability.59

Under a logical extension of the Park West rationale, courts could find landlords liable for criminal activity occurring within their buildings when such activity was made possible, or even probable, by a failure to provide adequate security precautions. The court of appeal's liberal interpretation of section 235-b, as well as its rationale in finding liability despite the intervening acts of third parties,

55. Park West, 47 N.Y.2d at 325, 328, 391 N.E.2d at 1293, 1295, 418 N.Y.S.2d at 315, 317 (emphasis added).
56. Id. at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316 (emphasis added). The scope of the warranty includes conditions caused by both latent and patent defects existing at the inception of and throughout the tenancy. Id.
57. See Braxton, 137 Misc. 2d at 570, 521 N.Y.S.2d at 372 (Park West's "reasoning makes it clear that the scope of the warranty of habitability is broad"); see, e.g., Park West, 47 N.Y.2d at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317 (warranty provided basis of landlord's liability for unsanitary conditions resulting from maintenance and janitorial strike).
58. See supra notes 14-18 and accompanying text.
59. See Park West, 47 N.Y.2d at 327, 329, 391 N.E.2d at 1294-95, 418 N.Y.S.2d at 316-17.
indicates that it would likely agree with the state’s lower courts and deem inadequate security a "[condition] endangering ... [tenants’] safety" under section 235-b.60

B. New York Courts Have Held Security Precautions Within the Scope of the Warranty

New York’s lower courts have utilized the implied warranty of habitability to impose an affirmative duty upon landlords to provide adequate security measures to protect tenants against the risk of criminal intrusion.61 These courts have held that security measures such as intercom systems and front door locks are "items materially affecting the habitability and security of an apartment" within the purview of section 235-b of the Real Property Law.62 According to

60. Park West, 47 N.Y.2d at 325, 391 N.E.2d at 1293, 418 N.Y.S.2d at 315.

61. In Highview Assocs. v. Koferl, 124 Misc. 2d 797, 477 N.Y.S.2d 585 (Dist. Ct. Suffolk County 1984), for example, the tenant abandoned her lease after experiencing a "peeping tom" and an attempted break-in. Id. at 797, 477 N.Y.S.2d at 585. The court held that the tenant was not liable for the balance of her rent because the landlord had breached the implied warranty of habitability by failing to take any security measures to protect his tenants after being notified of repeated thefts and burglaries in the building. Id. at 800, 477 N.Y.S.2d at 587.

As in the New Jersey Trentacost decision, see supra notes 41-47 and accompanying text, the Highview court appears to impose an affirmative duty on the landlord to take security precautions:

[T]here was no initial obligation on the part of the landlord to supply security devices for the protection of the tenants. After a number of years, however, the ... apartment complex has become the object of burglars and thieves, so that break-ins and thefts have become frequent. ... [L]iving conditions in the [landlord’s] ... apartment complex had become dangerous and ... the landlord had become obligated to take steps to protect its tenants by whatever means available to it. Id. at 799, 800, 477 N.Y.S.2d at 586-87 (emphasis added); cf. Brownstein v. Edison, 103 Misc. 2d 316, 425 N.Y.S.2d 773 (Sup. Ct. Kings County 1980) (when a landlord assumes duty to provide additional protection and increases rent to pay for it, building security is essential service within meaning of § 235-b).

Recently, in 610 W. 142nd St. Owners Corp. v. Braxton, 137 Misc. 2d 567, 521 N.Y.S.2d 370 (N.Y.C. Civ. Ct. N.Y. County 1987), the court cited Highview and Brownstein for the proposition that New York "landlord[s] [have] an affirmative duty to protect tenants and failure to do so is a breach of the warranty of habitability." Id. at 570-71, 521 N.Y.S.2d at 373.


