

LANDLORD LIABILITY IN MASSACHUSETTS

Traditional rules governing the landlord-tenant relationship made it extremely difficult for a person injured on leased premises to maintain an action against the landlord.¹ Except for a limited number of situations, the landlord at common law enjoyed an immunity from tort liability.² In recent years, however, many jurisdictions have expressed displeasure with the concept of landlord immunity, and have sought broader means of holding a landlord liable.³

In the Commonwealth of Massachusetts, developments within the last several years have completely abrogated the liability protection granted to landlords at common law. Both the legislature and judiciary played active roles in this dramatic change. The legislature helped to lay the groundwork by enacting housing statutes that expanded the duty owed by a landlord toward his rental property.⁴ Included in the statutory provisions are amendments that prescribe specific circumstances in which a landlord can be held liable for personal injury.⁵ The Massachusetts Supreme Judicial Court initiated a trend similar to that of the legislature, by increasing the landlord's responsibility toward his rental property and by expanding the landlord's potential liability in tort.⁶ Furthermore, in two recent decisions, the court has allowed recovery for personal injury on alternative theories of implied warranty and negligence.⁷

This note will discuss the evolution of landlord tort liability in Massachusetts. First, common law developments will be surveyed with par-

¹ See text and notes at notes 10-65 *infra*.

² *Id.*

³ See, e.g., *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528 (1973); *Brennan v. Cockrell Inv., Inc.*, 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (1973); *Pagelsdorf v. Safeco Ins. Co. of America*, 91 Wis. 2d 734, 284 N.W. 2d 55 (1979); *Clarke v. O'Connor*, 435 F.2d 104 (D.C. Cir. 1970). See also RESTATEMENT (SECOND) OF PROPERTY §§ 7-18 (1977).

⁴ See, e.g., MASS. GEN. LAWS ch. 111, §§ 127 A-K (1960) (sanitary code violation remedies); MASS. GEN. LAWS ch. 186, § 14 (1950) (penalties for failure to furnish essential services or for breach of quiet enjoyment); MASS. GEN. LAWS ch. 186, § 15E (1972) 127 (preclusion of certain defense for housing code violation in common area); MASS. GEN. LAWS ch. 186, § 19 (1972) (tort liability for lessor for failure to repair after notice); MASS. GEN. LAWS ch. 239, § 8A (summary process defenses and counterclaims; rent withholding).

⁵ MASS. GEN. LAWS ch. 186, § 19 provides in pertinent part:

The tenant or any person rightfully on said premises injured as a result of the failure to correct said unsafe condition [housing code violation] within a reasonable time shall have a right of action in tort against the landlord or lessor for damages.

⁶ See text and notes at notes 81-162 *infra*.

⁷ See *Crowell v. McCaffrey*, 1979 Mass. Adv. Sh. 568, 386 N.E.2d 1256 (1979) (breach of implied warranty); *Young v. Garwacki*, 1980 Mass. Adv. Sh. 729, 402 N.E.2d 1045 (1980) (negligence).

ticular emphasis on growth in Massachusetts. Recent judicial and legislative trends which precipitated the erosion of landlord immunity will then be examined. This note will next discuss the current state of landlord tort liability in Massachusetts in light of two important decisions: *Crowell v. McCaffrey*⁸ and *Young v. Garwacki*.⁹ Finally, some still unresolved issues in this area will be explored.

I. COMMON LAW DEVELOPMENT IN LANDLORD TORT LIABILITY

At common law, the landlord generally was immune from liability for personal injuries occurring to anyone on the leased property. This immunity was fostered by the long-standing principle that a lease was a conveyance of real estate.¹⁰ As a consequence of this view, the landlord conceptually transferred ownership of the rental property to the tenant.¹¹ Hence, the landlord's limited liability was seen as a logical corollary to his lack of control.¹² In short, the rental transaction closely resembled a sale of land for a period of time.¹³ The result was the application of the doctrine of caveat emptor to the rental exchange.¹⁴

The common law view of the lease as a conveyance originated in the context of an agrarian, feudal society.¹⁵ In this setting, the tenant's primary need was the acquisition of the land itself.¹⁶ Any building or structure situated on the land was generally considered a secondary and incidental aspect of the lease.¹⁷ Because the rental transaction focused on the use of the land, rather than the use of the buildings on the land, landlord maintenance was not considered integral to the agreement.¹⁸ Thus, due to his diminished control and the lack of emphasis on buildings, the landlord was not expected to make repairs during

⁸ 1979 Mass. Adv. Sh. 568, 386 N.E.2d 1256 (1979).

⁹ 1980 Mass. Adv. Sh. 729, 402 N.E.2d 1045 (1980).

¹⁰ As one court noted: "A lease is merely a form of transfer of a right in real estate." *Conahan v. Fisher*, 233 Mass. 234, 236, 124 N.E. 13, 14 (1919). See also *Cowen v. Sunderland*, 145 Mass. 363, 364, 14 N.E. 117 (1887).

¹¹ *Conahan v. Fisher*, 233 Mass. 234, 237, 124 N.E. 13, 14 (1919).

¹² *Conahan v. Fisher*, 233 Mass. 234, 237, 124 N.E. 13, 14 (1919) ("The law of the landlord and tenant is founded on the conception that the demised premises pass into the control of the tenant. This is its basis. Such control is commonly exclusive. Lack of control by the landlord involves relief from obligation to repair"); *Barrett v. Wood Realty Inc.*, 334 Mass. 370, 374-75, 135 N.E.2d 660, 663 (1956).

¹³ *Fowler v. Bott*, 6 Mass. 58, 62 (1809) (lease as a sale of the demised premises for a term).

¹⁴ *Cowen v. Sunderland*, 145 Mass. 363, 364, 14 N.E. 117, 118 (1887); *Bowe v. Hunking*, 135 Mass. 380, 386 (1883). Caveat emptor (let the buyer beware).

¹⁵ *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 189, 295 N.E.2d 831, 837 (1973); *Paradine v. Jane*, 82 Eng. Rep. 897 (1647). For discussion of the evolution of landlord tenant doctrine see *The Landlord-Tenant Relationship: A New Urban Structure*, 18 N.Y.L.F. 725 (Winter 1973).

¹⁶ *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 189, 293 N.E.2d 831, 837 (1973).

¹⁷ *Id.*

¹⁸ *Id.*

the term of the lease.¹⁹ As a result, the landlord generally was not held liable for injuries caused by unsafe conditions arising on the premises during the tenancy.²⁰

Another ramification of the lease as a conveyance was that the landlord had no duty to deliver possession of the rental property at the outset of the tenancy in any particular condition.²¹ Like a buyer of real estate, the tenant wishing to insure the fitness of rental premises had to inspect the property for himself.²² Under the doctrine of caveat emptor, there was no implied warranty that the premises would be safe to live in or fit for occupancy at the outset of the tenancy.²³ As a consequence, the landlord usually was not liable for injuries caused by defects existing prior to or at the beginning of the lease.²⁴

As the structure of society changed, primarily through a shift from a rural agrarian to an urban industrial economy, the premises on the land, rather than the land itself, became a more important element of the rental exchange.²⁵ While the primary purpose of leasing in the feudal days was to provide land for farming, the focus of leasing in the modern day setting is to provide a dwelling suitable for habitation.²⁶ Due to this shift in purpose, common law landlord non-liability rules, based upon an older cultural system and a rigid adherence to the lease as a conveyance concept, often produced inequitable results. Because the tenant bought the leasehold at his peril he could not expect the landlord to repair pre-existing defects, and because the tenant had dominion during the tenancy he could not rely on the landlord to take care of maintenance.²⁷

Recognizing the frequent harshness resulting from the inflexibility of common law doctrine, the judiciary developed a number of exceptions to the general rules of landlord non-responsibility and tort immunity. In Massachusetts the exceptions which evolved were not generally as favorable to plaintiffs

¹⁹ *Fiorntino v. Mason*, 233 Mass. 451, 452, 124 N.E. 283, 283 (1919); *Conahan v. Fisher*, 233 Mass. 234, 237-39, 124 N.E. 13, 14-15 (1919).

²⁰ *DiMarzo v. S. & P. Realty Corp.*, 364 Mass. 510, 513, 306 N.E.2d 432, 434 (1974); *Fiorntino v. Mason*, 233 Mass. 451, 452-53, 124 N.E. 283, 283 (1919).

²¹ *Bolieau v. Traiseř*, 253 Mass. 346, 348, 148 N.E. 809, 810 (1925); *Fiorntino v. Mason*, 233 Mass. 451, 452, 124 N.E. 283, 283 (1919).

²² *Cowen v. Sunderland*, 145 Mass. 363, 364, 14 N.E. 117, 118 (1887).

²³ *Bowe v. Hunking*, 135 Mass. 380, 386 (1883) ("Buildings are let in all sorts of conditions and the law is unusually strict in exempting the landlord for injuries arising from defects when there is no warranty or actual defect . . . the rule of caveat emptor applies.")

²⁴ *Bolieau v. Traiser*, 253 Mass. 346, 348, 148 N.E. 809, 810 (1925); *Stumpf v. Leland*, 242 Mass. 168, 171, 136 N.E. 399, 400 (1922); *Fiorntino v. Mason*, 233 Mass. 451, 452-53, 124 N.E. 283, 283 (1919).

²⁵ *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 196-98, 293 N.E.2d 831, 841-42 (1973). See also *The Landlord-Tenant Relationship: A New Urban Structure*, 18 N.Y.L.F. 725, 735 (Winter 1973).

²⁶ *Id.* See also *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (discussion of justifications for implied warranty of habitability).