The observation of one court is illustrative:

Section 235 of the Real Property Law was enacted when intercommu-
New York’s lower courts, the landlord’s failure to furnish adequate security to his or her tenants clearly constitutes a breach of the landlord’s implied warranty of habitability.\(^6\) Communication systems were uncommon and probably unnecessary to most apartment dwellers. Reality today militates [sic] a re-examination of this statute. We submit that buzzers in ... apartment buildings, and intercommunication systems, must now be deemed ["essential services"] and are as vitally necessary in such buildings as hot and cold water, heat, light, power, elevator and telephone services.

People v. Gruenberg, 67 Misc. 2d 185, 188-89, 324 N.Y.S.2d 372, 376 (N.Y.C. Crim. Ct. N.Y. County 1971) (citations omitted). Section 235 enumerates “hot or cold water, heat, light, power, elevator service, telephone service or any other service or facility ... necessary to the proper or customary use of such building” as items which must be furnished by the landlord. N.Y. REAL PROP. LAW § 235 (McKinney 1968 & Supp. 1988). Courts have typically referred to the “essential services” specified in § 235 when determining whether a breach of the landlord’s duty under the warranty of habitability has occurred. See Gruenberg, 67 Misc. 2d at 188, 324 N.Y.S.2d at 375. Because the statute fails to list security precautions specifically, courts have traditionally refrained from viewing protective devices as essential services under the implied warranty. See, e.g., Hall v. Fraknoi, 69 Misc. 2d 470, 330 N.Y.S.2d 637 (N.Y.C. Civ. Ct. N.Y. County 1972).


In Brownstein v. Edison, 103 Misc. 2d 316, 425 N.Y.S.2d 773 (Sup. Ct. Kings County 1980), the landlord increased the rent to install locks on the front doors of the apartment building. After the landlord allowed the locks to fall into disrepair, a tenant was robbed and killed in the lobby. Id. at 317, 425 N.Y.S.2d at 773. The court held that “where [landlords] have assumed a duty to provide some degree of protection to the tenants by installation of front door locks ... then to that extent building security is an essential service affecting habitability and thus coming within the scope of the [implied warranty of habitability].” Id. at 318, 425 N.Y.S.2d at 775; cf. Sherman v. Concourse Realty, 47 A.D.2d 134, 365 N.Y.S.2d 239 (2d Dep’t 1975) (similar case decided on negligence grounds). In Highview Assocs. v. Koferl, 124 Misc. 2d 797, 477 N.Y.S.2d 585 (Dist. Ct. Suffolk County 1984), the court interpreted the Sherman decision as extending the warranty. Id. at 798-99, 477 N.Y.S.2d at 586. See supra note 61 and accompanying text for a discussion of the Highview case.

In an attempt to confine its holding, however, the Brownstein court established an unworkable standard. If security is only an essential service when a landlord assumes a duty to provide such security, a landlord could seemingly avoid potential liability by inaction. Taken to its extreme, such logic would protect delinquent...
In holding landlords accountable for crimes committed in their buildings, courts are clearly responding to socio-economic burdens landlords who provide no locks at all. Cf. infra notes 97-100 and accompanying text (factors relevant to adequate security which may also be subject to manipulation by landlords).

In Tarter v. Schildkraut, No. 15161/85 (Sup. Ct. N.Y. County Feb. 11, 1988), a recent jury trial in the Supreme Court of New York County, Judge Coutante charged the jury as follows on the warranty of habitability:

I charge you as a matter of law that . . . there is a warranty of habitability from the landlord to the tenant warranting that the building had no conditions which were detrimental to life, health or safety. The test for a breach of the warranty of habitability is whether, as a result of the defect on the premises over which the landlord had control, the tenant was deprived of those essential functions which a residence is expected to provide as viewed by a reasonable person. I charge you that security is such an essential function and that failure by a landlord to maintain reasonable security is a breach of that warranty of habitability.


The jury subsequently returned a verdict in favor of the tenant who had been paralyzed after being shot in the building's outer vestibule, which was blocked by an unlocked outer door and a defectively locked inner door. Plaintiff's Memorandum of Law at 1-2, Tarter v. Schildkraut, No. 15161/85 (Sup. Ct. N.Y. County Feb. 11, 1988).