²⁷ *Young v. Garwacki*, 1980 Mass. Adv. Sh. 729, 731, 402 N.E.2d 1045, 1047 (1980).

as those of other jurisdictions.²⁸ These exceptions to landlord immunity enunciated by the Massachusetts judiciary may be briefly categorized as follows: (1) injuries caused by defects in portions of an apartment building under the landlord's control, (2) accidents caused by hidden defects, (3) accidents caused by defects in a short-term lease of a furnished dwelling and (4) injuries occurring under an express repair agreement or through negligently made repairs. Whether a person falling under one of the above exceptions could recover depended upon the plaintiff's status.²⁹ Usually the tenant, the tenant's family, and visitors lawfully on the premises were eligible to sue for damages.³⁰

The first exception to landlord immunity recognized the distinction between areas on the property remaining under the landlord's control, such as common hallways in a tenement, and areas which were part of the premises demised to the tenant. In Massachusetts, the landlord had a duty to exercise reasonable care to maintain areas under his control in a condition as safe as or as safe as appeared at the outset of the lease.³¹ A landlord negligent in this responsibility could be held liable for any resulting injuries.³² This cumbersome rule was unique to Massachusetts.³³ Other jurisdictions did not predicate the standard on the conditions existing at the beginning of the lease, but simply required that the landlord exercise reasonable care throughout the tenancy to maintain areas under his control.³⁴ Predictably, the Massachusetts formulation created many difficulties. Not only did the defective area have to be controlled by the landlord, but the defect also had to have grown worse since the inception of the tenancy.³⁵ Moreover, if the tenant knew of the defect at the outset of the

²⁸ See text and notes at notes 31-37 and 52-54 *infra*. In addition, Massachusetts was the only state not to give general recognition to another common law exception that involved property leased for public use. Under this rule, if the leased premises were to be used by the general public, the landlord had a duty to inspect for defects and make necessary repairs before the lease began. See RESTATEMENT (SECOND) OF PROPERTY § 17.2 (1977). Although never generally adopted, Massachusetts gave this exception limited recognition in *Oxford v. Leathe*, 163 Mass. 254, 43 N.E. 92 (1896) (four-day lease of public building). See generally W. PROSSER, LAW OF TORTS § 63 (4th ed. 1971).

²⁹ See *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973); W. PROSSER, LAW OF TORTS §§ 57-62 (4th ed. 1971).

³⁰ *Bacon v. Jaques*, 312 Mass. 371, 373, 144 N.E.2d 648, 650 (1942).

³¹ *Lindsey v. Massios*, 372 Mass. 79, 81, 360 N.E.2d 631, 633 (1977); *Finn v. Peters*, 340 Mass. 622, 624, 165 N.E.2d 896, 898 (1960); *Sordillo v. Fradkin*, 282 Mass. 255, 257, 184 N.E. 666, 667 (1933).

³² See, e.g., *Crea v. Stunzenas*, 344 Mass. 265, 267, 182 N.E.2d 141 (1962) (tenant injured from fall on piazza under landlord's control).

³³ See, e.g., RESTATEMENT (SECOND) OF PROPERTY § 17.3, Reporter's Note (1977); W. PROSSER, TORTS § 63 (4th ed. 1971).

³⁴ See, e.g., *Ross v. Beizer*, 199 Md. 187, 85 A.2d 799 (1952); *Hussey v. Long Dock R.R. Co.*, 100 N.J.L. 380, 126 A. 314 (1924). W. PROSSER, LAW OF TORTS § 63 (4th ed. 1971).

³⁵ *Sordillo v. Fradkin*, 282 Mass. 255, 257, 184 N.E. 666, 667 (1933). Often the initial inquiry would revolve around who had control of the dangerous area. Resolution of this conflict would frequently involve testimony concerning landlord repair of the defective condition. In this regard evidence of landlord repair or agreement to repair could be applied toward the issue of

lease, no liability could affix to the landlord and the landlord had no duty to make repairs.³⁶ Not unexpectedly because the landlord's duty of care was defined by conditions existing at the start of the lease, oftentimes each new tenant was subjected to a different standard of fitness for the common areas.³⁷ In short, although the Massachusetts common law did recognize the need to impose some duty on the landlord for common area maintenance, the narrow construction of the Massachusetts rule created many problems and frequently allowed the landlord to escape liability.

While the landlord's liability for injuries in common areas was carefully circumscribed, the liability for injuries on the premises demised to the tenant was also of limited scope under the Massachusetts exceptions. According to the hidden defects rule, the landlord had a duty to warn the tenant of any hidden dangers on the demised premises which the landlord knew to be existing at the outset of the lease.³⁸ Failure to issue such a warning could subject the landlord to liability if someone was injured as a result of the defect.³⁹ This rule, which ran counter to the general principle of caveat emptor, was justified by analogy

control but not toward the issue of landlord responsibility to repair. Contrast, for example, *Conahan v. Fisher*, 233 Mass. 234, 124 N.E. 13 (1919), where occasional repair of a platform by the landlord was deemed insufficient to constitute an admission of responsibility, *id.* at 238, 124 N.E. at 14, with *Finn v. Peters*, 340 Mass. 622, 165 N.E.2d 896 (1960), where evidence of landlord repair was allowed in on the issue of control, *id.* at 625, 165 N.E.2d at 898.

Resolution of who controlled a particular area often turned on tenuous factual distinctions. See, e.g., *Ludden v. Schwartz*, 291 Mass. 320, 196 N.E. 870 (1935) (piazza in hallway under tenant's control); *Sanford v. Belemeyessi*, 362 Mass. 123, 284 N.E.2d 588 (1972) (rear porch used as entrance controlled by tenants); *Minkinen v. Nymar*, 325 Mass. 92, 89 N.E.2d 209 (1949) (steps leading exclusively to tenant's apartment under tenant's control).

³⁶ *Sordillo v. Fradkin*, 282 Mass. 255, 257, 184 N.E. 666, 667 (1933). In *Sordillo*, the plaintiff's three-year old son was injured when he fell through a defective railing located in a common hallway of their tenement building. Prior to the effective starting date of the lease, the tenants had discovered the danger in the hallway and had obtained a promise from the landlord's agent to repair it. This promise was never carried out. The court held that because the tenants knew of the defect at the time the lease began, the landlord had no duty to repair or improve the conditions in the hallway. The court also held that even if the landlord had made a promise to repair, because no repairs were actually made, the landlord's maximum liability would be for contractual damages for the cost of the repair.

³⁷ Greaney, *Developing Duties of a Landlord with regard to Tenant Safety*, 63 MASS. L. REV. 61, 63 (1978). As Justice Greaney observed:

Conditions were altered with the dissolution of the old tenancy and the creation of a new one. In theory a landlord could permit benign deterioration of common areas without risk of liability if he had a steady change of tenants. Nomadic tenants in modern apartments were not infrequent, and duty requirements changed with the frequency of the rental.

Id.

³⁸ *Stumpf v. Leland*, 242 Mass. 168, 171, 136 N.E. 399, 400 (1922) (defective porch railing); *Cowen v. Sunderland*, 145 Mass. 363, 364, 14 N.E. 117, 118 (1887) (inadequately covered cesspool); *Bowe v. Hunking*, 135 Mass. 380, 383 (1883) (defective tread on stairway). The Massachusetts hidden defects exception conformed to the approach adopted by other jurisdictions. See generally RESTATEMENT (SECOND) OF PROPERTY § 17.1, Reporter's note (1977).

³⁹ *Cowen v. Sunderland*, 145 Mass. 363, 364, 14 N.E. 117, 118 (1887).

to consumer expectations in the sale of goods.⁴⁰ Hence, although the tenant normally had to take the premises as he found them, it was deemed unfair to allow the landlord to deliver property when he knew of a hidden danger. This rule did afford some protection to the tenant and to others using the leased property, but its narrow application made it of limited value to the injured party. For example, proving that the landlord knew of the defect could be extremely difficult,⁴¹ since the defect had to be non-discoverable on the tenant's part.⁴² If the tenant knew of the defect or could have discovered it using reasonable care, any claim for injury would generally be extinguished.⁴³

A third exception to the general rule of landlord tort immunity was limited to the rental of short-term furnished property. Under this exception, the landlord could be held liable for injuries caused by defects on the demised premises existing at the outset of a lease.⁴⁴ Imposition of liability in such cases followed as a logical extension of the rule developed in *Ingalls v. Hobbs*,⁴⁵ which held that in short-term, furnished rentals the landlord had a duty to deliver possession in a condition suitable for immediate occupancy.⁴⁶ The *Ingalls* court considered it unfair to impose pre-lease inspection requirements on the short-term furnished lessee whose only opportunity to inspect often came on the first day of the tenancy.⁴⁷ Thus, emphasizing the contractual rather than con-

⁴⁰ *Id.* at 364, 14 N.E. at 118. The court stated:

The principle, that one who delivers an article which he knows to be dangerous to another ignorant of the qualities, without notice of its nature or qualities, is liable for any injury reasonably likely to result and which does result, has been applied to the letting of tenements.

Id.

⁴¹ In *Stumpf v. Leland*, 242 Mass. 168, 136 N.E. 399 (1922), for example, the tenant was injured when the railing of his tenement porch gave way. *Id.* at 170, 136 N.E. at 400. The court in entering a verdict for the landlord concluded that actual knowledge of the danger was necessary to create liability. *Id.* at 173-74, 136 N.E. at 401-02. Evidence that the landlord's agent had made a cursory inspection of the railing from a distance, and that from such an inspection he concluded that the railing did not seem to be in good condition, was deemed insufficient to constitute knowledge of the specific nature of the danger involved. *Id.* at 400, 136 N.E. at 170. See also *Cooper v. Boston Housing Authority*, 342 Mass. 38, 40, 172 N.E.2d 117, 119 (1961); *Bolieau v. Traiser*, 253 Mass. 346, 148 N.E. 809 (1925).

⁴² *Cooper v. Boston Housing Authority*, 342 Mass. 38, 40, 172 N.E.2d 117, 119 (1961).

⁴³ *Id.*

⁴⁴ *Ackarey v. Carbonaro*, 320 Mass. 537, 540, 70 N.E.2d 418, 420 (1946); *Hacker v. Nitschke*, 310 Mass. 754, 756, 39 N.E.2d 644, 646 (1942).

⁴⁵ 156 Mass. 348, 351, 31 N.E. 286, 287 (1892).

⁴⁶ *Id.*

⁴⁷ *Id.* at 350, 31 N.E. at 286. In distinguishing the short-term lease, the court noted: Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One 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. 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.

veyance qualities of the short-term, furnished lease,⁴⁸ the court built a warranty of fitness into the agreement.⁴⁹ A dangerous defect was considered a violation of the landlord's warranty and, hence, resulting injuries were includable in damages.⁵⁰ While this position was not adopted in other jurisdictions, it did provide a degree of protection for a small class of lessees in Massachusetts.⁵¹ Yet it did not benefit the vast majority of tenants engaged in long-term rentals in the Commonwealth.

A fourth exception to the landlord's immunity from liability involved repair agreements and negligently made repairs. As has been noted,⁵² the common law landlord had no implied duty during the period of the lease to make repairs on the premises demised to the tenant. In Massachusetts, repairs made by the landlord, absent an express agreement for consideration, were generally held to be gratuitous and could only provide a basis for liability if made in a grossly negligent fashion.⁵³ This rule was unique to that state since other jurisdictions allowed recovery for negligently made gratuitous repair.⁵⁴ Massachusetts did, however, recognize two types of express repair agreements, both of which could serve as a basis for landlord liability.⁵⁵ Under the first type of agreement, the landlord consented to make repairs upon notice by the tenant that a defect existed.⁵⁶ If someone was injured as a result of a repair negligently made after the tenant had given notice, the landlord could be held liable for the cost of the injuries.⁵⁷ If the notified landlord completely failed to attempt a re-

⁴⁸ *Id.*

⁴⁹ *Id.* at 351, 31 N.E. at 286, 287.

⁵⁰ *Ackarey v. Carbonaro*, 320 Mass. 537, 540, 70 N.E.2d 418, 420 (1946); *Hacker v. Nitschke*, 310 Mass. 754, 756, 39 N.E.2d 644, 646 (1942). *Id.* In *Ackarey*, the minor plaintiff was injured in a fall caused by a defective piazza railing in the furnished summer home rented by his father. 320 Mass. at 537, 538, 70 N.E.2d at 418, 419. The court dismissed the plaintiff's claim under the hidden defect exception, holding that there was insufficient evidence to show that the landlord knew of the danger. *Id.* at 539, 70 N.E.2d at 420. Nevertheless, the court applied the In-gall's implied warranty theory and allowed recovery for the cost of medical expenses. *Id.* at 540, 70 N.E.2d at 420.

⁵¹ See Note, 23 ST. JOHN'S L. REV. 357 (1949).

⁵² See text and notes at notes 15-20 and 27 *supra*.

⁵³ *DiMarzo v. S. & P. Realty Corp.*, 364 Mass. 510, 513, 306 N.E.2d 432, 434 (1974); *Barrett v. Wood Realty Inc.*, 334 Mass. 370, 375, 135 N.E.2d 660, 664 (1956); *Bergeron v. Forest*, 233 Mass. 392, 398, 124 N.E. 74, 84 (1919). An exception to the gross negligence rule was made in cases where a negligently made gratuitous repair caused death. In such cases negligence was sufficient under the death statute to incur liability. See, e.g., *id.* at 398-99, 124 N.E. 74, 84 (1919).

⁵⁴ See RESTATEMENT (SECOND) OF PROPERTY § 17.7, Reporter's Note § 17.7 n.8 at 2:44 (1977).

⁵⁵ *Crowe v. Bixby*, 237 Mass. 249, 252, 129 N.E. 433, 435 (1921); *Fiorntino v. Mason*, 233 Mass. 451, 453, 124 N.E. 283, 283-84 (1919).

⁵⁶ *Crowe v. Bixby*, 237 Mass. 249, 252, 129 N.E. 433, 435 (1921); *Fiorntino v. Mason*, 233 Mass. 451, 453, 124 N.E. 283, 283 (1919).

⁵⁷ *Crowe v. Bixby*, 237 Mass. 249, 252, 129 N.E. 433, 435 (1921); *Fiorntino v. Mason*, 233 Mass. 451, 453, 124 N.E. 283, 283 (1919). The standard for establishing sufficient consideration varied. In *Bergeron v. Forest*, 233 Mass. 392, 124 N.E. 74 (1919), evidence that the landlord's son made occasional repairs in order to induce the tenants to stay was ruled sufficient

pair and injury resulted, however, the landlord could be held accountable only for the cost of the repair.⁵⁸ Thus, attempted repair brought an increased risk of liability whereas complete avoidance of a repair responsibility produced no added cost potential. Not unexpectedly, this rule actually discouraged landlord maintenance. In the second type of repair agreement the landlord consented to maintain the demised premises in a condition of safety *without regard to notice*.⁵⁹ Under this agreement, the landlord had the right to enter the premises as was necessary to make repairs.⁶⁰ If someone was injured because of a dangerous defect, the landlord could be held liable for the cost of the injuries regardless of whether he actually undertook to make repairs.⁶¹ Because this arrangement was considered contrary to normal policy, which imposed a minimal degree of responsibility on the landlord for the leased property, maintenance agreements of this sort were considered extremely burdensome on the landlord.⁶² For this reason most repair agreements were not interpreted in this manner.⁶³

In summary, the Massachusetts common law was unusually strict in shielding the landlord from tort liability. With the exception of limited rules in-

consideration to be non-gratuitous. *Id.* at 399-400, 124 N.E. at 85. As a rule, however, occasional repairs created no duty and were generally held to be gratuitous. *See, e.g.,* *Galvin v. Beals*, 187 Mass. 250, 252-53, 72 N.E. 969, 970 (1905), where the tenant was injured in fall from defective piazza railing. Evidence that the landlord had agreed to make repairs and had, prior to the accident, worked on other parts of the piazza but not the railing was held insufficient to constitute a basis for a cause of action in negligence. *Id.*

⁵⁸ *DiMarzo v. S. & P. Realty Corp.*, 364 Mass. 510, 513, 306 N.E.2d 432, 434 (1974); *Fiorntino v. Mason*, 233 Mass. 451, 453, 124 N.E. 283, 283 (1919). In instances where damages were held to be contractual, only the tenant or parties directly involved in the lease could recover. *Id.* This rule was based on the common law distinction between misfeasance and nonfeasance. As stated in *Tuttle v. Gilbert Manufacturing Co.*, 145 Mass. 169, 175, 13 N.E. 465, 467 (1887), "As a general rule, there must be some active negligence or misfeasance to support tort. There must be some breach of duty distinct from breach of contract."

⁵⁹ *Collins v. Humphrey*, 314 Mass. 759, 760, 51 N.E.2d 327, 327 (1943); *Crowe v. Bixby*, 237 Mass. 249, 252, 129 N.E. 433, 435 (1921); *Fiorntino v. Mason*, 233 Mass. 451, 453, 124 N.E. 283, 283-84 (1919).

⁶⁰ *Fiorntino v. Mason*, 233 Mass. 451, 453, 124 N.E. 283, 283-84 (1919).

⁶¹ *Id.* at 454, 124 N.E. at 284. In *Crowe v. Bixby*, 237 Mass. 249, 129 N.E. 433 (1921), one individual was killed and another injured in a fall caused by a defective piazza railing. The court held that evidence that the landlord had agreed to "keep the place in repair and safe to live in" was sufficient to create an agreement to repair without notice. *Id.* at 434-360. In *Collins v. Humphrey*, 314 Mass. 759, 51 N.E.2d 327 (1943), however, the plaintiff was injured when she tripped down defective stairs on the demised premises. Evidence that the landlord agreed to "take full responsibility and would make the place safe and sound" and would keep the premises in good condition was held insufficient to create a duty for the landlord to repair without notice. *Id.* at 760-62, 51 N.E.2d at 327, 328. *See also* *Fiorntino v. Mason*, 233 Mass. 451, 124 N.E. 283 (1919) (injury caused by defective stairs—evidence insufficient to establish agreement to repair without notice).

⁶² *Fiorntino v. Mason*, 233 Mass. 451, 453-54, 124 N.E. 283, 284 (1919).

⁶³ *Id.* at 454, 124 N.E. at 284. In *Collins v. Humphrey*, 314 Mass. 759, 51 N.E.2d 327 (1943), with reference to an agreement to repair without notice, the court noted: "Such an undertaking is burdensome in the extreme to the landlord. . . . It must be seldom indeed that such an agreement is actually made. Such an agreement is not readily to be inferred from evidence which fails to disclose distinctly every essential element of it." *Id.* at 761, 51 N.E.2d at 328.

volving common areas, hidden defects, short-term furnished dwellings, and negligently made repairs and express agreements, the person injured on the leased premises could receive no compensation from the landlord. In practice these rules were complex and confusing and often difficult to administer in a fair and consistent manner.⁶⁴ The common law exception approach which made sense when land was the major element of the exchange, was logically inconsistent with modern housing realities which focused on buildings on the land with substantial segments of the population living in large urban tenement houses.⁶⁵ Nevertheless, the conveyance and caveat emptor doctrines retained a strong hold on Massachusetts landlord-tenant law, and at common law the landlord enjoyed a limited immunity from tort liability.

II. RECENT REFORMS IN MASSACHUSETTS LANDLORD-TENANT LAW

A great deal has occurred in Massachusetts law in recent years to erode the theoretical foundation on which the landlord's limited immunity from tort liability has stood. An important initial factor which laid the groundwork for this development was the judicial and legislative recognition of the changing quality of the residential lease.⁶⁶ The legislature evinced its displeasure with the traditional concept of a lease as a conveyance by adopting extensive housing legislation that greatly increased the landlord's maintenance responsibilities.⁶⁷ Later, specific provisions creating tort liability were added to these statutes.⁶⁸ The judiciary was also extremely active, creating an implied warranty of habitability in the residential lease, abolishing "status" oriented rules which determined the plaintiff's ability to sue the land occupier, and altering certain common law tort rules in order to directly increase landlord tort liability.⁶⁹ These developments established the basis for two very recent decisions—*Crowell v. McCaffrey*⁷⁰ and *Young v. Garwacki*⁷¹—in which the Massachusetts Supreme Judicial Court allowed recovery for injuries from landlords on alternative theories of breach of implied warranty and negligence.⁷² This section of

⁶⁴ In discussing the Massachusetts common law exceptions Justice Greaney observed: The cases following these concepts arrived at conclusions which turned to a large extent on particular factual circumstances and gossamer distinctions. The result was the creation of a number of 'pigeonholes' where recovery hinged on plugging facts into one of the recognized sets of rules that formed the substance of the pigeonhole.

Greaney, *Developing Duties of a Landlord with Regard to Tenant Safety*, 63 MASS. LAW REV. 61, 63 (1978).

⁶⁵ See text and notes at notes 25-27 *supra*.

⁶⁶ See text and notes at notes 73-162 *infra*.

⁶⁷ See text and notes at notes 73-75 *infra*.

⁶⁸ See text and notes at notes 76-80 *infra*.

⁶⁹ See text and notes at notes 81-119 *infra*.

⁷⁰ 1979 Mass. Adv. Sh. 568, 569, 386 N.E.2d 1256, 1258 (1979).

⁷¹ 1980 Mass. Adv. Sh. 729, 736, 402 N.E.2d 1045, 1049 (1980).