Section 235-b does not itself prescribe any specific remedy in the event of breach. See N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1988). To date, most tenants who have prevailed in breach of warranty of habitability actions have based their suits on diminution of services or damage to property and courts have usually awarded recovery in the form of rent abatement. See, e.g., Park West Mgmt. Corp. v. Mitchell, 47 N.Y.2d 316, 329, 391 N.E.2d 1288, 1295, 418 N.Y.S.2d 310, 317, cert. denied, 444 U.S. 992 (1979) (court did not comment on availability of other remedies); Lerus Realty Corp. v. Robbins, 95 Misc. 2d 712, 408 N.Y.S.2d 166 (N.Y.C. Civ. Ct. N.Y. County 1978). Nevertheless, the legislature intended to leave the determination of an appropriate remedy for breach of the warranty of habitability to the court's discretion. See McGuinness v. Jakubiak, 106 Misc. 2d 317, 321, 431 N.Y.S.2d 755, 758 (Sup. Ct. Kings County 1980) ("[i]t will be the court's function to fashion remedies appropriate to the facts of each case") (citing Governor's Memorandum on Approval of § 235-b N.Y. REAL PROP. LAW (Aug. 1, 1975), reprinted in [1975] N.Y. LEGIS. ANN. 438); id. ("'warranty is available
which weigh heavily upon the tenant.\textsuperscript{64} In short, courts recognize that "chronic" urban housing shortages\textsuperscript{65} and the staggering increase in crime in the vicinity of apartment buildings\textsuperscript{66} continually endanger the welfare of urban inhabitants.\textsuperscript{67} For example, high incidence of crime was clearly a determinative factor in the \textit{Highview} decision\textsuperscript{68} where "[d]espite many notices . . . of thefts and burglaries . . . in the . . . apartment complex, the landlord [took no] steps to protect [his] tenants."\textsuperscript{69} Indeed, the "burgeoning cancer of crime has made as a cause of action or as an affirmative defense or counter claim' ") (citing Memorandum of Sen. H. Douglas Barclay, \textit{reprinted in} [1975] N.Y. LEGIS. ANN. 315).

Accordingly, it would appear that breach of the warranty of habitability for failure to provide adequate security precautions can form the basis of an affirmative cause of action for both personal injury and property loss in New York.


The New Jersey Supreme Court "has long recognized that traditional principles of property law, when applied in the context of a residential lease, have 'lagged behind changes in dwelling habits and economic realities.'" \textit{Trentacost, 82 N.J. at 225, 412 A.2d at 441-42 (quoting Michaels v. Brookchester, Inc., 26 N.J. 379, 382, 140 A.2d 199, 201 (1958)). The court emphasized that because lease agreements are frequently contracts of adhesion, tenants have difficulty achieving their legitimate present-day needs for fair housing. \textit{Id. at 226, 412 A.2d at 442. The court clearly perceived the modern landlord-tenant relationship as one characterized by "inequality of bargaining power." \textit{Id.}}

\textsuperscript{65} \textit{Trentacost, 82 N.J. at 225-26, 412 A.2d at 442. The court identified increasing urbanization, population growth and inflated construction costs as causes of the shortage. Id.; see supra note 24.}

\textsuperscript{66} \textit{Trentacost, 82 N.J. at 218, 222, 412 A.2d at 438, 440; Braitman, 68 N.J. at 387, 346 A.2d at 86 ("depressing specter of rising crime" may require re-evaluation of traditional landlord-tenant relationship); see supra note 23.}

\textsuperscript{67} \textit{In Trentacost, evidence showed that in the three years preceding the incident, the police had investigated from 75 to 100 crimes in the neighborhood. \textit{Trentacost, 82 N.J. at 218-19, 412 A.2d at 438-39. In Kline, the court relied heavily on evidence documenting the occurrence of prior crimes within the particular apartment building. \textit{Kline, 439 F.2d at 479-80.}}