⁷² See text and notes at notes 121-162 *infra*.

the article will discuss the recent reforms in Massachusetts landlord tenant law with special emphasis on the contribution of the *Crowell* and *Young* decisions.

A. Legislative Reform

The Massachusetts legislature paved the way for a modification of common law theory by enacting a number of housing statutes and safety codes that set minimum standards for safety and fitness in residential tenancies.⁷³ Unfortunately, these statutes had little initial effect on landlord tort liability because courts consistently held that violations of a safety code provision were not evidence of negligence in a tort action.⁷⁴ Nevertheless, by recognizing the need to increase the landlord's responsibility for his housing property, the legislature in a sense repudiated the conveyance notion of the lease and acknowledged that the modern residential tenancy was more analogous to a contract for shelter and services.⁷⁵ In 1972, the legislature enacted two statutes that directly increased the landlord's potential liability in tort. Under chapter 186 of the Massachusetts General Laws, section 15E, if an injury is caused by a defect existing in a common area of a building which amounts to a housing code violation, the landlord cannot raise the defense that the defect existed at the outset of the lease.⁷⁶ Under chapter 186 of the Massachusetts General Laws, section 19, a landlord is required to remedy unsafe conditions on the leased premises after receiving proper notice.⁷⁷ A landlord failing to exercise reasonable care to

⁷³ See note 4 *supra*.

⁷⁴ See, e.g., *Stapleton v. Cohen*, 353 Mass. 53, 56, 228 N.E.2d 64, 66 (1967); *Greenway Wood Heel Co., Inc. v. John Shea Co.*, 313 Mass. 177, 181, 46 N.E.2d 746, 750 (1943).

⁷⁵ *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 198-99, 293 N.E.2d 831, 842-43 (1973).

⁷⁶ MASS. GEN. LAWS ch. 186, § 15E provides:

An owner of a building shall be precluded from raising as a defense in an action brought by a lessee, tenant or occupant of said building who has sustained injury caused by a defect in a common area that said defect existed at the time of letting of the property, if said defect is at the time of injury a violation of the building code of the city or town wherein the property is situated. Any waiver of this provision in any lease or other rental agreement shall be void and unenforceable.

⁷⁷ MASS. GEN. LAWS ch. 186, § 19 provides:

A landlord or lessor of any real estate except an owner-occupied two- or three-family dwelling shall, within a reasonable time following receipt of a written notice from a tenant forwarded by registered or certified mail of an unsafe condition, not caused by the tenant, his invitee, or any one occupying through or under the tenant, exercise reasonable care to correct the unsafe condition described in said notice except that such notice need not be given for unsafe conditions in that portion of the premise not under control of the tenant. The tenant or any person rightfully on said premises injured as a result of the failure to correct said unsafe condition within a reasonable time shall have right of action in tort against the landlord or lessor for damages. Any waiver of this provision in any lease or other rental agreement shall be void and unenforceable. The notice requirement of this section shall be satisfied by a notice from a board of health or other code enforcement agency to a landlord or lessor of residential premises not exempted by the provisions of this section of a violation of the state sanitary code or other applicable by-laws, ordinances, rules or regulations.

make repairs in a reasonable time after notice may be held liable for resulting injuries.⁷⁸ Although these statutes allow a greater tort recovery potential, they are still difficult to use in several respects. Section 15E, for example, requires that the defect be a violation of the appropriate housing code.⁷⁹ This may preclude recovery for injuries caused by non-housing code defects. In addition, section 19 cannot be used unless the landlord receives proper notice as set out in the statute.⁸⁰ A plaintiff injured where proper notice was not given could conceivably lose his section 19 cause of action.

B. Judicial Reform

1. Decisions Prior to *Crowell* and *Young*

Extensive judicial reformulation of landlord-tenant and corresponding tort law began in 1972. The major break came in *Boston Housing Authority v. Hemingway*.⁸¹ This case marked the Massachusetts Supreme Judicial Court's first indication of its willingness to abandon traditional conveyance notions of the lease in favor of a modern contractual approach premised on changing social conditions and legislative intent, as interpreted through the housing statutes.⁸² In *Hemingway* the landlord brought an action of summary process against his tenants for failure to pay rent.⁸³ As part of their defense, the tenants argued that by allowing the premises to deteriorate, the landlord had breached an implied warranty of habitability, therefore extinguishing their rent obligation.⁸⁴ Agreeing with the tenants, the court held that there was an implied warranty of habitability in the residential lease which served as a proper defense to the summary process action.⁸⁵

In arriving at this new implied warranty of habitability standard, the *Hemingway* court noted the changing quality of the residential lease, stressing the evolution from the common law emphasis on the land to the modern-day focus

⁷⁸ *Id.*

⁷⁹ See MASS. GEN. LAWS ch. 186, § 15E; sanitary code standards of fitness for human habitation, Mass. Sanitary Code, Ch. II, 105 Code of Mass. Regs. (C.M.R.) 400.000 - 410.960 (1979).

⁸⁰ Under MASS. GEN. LAWS ch. 186, § 19 written notice must be given in reasonable time by registered or certified mail. This requirement is satisfied by notice from a board of health or other code enforcement agency. In areas of the premises not under control of the tenant, notice is unnecessary as the landlord has a duty to inspect and maintain common areas.

⁸¹ 363 Mass. 184, 293 N.E.2d 831 (1973).

⁸² *Id.* at 195-99, 293 N.E.2d at 840-43.

⁸³ *Id.* at 185, 293 N.E.2d at 835.

⁸⁴ *Id.* The tenants also argued that they were permitted to withhold rent pursuant to MASS. GEN. LAWS ch. 239, § 8A, which allows a tenant to withhold rent after giving the landlord adequate notice that the premises are below the minimum standards set by the housing codes. The court rejected this argument, finding that the tenants had not complied with the notice requirements in § 8A. *Id.* at 203, 293 N.E.2d at 845.

⁸⁵ *Id.* at 199, 203, 293 N.E.2d at 843, 845. The court held that under the implied warranty the tenants were eligible for at least a partial rent withholding. *Id.*

on urban residential apartment buildings.⁸⁶ In short, the court found that the exception announced in *Ingalls v. Hobbs*,⁸⁷ which applied an implied warranty of habitability to short-term furnished dwellings, was now the overriding rule in all residential leases.⁸⁸ The *Hemingway* court emphasized in its reasoning that the legislature also, through the housing codes, had evidenced a recognition that the modern day lease was not reconcilable with old common law.⁸⁹

Hemingway did not deal specifically with the issue of the landlord tort liability. Yet, by redefining the residential lease as essentially a contract for services and reaffirming the landlord's duty to maintain housing property at a defined minimum standard, the court established the theoretical basis on which principles relating to personal injury could be developed. In this respect *Hemingway* presaged the beginning of a rapid and dramatic change in the common law governing the landlord tenant laws in Massachusetts.

Hemingway was soon followed by *Mounsey v. Ellard*, where the Supreme Judicial Court of Massachusetts disregarded the common law concept that the duty owed a visitor by the occupier of land varied according to the status classification of the visitor.⁹⁰ This case solidified the court's desire to do away with outmoded common law property rules that failed to respond to modern day needs. In *Mounsey* a police officer, en route to delivering a summons to a home owner, slipped and was injured on an icy walk.⁹¹ Under a common law analysis, a police officer was generally categorized as licensee and could recover in negligence only upon a showing of "willful, wanton or reckless conduct" on the part of the land occupier.⁹² Conversely, plaintiffs classified as "invitees" could recover upon a demonstration of ordinary negligence.⁹³ In a major reversal of common law doctrine, the court abolished this status classification test and held that the occupier of land owed to all lawful visitors the same duty — to exercise reasonable care to maintain the premises in a safe condition.⁹⁴ In presenting its rationale, the court pointed out that the licensee-

⁸⁶ *Id.* at 196-97, 293 N.E.2d 841.

⁸⁷ 156 Mass. 348, 351, 31 N.E. 286, 287 (1892).

⁸⁸ *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 196-97, 293 N.E.2d 831, 841 (1973). Said the court:

Our reexamination leads us to conclude that the exception . . . carved out by the *Ingalls* case, in response to what was then an unusual situation, must now become the rule in an urban industrial society where the essential objective of the leasing transaction is to provide a dwelling suitable for habitation. . . .

Id.

⁸⁹ *Id.* at 194-95, 196, 293 N.E.2d at 840, 841.

⁹⁰ 363 Mass. 693, 297 N.E.2d 43 (1973).

⁹¹ *Id.* at 694, 297 N.E.2d at 44.

⁹² *Id.*

⁹³ *Id.* at 695, 297 N.E.2d at 45.

⁹⁴ *Id.* at 707, 297 N.E.2d at 51. While abolishing the licensee-invitee distinction, the court refused to change the legal status of trespassers, who are owed only the duty to avoid willful and similar misconduct. *Id.* at 707 n.7, 297 N.E.2d at 51 n.7. *But see*, *Soule v. Massachusetts Electric Co.*, 1979 Mass. Adv. Sh. 1380, 390 N.E.2d 716 (1979) (duty of reasonable care owed to foreseeable child trespassers); *Pridgen v. Boston Housing Auth.*, 364 Mass. 696, 308 N.E.2d 467

invitee distinction found little logical support in a modern cultural setting.⁹⁵ Not only was the status test difficult to administer and inconsistent in its results, but it ran counter to the current trend of holding all defendants in such tort cases to a reasonable standard of care.⁹⁶

Again, although *Mounsey* did not deal specifically with the issue of landlord tort liability, it indicated the court's recognition that common law rules of property needed to be simplified in order to conform to modern day theory, which attempted to do away with pre-deterministic tests designed to measure the defendant's liability. The court's emphasis now would center on a different approach, necessitating a standard of "reasonable care in all circumstances"⁹⁷ taking into account the many factors surrounding the incident.

Drawing on the themes developed in *Hemingway* and *Mounsey*, the Supreme Judicial Court in *Lindsey v. Massios*⁹⁸ applied modernized lease and tort ideas directly to the problems of landlord tort liability.⁹⁹ In *Lindsey*, a guest of the tenant was injured when she fell down a slippery and dimly lit common stairway of a tenement owned by the defendant landlord.¹⁰⁰ The Supreme Judicial Court overruled the former Massachusetts common law test which tied the landlord's duty of care in maintaining areas under his contract to the condition in which the premises were or appeared to be in at the outset of the lease.¹⁰¹ In bringing Massachusetts up to date with other jurisdictions, the court held that the landlord could be liable to a tenant's guests for injuries caused by the negligent failure to maintain common areas in a tenement in safe repair.¹⁰² This duty extended throughout the term of the lease and was no longer predicated on conditions existing at the beginning of the tenancy.¹⁰³ In reaching its decision, the court relied on its reasoning in *Mounsey* which favored

(1974) (reasonable duty of care and affirmative action if necessary owed to helplessly trapped trespassers).

⁹⁵ *Mounsey v. Ellard*, 363 Mass. 693, 706-07, 297 N.E.2d 43, 51 (1973).

⁹⁶ *Id.* at 705, 706, 297 N.E.2d at 50, 51. The *Mounsey* court indicated its willingness to part with prior precedent which ran counter to modern policy:

We can no longer follow this ancient and largely discredited common law distinction which favors the free use of property without due regard to the personal safety of those individuals who have heretofore been classified as licensees. The problem of allocating the costs and risks of human injury is far too complex to be decided solely by the status of the entrant, especially where the status question often prevents the jury from ever determining the fundamental question whether the defendant has acted reasonably in light of all the circumstances in the particular case.

Id. at 706-07, 297 N.E.2d at 51.

⁹⁷ *Id.* at 708, 297 N.E.2d at 52.

⁹⁸ 372 Mass. 79, 360 N.E.2d 631 (1977).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 80, 81, 360 N.E.2d at 633.

¹⁰¹ *Id.* at 82, 360 N.E.2d at 634.

¹⁰² *Id.* Note that this case arose prior to the effective date of MASS. GEN. LAWS ch. 186, § 15E which would provide a similar result.

¹⁰³ *Id.*

the "protection of personal safety over rights of absolute property control."¹⁰⁴ As in *Mounsey*, rules which found their underlying rationale no longer grounded in modern day reality needed to be altered.¹⁰⁵

In *Lindsey*, the court also overruled the firmly entrenched common law rule which held that violation of a safety statute could not be used as evidence of negligence, at least with regard to common areas.¹⁰⁶ In allowing violation of a code provision to be used as evidence of negligence, the court reasoned that the former rule was based on the assumption that the landlord's only duty of care toward areas under his control was to maintain them in the same condition as they were at the outset of the lease.¹⁰⁷ By changing the landlord's duty toward common areas to one of reasonable care throughout the lease, the court undercut the former rule's rationale.¹⁰⁸

Although the *Lindsey* opinion was limited to areas in the tenement under the landlord's control, the case did directly increase the landlord's responsibility and potential in negligence by first judicially requiring continual upkeep of common areas throughout the lease and second by recognizing the use of safety statutes as evidence of negligence.¹⁰⁹ Soon after *Lindsey* the court in *King v. G & M Realty Corp.*¹¹⁰ extended the rule created in *Lindsey*, which applied only to tenants' guests, to tenants as well.¹¹¹

In *Poirier v. Town of Plymouth*¹¹² the Supreme Judicial Court signalled its dissatisfaction with yet another common law tort rule which held that the only duty owed an employee by his employer was to disclose the existence of hidden defects on the premises.¹¹³ In *Poirier*, an employee of an independent contractor working for the Town of Plymouth was injured when a ladder he was climbing broke and threw him to the ground.¹¹⁴ Under existing law, in order to prevail in his action against the Town, the employee had to show the accident was caused by a hidden defect which the defendant knew or should have known existed.¹¹⁵ The court abolished the hidden defects rule and held that the employer

¹⁰⁴ *Id.* at 82, 360 N.E.2d at 634.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 83, 360 N.E.2d at 634. The plaintiff claimed that the condition of the hallway violated MASS. GEN. LAWS ch. 144, § 61, which requires the lighting of common hallways near stairways at night in tenement houses.

¹⁰⁷ 372 Mass. 79, 83, 360 N.E.2d 631, 634 (1977).

¹⁰⁸ *Id.* The *Lindsey* court, however, refused to rule that violation of MASS. GEN. LAWS ch. 144, § 61 created a cause of action for nuisance under MASS. GEN. LAWS ch. 144, § 88. *Id.* at 84-85, 360 N.E.2d at 635.

¹⁰⁹ Requiring the continual upkeep of common areas by landlord is consistent with MASS. GEN. LAWS ch. 186, § 15E. See note 76 *supra*.

¹¹⁰ 373 Mass. 658, 370 N.E.2d 413 (1977).

¹¹¹ *Id.* The court held the tenant was owed the same standard of care as tenants' guests. *Id.* at 661, 370 N.E.2d at 415, "the tenant is not different from the visitor except as he may the more readily have or be chargeable with knowledge of a dangerous condition of a common area. . . ." *Id.*

¹¹² 1978 Mass. Adv. Sh. 100, 372 N.E.2d 212 (1978).

¹¹³ *Id.*

¹¹⁴ *Id.* at 100, 372 N.E.2d at 216-17.

¹¹⁵ *Id.* at 105, 372 N.E.2d at 218-19.

owed employees of independent contractors a duty to exercise reasonable care to keep the premises safe.¹¹⁶ This conclusion was consistent with *Mounsey* and *Lindsey*, decisions which sought to do away with common law tests for assessing liability in tort.¹¹⁷ The court again stressed that such formulas found little logical support in our modern society.¹¹⁸ The court also noted the particular incongruence in placing on the plaintiff the burden of proving a defect which was both too difficult to be discovered by the employee through a "reasonable inspection" but not so obscure as to be non-discoverable by the employee using "reasonable care."¹¹⁹ Preceding both *Crowell* and *Young*, this case forecast the demise of the hidden defects rule as it applied to the landlord-tenant situation.

In summary, both the Massachusetts legislature and judiciary were extremely active in laying firm groundwork for the abolition of landlord tort immunity. The legislature aided this process by instituting an extensive set of statutes and codes greatly increasing landlord responsibility and in section 15E and section 19, expanding landlord liability. The judiciary first did away with the old conveyance notion of the lease in *Hemingway* by adopting an implied warranty of habitability approach. In addition, various other common law property rules were abolished in cases such as *Mounsey* and *Poirier*. Finally, landlord liability was directly increased in *Lindsey* and *King*, at least with respect to common areas in a tenement.

2. *Crowell* and *Young*

With great rapidity, the Supreme Judicial Court decided two cases which capitalized on recent judicial and legislative reforms and completely wiped out any vestige of landlord immunity. These decisions foreclose the further need for common law exception analysis. Added to section 19, these two new theories may be used to hold a landlord liable for injuries occurring on the leased premises.

In *Crowell v. McCaffrey*,¹²⁰ the court extended the implied warranty of habitability theory developed in *Hemingway* to include personal injuries occurring on the premises rented to the tenant.¹²¹ In *Crowell*, a tenant sued his landlord for injuries sustained after he fell from a third-story porch when the

¹¹⁶ *Id.* at 116, 127, 372 N.E.2d at 223, 227.

¹¹⁷ *Id.* at 119-21, 127, 372 N.E.2d at 224-25, 227-28.

¹¹⁸ *Id.* at 118, 372 N.E.2d at 224. The court stated:

Were there strong social policy reasons to maintain the hidden defect test, the hurdles thrown in the path of the injured employee of an independent contractor might be unobjectionable. Recent decisions of this court clearly reflect, however, a shift in philosophy with regard to status distinctions in tort standards of care, casting great doubt on the continuing relevancy of this aspect of the common law hidden defect test. . . .

Id.

¹¹⁹ *Id.* at 118, 372 N.E.2d at 224.

¹²⁰ 1979 Mass. Adv. Sh. 568, 386 N.E.2d 1256 (1979).

¹²¹ *Id.* at 569, 386 N.E.2d at 1258.

railing he was leaning on gave way.¹²² The tenant rented the third-story apartment, but there was conflicting evidence as to who controlled the porch.¹²³ Photographs were produced which showed the porch railing to be in a deteriorated state.¹²⁴ The trial judge concluded that the porch was rented to the tenant and under his control.¹²⁵ As a result, the rule in *Lindsey and King*, requiring that the landlord exercise reasonable care to maintain common areas, was not applied,¹²⁶ and evidence that the porch violated housing code provisions was similarly excluded.¹²⁷ In addition, assuming that the porch was under the tenant's control, the trial judge found no evidence that the landlord knew or had received adequate notice, as was required to take advantage of recovery under the housing code provisions.¹²⁸

The Supreme Judicial Court reversed, holding that a jury could have found the porch to be under the landlord's control.¹²⁹ Hence, under *Lindsey and King*, violation of a housing code statute could have been admissible as evidence of negligence.¹³⁰ More importantly, the court ruled that even if the porch had remained in the tenant's control, the tenant could rely on an implied warranty of habitability to obtain recovery from the landlord for his injuries.¹³¹ This new cause of action sprang in part from an extension of *Hemingway* to include tort liability.¹³² It also followed from *Mounsey*, *Poirier*, and other cases which broadened the land occupier's tort liability, and from *Lindsey and King*, which directly increased the landlord's liability for personal injury.¹³³

The *Crowell* court utilized the housing code statutes to help define the scope of the landlord's liability under the implied warranty theory, making it clear that the landlord who failed to comply with the minimum requirements established by the codes could be subject to liability for injuries.¹³⁴ Despite its

¹²² *Id.*

¹²³ *Id.* at 576, 386 N.E.2d at 1260.

¹²⁴ *Id.* at 569, 386 N.E.2d at 1258.

¹²⁵ *Id.*

¹²⁶ *Id.* at 575, 386 N.E.2d at 1260.

¹²⁷ *Id.* at 575-76, 386 N.E.2d at 1260. See text and notes at notes 108-11 *supra*.

¹²⁸ *Id.* at 569-70, 386 N.E.2d at 1258.

¹²⁹ *Id.* at 575-76, 386 N.E.2d at 1260.

¹³⁰ *Id.*

¹³¹ *Id.* at 577-79, 386 N.E.2d at 1261-62.