\textsuperscript{68} \textit{Highview Assocs. v. Koferl, 124 Misc. 2d 797, 477 N.Y.S.2d 585 (Dist. Ct. Suffolk County 1984). See supra note 61 and accompanying text for a discussion of this case.}

\textsuperscript{69} \textit{Highview, 124 Misc. 2d at 800, 477 N.Y.S.2d at 587. In addition, the court made a point of calculating the amount of crime in the particular building: [T]here were approximately 5 to 10 burglaries each year in the entire complex.... [T]his amounts to one burglary in every 36.6 apartments.... [I]f we extend this ratio over a period of years, almost 10% of the tenants in the [landlord's] apartment complex will be victims of burglaries, thefts and worse over a three-year period. \textit{Id. at 799, 477 N.Y.S.2d at 586-87; see also Braxton, 137 Misc. 2d at 571, 521}
WARRANTY OF SECURITY

... citizens veritable hermits in their home." Buzzers and similar security devices, therefore, are as vitally necessary to the habitability of apartment buildings as hot and cold water, heat, light, power and elevator services. Even the court of appeals prefaced its Park West decision with a discussion of the transformation of the housing market characterized by well-documented shortages of low and middle income housing in urban centers. The court, recognizing that the urban tenant requires shelter "and the services necessarily appurtenant thereto," identified the warranty of habitability as an important vehicle to ensure those basic services.

C. Multiple Dwelling Laws Evidence Legislative Concern for Tenant Security

The growing concern for tenant rights by various state legislatures is also well-documented. New York's Multiple Dwelling Laws are illustrative. Acknowledging the importance of tenant security, the

N.Y.S.2d at 373 (court took "judicial notice" of high crime rate in New York City).


73. See Park West, 47 N.Y.2d at 324-25, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314. Such shortages have placed landlords in a vastly superior bargaining position, leaving tenants powerless to compel performance of essential services. Id.

74. Id. at 323, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313.

75. Id. at 325, 391 N.E.2d at 1292, 418 N.Y.S.2d at 314. The court stated that until the development of the warranty of habitability, the contemporary tenant "possessed few private remedies and little real power, under either the common law or modern housing codes, to compel his landlord to make necessary repairs or provide essential services." Id. The court emphasized that traditional landlord-tenant principles do not meet the needs of tenants in a society rapidly undergoing urbanization. Id. at 323-24, 391 N.E.2d at 1291-92, 418 N.Y.S.2d at 313-14.


state legislature has imposed a duty upon landlords to maintain minimum security measures. Indeed, the failure to maintain these security measures can result in misdemeanor charges. Such laws, however, are somewhat ineffective because they are enforceable only by the Buildings Department, which, due to administrative backlogs and red tape, "is often as dilatory in making repairs as [is] the private landlord." Therefore, judicial expansion of the warranty to include security measures would seem to facilitate the legislative goals evidenced by the provisions of the Multiple Dwelling Laws.

IV. New York's "Warranty of Security": The Need for a Standard

While New York's lower courts have imposed a duty upon landlords to protect tenants against criminal intrusion, these courts have failed to describe the scope of that duty or the standards by which a landlord's conduct is to be evaluated. For example, would main-

78. See N.Y. MULT. DWELL. LAW § 50-a(1) (McKinney 1974 & Supp. 1988) (entrance-ways must be equipped with automatic self-closing and self-locking doors); id. § 50-a(2) (McKinney 1974 & Supp. 1988) (dwelling must be equipped with intercommunication systems); id. § 57(1) (McKinney 1974) (bells and buzzers must be maintained in good working order); id. § 51-a (McKinney 1974) (peepholes must be installed and maintained on entrance doors of each housing unit); id. § 51-b (McKinney 1974) (self-service elevators must be equipped with a mirror to enable persons to view the inside thereof prior to entering such elevator to determine whether any person is in elevator); id. § 35 (McKinney 1974) (adequate lighting must be maintained at or near the entranceway of building); id. § 37 (McKinney 1974) (all common areas of building must be adequately lighted).