¹³² *Id.* at 578, 386 N.E.2d at 1261. The court reasoned: "Thus extension of the warranty to the ordinary residential tenancy at will, in accordance with the *Hemingway* decision, logically carries with it liability for personal injuries caused by a breach." *Id.*

¹³³ *Id.* at 572-73, 386 N.E.2d at 1259-60. The other cases mentioned extending landowner liability were *Pridgen v. Boston Housing Auth.*, 364 Mass. 696, 711-13, 308 N.E.2d 467, 477-78 (1974) (liability to trespasser); *Bouchard v. De Gagne*, 368 Mass. 45, 329 N.E.2d 114 (1975) (retroactive application of *Mounsey* rule); *Poirier v. Town of Plymouth*, 1978 Mass. Adv. Sh. 100, 372 N.E.2d 212 (1978) (liability of landowner for hidden defects to employee of independent contractor).

¹³⁴ *Crowell v. McCaffrey*, 1979 Mass. Adv. Sh. 568, 579, 306 N.E.2d 1256, 1260-61 (1979). The *Crowell* court noted that *Hemingway* dealt only with "vital" facilities on the residential premises. *Id.* at 578, 386 N.E.2d at 1261-62. The court also pointed out that the concurring and dissenting opinions in *Hemingway* were not limited to vital facilities. *Id.* The *Crowell* court held that it was unnecessary to decide whether the porch was a vital facility or alternatively to adopt a

reliance on the codes, however, the court left open the possibility that the implied warranty action might not be limited to the statute's violation and notice requirements.¹³⁵ Thus, just as the *Ingall's* rule, which allowed recovery of rent under an implied warranty theory in short-term dwellings, was expanded to include liability in tort,¹³⁶ and later extended to all residential leases in *Hemingway*, so too was the *Hemingway* decision, which allowed among other things the withholding of rent, extended to include liability for personal injury.¹³⁷

Soon after *Crowell*, the court displayed its willingness to add yet another theory to hold the landlord liable. The Massachusetts Supreme Judicial Court extended recent reforms in *Young v. Garwacki*,¹³⁸ by adopting a negligence test to deal with the issue of landlord liability in cases where a tenant's guest is injured on the rental premises.¹³⁹ In *Young* a guest of the tenant was injured when she fell from a second story porch after a defective railing gave way.¹⁴⁰ The porch could only be reached through the tenant's apartment and was part of the demised premises under the tenant's control.¹⁴¹ Some months prior to the accident the landlord warned the tenant that the railing was unsafe, after the landlord's insurance company had determined that the railing was dangerous and cancelled his liability insurance.¹⁴² Although the landlord was under no express agreement to keep the rental premises in repair, he felt it his obligation to fix the railing.¹⁴³ Thus the landlord purchased materials to repair the railing, but no repairs were made.¹⁴⁴

In an action for damages in negligence brought in Superior Court against the landlord and the tenant, a jury returned a verdict against both defendants.¹⁴⁵ After the verdict was returned, the landlord was granted a motion

wider scope of implied warranty, because it concluded that a jury could have found that the porch violated building and sanitary codes. *Id.* at 578-79, 386 N.E.2d at 1261. In this case then, *Crowell* limited its holdings to injuries caused by housing code violations.

¹³⁵ *Id.* at 579-80, 386 N.E.2d at 1262. It was unnecessary for the court to determine whether the landlord had received proper notice as was required by the codes. The court concluded that there was evidence to show that the code violations existed at the time of letting. *Id.* at 579, 386 N.E.2d at 1262. Because the accident occurred two months after the tenancy began, it was also unnecessary for the court to decide whether the landlord had adequate opportunity to repair after notice as the code required. *Id.* Hence, the issue of compliance with code requirements for violations occurring after the beginning of the lease was avoided.

¹³⁶ The short-term dwelling exception was later extended to include liability in tort. See *Ackarey v. Carbonaro*, 320 Mass. 537, 70 N.E.2d 418 (1946); *Hacker v. Nitschke*, 310 Mass. 754, 39 N.E.2d 644 (1942). See text and notes at notes 49-54 *supra*.

¹³⁷ *Crowell v. McCaffrey*, 1979 Mass. Adv. Sh. 568, 386 N.E.2d 1256 (1979).

¹³⁸ 1980 Mass. Adv. Sh. 729, 402 N.E.2d 1045 (1980).

¹³⁹ *Id.* at 736, 402 N.E.2d at 1049.

¹⁴⁰ *Id.* at 730, 402 N.E.2d at 1046.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* No appeal was taken from the verdict by the tenant-defendant Garwacki. Under traditional tort analysis, the tenant who remains in control of an unsafe area on the rented premises could always be held liable for injuries. *Id.* at 735 n.5, 402 N.E.2d at 1049 n.5.

notwithstanding the verdict.¹⁴⁶ The plaintiff appealed. On appeal the Massachusetts Supreme Judicial Court, in an unanimous decision, reversed and held that: even in the absence of express agreement by the landlord to keep the rental premises in repair, a landlord may be held liable to his tenant's guests for injuries which result from the landlord's negligent failure to maintain the safety of the premises.¹⁴⁷

As its rationale, the court explained that both judicial and legislative trends supported the imposition of a negligence standard.¹⁴⁸ The court noted that in *Hemingway, Lindsey, King, and Crowell*, it had attempted to increase landlord responsibility and liability, while in related cases, such as *Mounsey*, it sought to disregard old common law status tests.¹⁴⁹ Further, the court observed that the legislature, buttressing judicial reform, had established a housing code, which set minimum standards of habitability, and enacted section 15E and section 19, which directly increased landlord liability.¹⁵⁰

The *Young* court also pointed out two policy reasons which under previous law made it difficult to bring suit against a landlord and sometimes discouraged repairs. According to the court, the first reason was the difficulty that plaintiffs injured on the demised premises experienced in even raising the issue of landlord negligence at trial.¹⁵¹ Notwithstanding a limited number of exceptions, if the accident occurred on a tenant-controlled portion of the property, the landlord, devoid of maintenance responsibility, was immune from liability.¹⁵² The court emphasized the tremendous effort made by judges to stretch fact patterns to fit exceptions in order to allow recovery.¹⁵³ By implication the use of a general negligence standard which eliminates the further need of exceptions, would make it easier to bring an action and simpler to handle the issues in a case in a clear and consistent manner.¹⁵⁴ A second factor encouraging a new rule for landlord care was that many times neither the landlord, who stood to increase his liability potential, nor the tenant, who lacked means and expertise to make long-term repairs, had strong incentive to engage in maintenance.¹⁵⁵ As a result dangerous defects would often go unremedied until someone was actually hurt.¹⁵⁶

Finally, the *Young* court found support for its decision from other jurisdictions which to varying degrees had abolished the rule of landlord immunity.¹⁵⁷

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 735, 402 N.E.2d at 1049. The court expressed the new rule: "Today we do away with the ancient law which bars a tenant's guest from receiving compensation from a landlord for injuries caused by negligent maintenance of areas rented to the tenant."

¹⁴⁸ *Id.* at 733-34, 402 N.E.2d at 1048-49.

¹⁴⁹ *Id.* at 733-35, 402 N.E.2d at 1048-49.

¹⁵⁰ *Id.* at 733 n.3, 737-38, 402 N.E.2d at 1048 n.3, 1050-51.

¹⁵¹ *Id.* at 735, 402 N.E.2d at 1049.

¹⁵² *Id.*

¹⁵³ *Id.* at 736 n.6, 402 N.E.2d at 1049 n.6.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 735, 402 N.E.2d at 1049.

¹⁵⁶ *Id.* at 735-36, 402 N.E.2d at 1049.

¹⁵⁷ *Id.* at 736, 402 N.E.2d at 1049.

The court found the reasoning in the New Hampshire decision, *Sargent v. Ross*,¹⁵⁸ particularly convincing and utilized the language in this case to express the Massachusetts rule:

Henceforth, landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm. A landlord must act as a reasonable person under all circumstances including the likelihood of injury to others, the probable seriousness of such injuries and the burden of reducing or avoiding the risk.¹⁵⁹

In stating this test, the court in *Young* was careful to point out that the common law approach did have an element of validity. Because the landlord lacked control of the demised premises during the lease, it was often difficult for him to inspect or repair.¹⁶⁰ The court, however, rejected the notion that this lack of control would be outcome determinative by itself.¹⁶¹ Rather, the issue of control would become another element in the overall negligence test, bearing on "reasonableness and foreseeability."¹⁶²

Hence, in less than ten years, Massachusetts law evolved from a common law exception analysis, to a general rule which held the landlord liable for failure to fulfill his maintenance responsibility toward both areas under his control and areas demised to the tenant. The culmination of this trend came in *Crowell* and *Young*, which provide actions against the landlord on theories of breach of implied warranty and negligence.

III. ANALYSIS OF RECENT REFORMS IN MASSACHUSETTS LANDLORD-TENANT LAW

A. *Judicial and Legislative Reforms*

With the imposition of the negligence formula announced in *Young* and the implied warranty action created in *Crowell*, the Massachusetts Supreme Judicial Court has made it clear that the tenement landlord no longer enjoys a favored position with regard to tort immunity. Massachusetts law now offers essentially three theories on which the person injured on the leased premises may proceed against the landlord. The plaintiff may claim a violation under section 19, a breach of an implied warranty under *Crowell* or negligence under *Young*. In comparing these theories, it is important to note that all three actions recognize the landlord's implied duty to aid in the maintenance of the demised premises. Hence, no express repair agreement or attempted repair is necessary to activate them.¹⁶³ In this regard these actions greatly expand landlord liability.

¹⁵⁸ *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528 (1973).

¹⁵⁹ 1980 Mass. Adv. Sh. at 736, 402 N.E.2d at 1049.