79. See id. § 50-a(5) (McKinney 1974).
80. Id. § 303 (McKinney 1974).
82. Courts typically point to administrative rules such as building codes to justify implementation of the warranty of habitability, concluding that the legislature has made a policy judgment to impose such duties on the landlord. See, e.g., Javins v. First Nat'l Realty Co., 428 F.2d 1071, 1074-77 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); Pines v. Perssion, 14 Wis. 2d 590, 595-96, 111 N.W.2d 409, 412-13 (1961).
83. See supra notes 61-75 and accompanying text; see also Hudson, supra note 3, at 1516 (criticizing New Jersey Trentacost decision for failing to describe scope and standards); A New Standard for Habitability, supra note 13, at 428 (same). New York courts have offered little guidance in this area. One court stated that landlords are obligated to protect their tenants "by whatever means available to [them]." Highview Assocs. v. Koferl, 124 Misc. 2d 797, 800, 477 N.Y.S.2d 585,
tenance of proper locks and buzzers fulfill a landlord's duty to provide "adequate" or "reasonable" security, or should the landlord be required to provide intercom systems, security guards, closed-circuit T.V. monitors or some combination thereof? Clearly, the extent to which landlords are required to provide security devices remains uncertain.8

The New York Court of Appeals has emphasized that the standards of habitability set forth in local housing codes should be consulted as guidelines in determining whether the warranty of habitability has been breached.85 "Substantial violation of a housing, building or sanitation code provides a bright-line standard capable of uniform application."86 Once a code violation has been shown, the parties must come forward with "evidence concerning the extensiveness of the breach, the manner in which it [affected] the . . . safety . . . of the tenants, and the measures taken by the landlord to alleviate the violation."87

587 (Dist. Ct. Suffolk County 1984) (emphasis added). Very recently, a New York judge charged a jury that the landlord must provide "reasonable" security under the warranty of habitability. See Plaintiff's Requests to Charge - Liability, Tarter v. Schildkraut, No. 15161/85 (Sup. Ct. N.Y. County Feb. 11, 1988); cf. Brownstein v. Edison, 103 Misc. 2d 316, 318, 425 N.Y.S.2d 773, 775 (Sup. Ct. Kings County 1980) (buzzers on outside doors are as vital to habitability as water, heat and electrical services); 610 W. 142nd St. Owners Corp. v. Braxon, 137 Misc. 2d 567, 570, 521 N.Y.S.2d 370, 372 (N.Y.C. Civ. Ct. N.Y. County 1987) ("secure apartment door is last line of defense against forced entry by intruders").

84. Given the judiciary's activism in this area, it would seem incumbent upon the legislature to reevaluate and clarify the scope of the warranty.
85. Park West, 47 N.Y.2d at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316; see also Javins, 428 F.2d at 1082 (court justified breach of warranty based on numerous housing code violations); Richardson v. Wilson, 46 Ill. App. 3d 622, 623, 361 N.E.2d 110, 111-12 (1977) (violation of city building code would support claim by tenant of substantial breach of warranty); Berzito v. Gambino, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973) (whether condition violates housing regulation is important factor to consider in determining existence of breach of warranty).
86. Park West, 47 N.Y.2d at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316.
87. Id. at 328, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316. In evaluating tenant security cases, the courts should certainly look to many of the same factors which traditionally have been enumerated in warranty of habitability cases dealing with physical defects in the premises. See Hudson, supra note 3, at 1517. Courts have typically considered a combination of eight factors: (1) the nature and seriousness of the defect; (2) the deficiency's effect on a vital facility; (3) the potential or actual impact of the defect upon safety; (4) the length of time the defect has persisted; (5) the age of the building; (6) the design and location of the building; (7) the amount of rent charged; and (8) the tenant's possible responsibility for the defect. See Reese v. Diamond Hous. Corp., 259 A.2d 112, 112 (D.C. Ct. App. 1969); Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1973); Kline v. Burns, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971); Berzito v. Gambino, 63 N.J. 460, 470, 308 A.2d
Violations of a housing or building code, however, are not the exclusive determinant of whether there has been a breach. In short, housing codes do not provide a complete delineation of the landlord's obligation; rather, they serve as a starting point in that determination by establishing minimal standards. Therefore, until the state legislature acts to clarify this issue, New York courts should refer to the minimum security measures outlined in the Multiple Dwelling Laws as a threshold requirement that all residential buildings must meet, but not as an exclusive list of those duties which a landlord must fulfill.