¹⁶⁰ *Id.* at 737, 402 N.E.2d at 1050.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 737, 402 N.E.2d at 1050; *Crowell v. McCaffrey*, 1979 Mass. Adv. Sh. 568, 579, 386 N.E.2d 1256, 1261-62 (1979).

ty from common law and foreclose any further need for the common law exception analysis.¹⁶⁴ The landlord failing to fulfill his duty to repair unsafe conditions on the leased premises will automatically incur potential liability for any resulting injury.¹⁶⁵

Despite their basic similarity, these theories do contain differences. One important distinction involves the degree of notice required. In order to take advantage of section 19, the landlord must receive proper notice as set out in the statute. This requires that the tenant notify his landlord of the defect in a reasonable time via registered or certified mail, or through the proper code enforcement agency.¹⁶⁶ Similarly the implied warranty of habitability theory developed in *Crowell*, which is grounded in the housing code provisions, would at least potentially, necessitate compliance with the code notice requirement.¹⁶⁷ By contrast, under the negligence formula as set out in *Young*, the only requirement placed on notice is that it be reasonable.¹⁶⁸ Presumably, under *Young*, if the landlord knew or should have known of a dangerous condition no notice would even be required.¹⁶⁹

A second possible distinction between the theories involves the length of time after notice of a defect that a landlord will have to make repairs before incurring potential liability. In the *Young* opinion, the court indicated that "reasonable time" after notice may differ between the implied warranty and negligence approaches.¹⁷⁰ Citing *Berman and Sons v. Jefferson*,¹⁷¹ which held that the right to rent abatement after a breach of implied warranty begins right after notice, the *Young* court seemed to infer that under the implied warranty theory landlord liability might also begin right after notice.¹⁷² This interpretation would markedly depart from the negligence theory as well as section 19 in which landlord liability would begin some reasonable time after notice.¹⁷³

A final possible distinction between the warranty and negligence theories is that in its narrowest application, the *Crowell* warranty theory also requires

¹⁶⁴ *Young v. Garwacki*, 1980 Mass. Adv. Sh. 729, 736 n.6, 402 N.E.2d 1045, 1049 n.6. (1980).

¹⁶⁵ *Id.* at 738, 402 N.E.2d at 1250-51 (comparing result in decision with liability under relevant housing statutes).

¹⁶⁶ MASS. GEN. LAWS ch. 186, § 19. See note 77 *supra*.

¹⁶⁷ See text and notes at notes 134-35 *supra*.

¹⁶⁸ *Young v. Garwacki*, 1980 Mass. Adv. Sh. 729, 737, 402 N.E.2d 1045, 1050 (1980).

¹⁶⁹ *Id.* at 736 n.6, 737, 402 N.E.2d at 1049 n.6, 1050. Because the landlord knew of the defect, notice was not required in *Young*. *Id.* at 737 n.8, 402 N.E.2d at 1050 n.8. The RESTATEMENT (SECOND) OF PROPERTY § 17.6, comment c at 233 (1977) supports the supposition that notice is not required if the landlord is aware or should have known of the defect had he exercised reasonable care.

¹⁷⁰ *Young v. Garwacki*, 1980 Mass. Adv. Sh. 729, 737 n.9, 402 N.E.2d 1045, 1050 n.9 (1980).

¹⁷¹ 1979 Mass. Adv. Sh. 2459, 396 N.E.2d 981 (1979).

¹⁷² *Young v. Garwacki*, 1980 Mass. Adv. Sh. 729, 737 n.9, 402 N.E.2d 1045, 1050 n.9 (1980).

¹⁷³ *Id.* at 737, 402 N.E.2d at 1050.

that the defect be a housing code violation.¹⁷⁴ In contrast, the negligence formula in no way necessitates that the defect be a code violation, although it seems likely that such a finding would strengthen the plaintiff's case.¹⁷⁵

Thus to the extent that the *Young* negligence rule is free from the burden of housing code notice and violation requirements, it represents an expansion of landlord liability over both *Crowell* and section 19.¹⁷⁶ Because code requirements can be cumbersome and arguably are not known to all tenants, at times the unsophisticated tenant will fail to give proper notice, thus barring an otherwise valid claim.¹⁷⁷ The ultimate effect of *Young* in this regard will be to allow the unusual case, barred under an alternative theory, to proceed to trial on its merits.¹⁷⁸ The injured plaintiff using the negligence theory will still have to show that the landlord knew or should have known of the danger, that he had a reasonable amount of time to make repairs, and that the defect was serious enough to be a foreseeable causal factor in precipitating the accident.¹⁷⁹ In addition, under the negligence theory of *Young*, the landlord will be able to raise the defense of contributory negligence.¹⁸⁰ These issues, however, will generally be questions for the trier of fact and very rarely should a plaintiff suffer a directed verdict. The well-prepared plaintiff should be ready to argue any or all of the theories now allowed under Massachusetts law.

Although differences do exist between the various theories now available

¹⁷⁴ *Crowell v. McCaffrey*, 1979 Mass. Adv. Sh. 568, 578-79, 386 N.E.2d 1256, 1261-62 (1979). The court stated:

We now find in the rental of a dwelling unit, with regard to length of term or presence or absence of furniture, an implied agreement by the landlord that the rented unit complies with the minimum standard prescribed by building and sanitary codes and that he will do whatever those codes require for compliance during the term of the renting.

Id. See text and notes at notes 134-35 *supra*.

¹⁷⁵ Note also that § 19 does not require that the defect be a code violation. Rather it refers only to "unsafe conditions." MASS. GEN. LAWS ch. 186, § 19.

¹⁷⁶ See text and notes at notes 63-64, 166-69 *supra*.

¹⁷⁷ See, e.g., *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 203, 293 N.E.2d 831, 845 (1973) (tenant's failure to give proper notice as required by statute barred summary process defense).

¹⁷⁸ Even when set against the background of recent reform, Carroll Young would not have had an easy case against the landlord. Because the porch was under the tenant's control, the rule developed in *Lindsey and King*, requiring reasonable care of common areas would not apply. The tenant had been warned that the railing might be dangerous, hence the hidden defects' rule would be unavailing and there was no repair agreement or attempted repair. Young might have relied on MASS. GEN. LAWS ch. 186, § 19, but would still have had to meet code notice and defect requirements. Young's case also arose before the development of the implied warranty theory in *Crowell*, which, given the landlord's knowledge of the defect three months prior to the accident, probably would have allowed recovery.

¹⁷⁹ *Young v. Garwacki*, 1980 Mass. Adv. Sh. 729, 737, 402 N.E.2d 1045, 1050 (1980). The heart of the *Young* test involves a standard negligence analysis balancing risk of harm and gravity of potential harm against burden of reducing the risk. The tenant can always be held liable for injuries on the demised premises. *Id.* at 735 n.5, 402 N.E.2d at 1049 n.5.

¹⁸⁰ *Id.* at 737, 402 N.E.2d at 1050.

under Massachusetts law, it is important to note that both *Young* and *Crowell* are consistent with modern judicial and legislative trends that have sought to expand landlord liability and simplify common law.¹⁸¹ The common law outlook, which provided the landlord with a limited tort immunity, was premised on the assumption that because the lease was a conveyance, transferring control to the tenant, the landlord had no duty to assist in the maintenance of the demised premises.¹⁸² In the absence of such a duty, it was impossible to form the basis for a general action in tort.¹⁸³ Instead, the person injured on the demised premises had to show the existence of an exception to collect damages from the landlord.¹⁸⁴ Failure to prove a hidden defect known to the landlord or a negligent repair under an express agreement normally would bar the claim.¹⁸⁵ Recent judicial decisions, as initiated in *Hemingway*, and the legislative housing statutes have established that in the residential lease at least, the landlord does have a duty to maintain areas leased to the tenant.¹⁸⁶ Judicial rules that hold the landlord negligent in this duty liable for personal injuries logically follow and are expressly supported by the legislature in section 19.¹⁸⁷ In this regard, *Young* and *Crowell*, both of which provide theories in which to hold the landlord liable for injuries on the demised premises, are firmly supported by modern legal theory.¹⁸⁸

Young and *Crowell* are also consistent with a second trend in Massachusetts law. The simplification of common law doctrine has been the aim of recent decisions, such as *Mounsey*, which partially abolished property law status classifications, and *Lindsey*, which allowed for a general negligence action in common areas of the tenement.¹⁸⁹ *Young*, and to a slightly lesser extent, *Crowell* should further this goal.¹⁹⁰ Use of the *Young* negligence formula should, for example, greatly simplify the issues of trial. As the court pointed out in *Young*, it will no longer be necessary to mold the facts in a case to fit an exception.¹⁹¹ Instead, the overriding question in the negligence action will be whether, given the facts, the accident was foreseeable and the landlord reasonable.¹⁹² Alternatively, both the section 19 and *Crowell* implied warranty actions are also much simpler to use than a common law exception analysis. Nevertheless, both will sometimes present threshold questions of code compliance, which could

¹⁸¹ See text and notes at notes 66-162 *supra*.

¹⁸² See text and notes at notes 10-24 *supra*.

¹⁸³ *Id.*

¹⁸⁴ See text and notes at notes 28-65 *supra*.

¹⁸⁵ See text and notes at notes 38-43, 52-63 *supra*.

¹⁸⁶ See text and notes at notes 66-119 *supra*.

¹⁸⁷ See note 77 *supra*.

¹⁸⁸ See text and notes at notes 66-119 *supra*.

¹⁸⁹ See text and notes at notes 90-119 *supra*.

¹⁹⁰ See text and notes at notes 149, 151-54 *supra*.

¹⁹¹ *Young v. Garwacki*, 1980 Mass. Adv. Sh. 729, 736 n.6, 402 N.E.2d 1045, 1049 n.6 (1980).

¹⁹² *Id.* at 737, 402 N.E.2d at 1050.

conceivably blur the important underlying issues of reasonableness and foreseeability.¹⁹³

In summary, Massachusetts law now provides three theories under which a landlord can be held liable for injuries occurring on the leased premises — violation of section 19, breach of implied warranty and negligence. Although all three theories serve to increase landlord liability over common law they do contain differences. The principal dissimilarities relate to degree of notice, reasonable time after notice and type of violation. Nevertheless, *Crowell*, *Young* and section 19 are consistent with modern Massachusetts trends which have sought to increase landlord liability and simplify common law doctrine.

B. Unresolved Problems after *Crowell* and *Young*

Despite the far reaching effect of *Young*, *Crowell* and section 19, several questions still remain unanswered. These issues include the degree to which a landlord not receiving actual notice of a defect will be charged with its knowledge, and the length of time after notice a landlord will have to make repairs before becoming potentially liable for resulting injuries. In addition, it is uncertain whether the negligence theory will apply to non-residential property, owner-occupied two- and three-family dwellings, and recovery for tenants. Finally, it remains to be determined whether increased liability will actually encourage landlord maintenance. This section will explore these questions.

The first unresolved issue relates to the degree a landlord not receiving actual notice of a defect will be charged with its knowledge.¹⁹⁴ This question will arise in situations where a landlord may have been able to infer the existence of a danger through a more careful inspection of the premises either at the outset or during the term of the tenancy. Under the negligence theory the issue really comes down to how stringently courts construe the landlords' duty to inspect. Several older Massachusetts decisions held that it was not enough to create liability if the landlord only had a general knowledge that an area was run down.¹⁹⁵ To create liability the landlord had to have knowledge of the specific nature of the danger.¹⁹⁶ Given the court's emphasis in *Young* on reasonableness and foreseeability, however, it is now likely that under the negligence theory the required standard of knowledge will be much lower. Too many potential fact situations can arise to state definitively one ideal standard, but holding a landlord to have made all reasonable inferences of danger, where a given area

¹⁹³ See text and notes at notes 166-78 *supra*.

¹⁹⁴ This question was left open in *Young* because the court concluded that the landlord actually knew of the defective condition. *Young v. Garwacki*, 1980 Mass. Adv. Sh. 729, 737 n.8, 402 N.E.2d 1045, 1050 n.8 (1980).

¹⁹⁵ See, e.g., *Stumpf v. Leland*, *supra* note 41 (actual knowledge of specific nature of danger necessary to create liability under hidden defect exception). See also *Marks v. Citron*, 243 Mass. 454, 137 N.E. 647, 648 (1923) (rusty beam causing injury to tenant's son not a trap).

¹⁹⁶ See *Stumpf v. Leland*, at note 41, *supra*.

looks in need of repair, would not seem unfair.¹⁹⁷ As section 19 requires that the landlord receive actual notice from the tenant or equivalent, this issue should not arise in actions brought under this statute.¹⁹⁸ It is uncertain whether the question of degree of landlord knowledge will arise in actions brought under implied warranty. For example, a landlord might be held strictly liable, regardless of knowledge of a specific danger, for injuries caused by defects present prior to or at the outset of the tenancy.¹⁹⁹ Similarly, if the implied warranty theory incorporates section 19 notice requirements, then a landlord will have to have actual knowledge of a defect, and, hence, degree of landlord knowledge will not become an issue.²⁰⁰ Another possibility, however, is that implied warranty actions will operate free from notice requirements, in which case the reasonableness standard of the negligence formula should apply.²⁰¹ This latter formulation would appear preferable as it would allow courts to respond with maximum flexibility to the facts in a particular case.

A second unresolved issue involves the length of time a landlord will have to make repairs, once he has received notice of a defect. As has been noted, the Supreme Judicial Court in *Young* distinguished between the negligence and implied warranty theories in this regard.²⁰² While in a negligence action a landlord is given a reasonable time after notice to make repairs, under an implied warranty theory, liability might begin immediately following notice.²⁰³ This analysis was based upon *Berman & Sons v. Jefferson*²⁰⁴ where the court held that a right to rent abatement begins immediately after notice.²⁰⁵ The analogy

¹⁹⁷ In reference to undisclosed dangers known to the landlord the RESTATEMENT (SECOND) OF PROPERTY § 17.1, comment b at 161 (1977) suggests that the landlord need not have actual knowledge of the condition. Rather, all that is necessary is that he have information which would lead a person of reasonable intelligence, or a person of his own superior intelligence, to infer a danger.

¹⁹⁸ See text and notes at notes 77-80 *supra*.

¹⁹⁹ See note 206 *infra*. It would appear that the implied warranty exception for the short-term furnished dwelling was premised in strict liability. The court in *Ackarey*, *supra* note 44, for example, found no basis to establish negligence under the hidden defects exception as there was no evidence that the landlord knew of the defects. *Id.* at 539, 70 N.E.2d at 420. Nevertheless, the landlord was held liable for the injuries sustained from a pre-existing defect. *Id.* Inasmuch as the implied warranty has been extended to all residential leases, arguably *Crowell* may encompass strict liability for defects existing at the outset of the lease.

²⁰⁰ The court in *Crowell* did not deal with the issue of what type of notice a landlord must have under the implied warranty theory. The court concluded that the landlord using reasonable care could have discovered the defect prior to the tenancy. *Crowell v. McCaffrey*, 1979 Mass. Adv. Sh. 568, 580, 386 N.E.2d 1256, 1262 (1979). The court went on to note that it would not decide whether such a finding would be essential for liability. *Id.*

²⁰¹ The court in *Crowell* cited *Hemingway*, § 19 and the RESTATEMENT (SECOND) OF PROPERTY § 17.6 (1977) noting that these sources proscribe a negligence standard. 1979 Mass. Adv. Sh. 568, 580, 386 N.E.2d 1256, 1262 (1979).

²⁰² *Young v. Garwacki*, 1980 Mass. Adv. Sh. 729, 737 n.9, 402 N.E.2d 1045, 1050 n.9 (1980). See also text and notes at notes 170-73 *supra*.

²⁰³ *Id.*

²⁰⁴ 1979 Mass. Adv. Sh. 2459, 396 N.E.2d 981 (1979). See text and notes at notes 170-73 *supra*.

²⁰⁵ *Id.*

between rent abatement, which creates only a temporary deferral of payment, and personal injury liability, which causes a permanent and often much larger loss of money, is fairly tenuous. For this reason it is recommended that the court apply the more flexible "reasonable time after notice" standard as used in *Young* and section 19 to the implied warranty action.²⁰⁶

Another issue which was left open in *Young* is whether the negligence standard will apply to non-residential rental property. The court in *Young* noted that sections 15E and 19 are not limited by their terms to residential property.²⁰⁷ Yet the court also cited *Berman*, *Crowell*, and *Hemingway* as cases limiting landlord implied warranty to residential leases.²⁰⁸ Given the fundamental differences between residential and commercial rental property, it would seem reasonable and consistent to similarly limit the negligence theory.²⁰⁹

Another issue left open by the court in *Young* is whether owner occupied two- and three-family dwellings will be excluded under the negligence theory.²¹⁰ The court noted that section 19 excludes such dwellings from its coverage.²¹¹ In *Crowell*, however, the court cited section 19 and specifically rejected extension of the two- and three-family limitation to the implied warranty action.²¹² In light of the underlying theme of *Young*, which requires landlords to act reasonably in all circumstances, such dwellings probably should not be automatically excluded from coverage under the negligence theory.

The court in *Young* also did not resolve whether tenants injured on the ren-

²⁰⁶ Adopting the *Berman* notice test would approach a strict liability standard by discounting in many cases the elements of reasonableness and foreseeability. This result would in turn conflict with the court's reasoning in *Young*: "The question now must be whether the landlord, in the exercise of reasonable care, should have discovered the defect and repaired it within a reasonable time." *Id.* at 736 n.6, 402 N.E.2d at 1049 n.6.

A distinction, however, might be made in this regard between defects existing at the outset of the lease and defects arising during the lease. Injuries arising in the former situation could be subject to a strict liability standard under the implied warranty of habitability theory. This would be based on the landlord's duty to deliver the premises in a habitable condition and would not interfere with reasonable notice standards. See Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence or Strict Liability?* 1975 WIS. L. REV. 19 (1975), where it is stated that the notice requirement makes sense for defects arising during the lease because of the landlord's inability to inspect. *Id.* at 104-05. The author suggests, however, that the notice requirements for defects existing at the outset of the tenancy is a product of the motion of a lease or a conveyance and hence makes little sense in relation to a contractual approach as provided by an implied warranty of habitability theory. *Id.*

This may indeed be where the Supreme Judicial Court is headed. See note 197 *supra*. It might be added that if the court does abolish the reasonableness standard in the implied warranty action for defects existing at the outset of the lease, then in this sense the implied warranty theory would be broader than the negligence action.

²⁰⁷ 1980 Mass. Adv. Sh. 729, 738-39 n.12, 402 N.E.2d 1045, 1051 n.12 (1980).

²⁰⁸ *Id.*

²⁰⁹ See, RESTATEMENT (SECOND) OF PROPERTY § 5.1, Caveat, note b, (1977), which does not extend to commercial property the rule requiring delivery of rental property in suitable condition. The Restatement, however, notes that this does not indicate that it would disfavor such an extension.

²¹⁰ 1980 Mass. Adv. Sh. 729, 738-39 n.12 (1980). 402 N.E.2d 1045, 1051 n.12 (1980).

²¹¹ *Id.*

²¹² 1979 Mass. Adv. Sh. 568, 580, 386 N.E.2d 1256, 1262 (1979).

tal premises could recover under the negligence theory. The *Young* decision in the narrowest reading applies only to tenant's guests.²¹³ Undoubtably, however, *Young* will eventually be extended to allow recovery by tenants as well. This would be consistent with *King*, *Crowell* and section 19, all of which allow recovery by a tenant.²¹⁴ A tenant's possible superior knowledge of the conditions of the rental premises should not automatically bar his recovery. Rather this should become one factor, possibly bearing on contributory negligence, to be decided by the trier of fact.²¹⁵

A final point of speculation will be the effect of increased liability on landlord maintenance. At common law, the landlord actually might be discouraged at times from making repairs for fear of increased liability.²¹⁶ In one sense the negligence and implied warranty theories might be seen as reversing this trend. The landlord with knowledge of a defect must take reasonable steps in a reasonable time to effectuate repairs or run the risk of a personal injury suit.²¹⁷ Yet, the increased liability also may discourage landlords from making the initial investigation. A landlord may be less motivated to seek information on the condition of the premises because mere knowledge of the defect will incur potential liability. Hence, in the final analysis, *Young* and *Crowell* may encourage prompt repair of known defects but discourage actual surveillance in order to discover defects.

CONCLUSION

The growth of landlord liability in Massachusetts presents an excellent study of common law evolution. Such growth is a dynamic process and represents an interaction of many factors, including changes in cultural conditions and philosophy as well as corresponding shifts in legal doctrine. In relation to current judicial and legislative trends, increased landlord liability, as capsulized in the *Crowell* implied warranty theory and *Young* negligence approach, is conceptually sound and consistent. Abolition of landlord immunity also makes sense in residential leases as a further means of motivating landlord repair after notification and of assuring that the injured party not be without compensation for his injury. Future modifications in residential lease doctrine may provide a new basis for additional alterations in the rules governing landlord liability. Hopefully, both the court and legislature will continue to maintain a flexible attitude, willing to alter legal doctrine in order to respond to new cultural developments as they arise.

JEFFREY H. KARLIN

²¹³ 1980 Mass. Adv. Sh. 729, 738-39 n.12, 402 N.E.2d 1045, 1051 n.12 (1980).

²¹⁴ See text and notes at notes 110, 121-37 *supra*.

²¹⁵ See *King*, *supra* note 110.

²¹⁶ See text and notes at notes 57-58, 155-56 *supra*.

²¹⁷ See text and notes at notes 161-65 *supra*.