In determining liability for substandard security, several additional considerations must be addressed. Clearly, the incidence of crime

17, 22 (1973); Marini v. Ireland, 56 N.J. 130, 144-45, 265 A.2d 526, 534 (1970); Detling v. Edelbrock, 671 S.W.2d 265, 270 (Mo. 1984); see also N.Y. REAL PROP. LAW § 235-b(1) (McKinney Supp. 1988) ("[w]hen [a defective] condition has been caused by the misconduct of the tenant . . . or persons under his . . . control, it shall not constitute a breach of . . . warrant[y]").


Proof of any violation of [housing] regulations would usually constitute compelling evidence that the apartment was not in habitable condition.

. . . However, the protection afforded by the implied warranty of habitability does not necessarily coincide with the [regulation's] requirements. There may be instances where conditions not covered by the [housing] regulations render the apartment uninhabitable.

Id. at 200 n.16, 293 N.E.2d at 844 n.16.

89. See Park West, 47 N.Y.2d at 328, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316; see Braxton, 137 Misc. 2d at 570, 521 N.Y.S.2d at 372.

90. See supra notes 76-82 and accompanying text for discussion of New York's Multiple Dwelling Laws.

91. See Hudson, supra note 3, at 1520. The minimum requirements of operable locks and buzzer systems outlined in the Multiple Dwelling Laws not only provide helpful guidelines for courts in their evaluation of tenant security cases, but also a rough outline for landlords in their assessment of required safety measures. Id.

Some commentators have criticized the New Jersey Supreme Court's extension of the warranty to include security on the ground that it established a new duty for the landlord but failed to delineate any boundaries for such duty. See, e.g., id. at 1516. Several critics suggest that the state legislature may solve this problem by enacting a statute requiring minimum security regulations to provide landlords with some guidelines. See Henszey & Weisman, supra note 25, at 125; Hudson, supra note 3, at 1520; Warranty of Habitability and Security in Residential Leases, supra note 47, at 690. This criticism carries little weight in New York, however, because New York's Multiple Dwelling Laws establish such minimum security requirements. Since landlords in New York are already on notice of the minimum security precautions they must provide, holding them liable under an implied warranty theory would not be inequitable.
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in both the particular building and general vicinity is an important factor.\(^9\) Although New York courts have indicated that some type of notice to landlords is necessary to find liability on a breach of warranty of security basis,\(^9\) it is unclear whether an increase in crime in the general vicinity alone would be sufficient to put the landlord on constructive notice.\(^9\)

The cost and viability of the proposed precautions should also be a consideration.\(^9\) Indeed, most landlords operating in the highest crime areas—where the need is greatest for security precautions—

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92. See Hudson, supra note 3, at 1517; A New Standard for Habitability, supra note 13, at 428; infra note 94 and accompanying text.

93. See Jangla Realty Co. v. Gravagna, 112 Misc. 2d 642, 645, 447 N.Y.S.2d 338, 341 (N.Y.C. Civ. Ct. Queens County 1981) (landlord’s failure to repair defective lock after being given notice of defect breaches warranty of habitability); Highview Assocs. v. Koferl, 124 Misc. 2d 797, 799-800, 477 N.Y.S.2d 585, 587 (Dist. Ct. Suffolk County 1984) (once landlord had notice of criminal activity, he became obligated to take steps to protect tenants). In the recent case of Tarter v. Schildkraut, No. 15161/85 (Sup. Ct. N.Y. County Feb. 11, 1988), for example, the court presented the jurors with a questionnaire to aid them in their deliberations. The first issue the jury was asked to consider was whether landlords “[knew] or should they have known that the [security] system was inadequate.” Official Copy of Jury Questionnaire, Tarter v. Schildkraut, No. 15161/85 (Sup. Ct. N.Y. County Feb. 11, 1988) (question No. 5).


95. See A New Standard for Habitability, supra note 13, at 428. Certainly the cost of providing adequate security could be prohibitive in some areas. For a discussion of the economic costs of expanding the warranty of habitability to include security measures, see Landlord’s Emerging Responsibility, supra note 39, at 295-301 (1971); Duty to Protect, supra note 13, at 1194-97.
are less likely to be in a financial position to provide such security.96

Another important factor should be the degree of security measures existing at the beginning of the lease term because the tenant would reasonably expect to rely upon such measures.97 The amount of security existing at the beginning of a tenancy, however, should not be determinative. Such a standard might give landlords an incentive not to provide protection in an attempt to forestall claims of expectation or reliance upon security measures implied in the lease.98 Courts could similarly refer to precautions taken by landlords of neighboring leaseholds.99 Again, however, this should only be one factor in the courts' consideration because a landlord who is sued should not be able to escape liability by merely showing that his security precautions were equal to those of surrounding buildings. In slum areas, such precautions could well be nonexistent.100

V. Conclusion

In expanding the warranty of habitability to include basic security precautions, courts are clearly responding to the needs of the modern urban tenant. With crime rates skyrocketing in our cities, safety precautions have become an essential element in making a residential dwelling “habitable.” Although the standard of security required by the expanded warranty is still rather vague, proper judicial balancing of competing policy concerns will work to define its parameters. To this end, the Multiple Dwelling Laws provide important guidance both to the courts in defining the duty and to landlords

96. Hudson, supra note 3, at 1519; Warranty of Habitability and Security in Residential Leases, supra note 47, at 692. If such landlords cannot absorb the cost of increased security, they may be forced to sell or abandon their buildings—further exacerbating the rental housing shortage. See Hudson, supra note 3, at 1519; Warranty of Habitability and Security in Residential Leases, supra note 47, at 690-92. Therefore, imposing an unrealistic financial burden on landlords could, in effect, undermine the policy goals that actually led to the expansion of the warranty of habitability.

97. See Kline, 439 F.2d at 485; see also Hudson, supra note 3, at 1517.

98. See Hudson, supra note 3, at 1517; see also Highview, 124 Misc. 2d at 799-80, 477 N.Y.S.2d at 586-87 (although landlord was under no initial obligation to provide security, such duty arose when building break-ins and thefts became frequent).

99. A “community standard” test was employed by the Kline court: “[The] standard of protection may be taken as that commonly provided in apartments of this character and type in this community, and this is a reasonable standard of care on which to judge the conduct of the landlord . . . .” Kline, 439 F.2d at 486.

100. Warranty of Habitability and Security in Residential Leases, supra note 47, at 689 n.27.
in placing them on notice of their basic security obligations.

At a minimum, New York landlords are required to provide those security precautions enumerated in the Multiple Dwelling Laws and failure to do so should clearly constitute a breach of the warranty of habitability.\textsuperscript{101} The landlord’s duty to provide security measures beyond these minimum standards should be determined by weighing traditional warranty factors\textsuperscript{102} as well as special considerations that bear on security cases. Such considerations include: (1) the foreseeability of danger given the character of the local environment and record of crime in the particular building; (2) whether the landlord is on notice of a dangerous atmosphere or a broken security device; (3) the cost and viability of the particular security precautions; (4) the nature of any past precautions taken for the protection of the leasehold and tenant; and (5) the precautions taken by landlords of neighboring leaseholds. Through an equitable balancing of these various factors, courts will promote necessary security for residential tenants without imposing unfair and unrealistic burdens on landlords.

\textit{Christine Hagan}

\textsuperscript{101} See supra note 78 for a listing of these required security measures.

\textsuperscript{102} See supra note 87 for a listing of these factors.