LANDLORD AND TENANT—PRODUCTS LIABILITY—LANDLORD'S IMPLIED WARRANTY OF HABITABILITY DOES NOT GIVE RISE TO STRICT TORT LIABILITY FOR TENANT'S PERSONAL INJURIES—*Dwyer v. Skyline Apartments, Inc.*, 63 N.J. 577, 311 A.2d 1 (1973).

For fifteen years, Josephine Dwyer was a tenant in the multiple-family garden apartments owned by Skyline Apartments, Inc. On February 8, 1971, she was burned when the hot water faucet on her bathtub fell out of the tile wall, pouring scalding water over her body.[1] Suffering from burns, Mrs. Dwyer brought an action against the defendant landlord to recover for personal injuries. The only witness at the trial was the plaintiff, who described the faucet as "very corroded."[2] The plaintiff added that she had not known about the dangerous condition before the accident[3] since the corroded portion of the fixture was a latent defect[4] located within the wall. Since she had experienced no prior difficulty with the plumbing system and had no knowledge of the defective faucet, no complaint had ever been made to the landlord.[5]

The trial court,[6] sitting without a jury, entered judgment in favor of the plaintiff for $1500. Despite the lack of actual or constructive knowledge by the landlord necessary for establishing liability in negligence, the trial judge held that the landlord was strictly liable to the tenant under a continuing implied covenant of habitability.[7]

On appeal, the appellate division in *Dwyer v. Skyline Apartments, Inc.*[8] reversed with directions to enter judgment in favor of the de-

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1 Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 51, 301 A.2d 463, 464 (App. Div.), *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973).

2 123 N.J. Super. at 51, 301 A.2d at 464.

3 *Id.*

4 A latent defect is one that is hidden and not discoverable by reasonable inspection, whereas a patent defect is one that is easily observed or discovered. Roberts v. Rogers, 129 Neb. 298, 302-03, 261 N.W. 354, 356-57 (1935). A tenant is expected to make an inspection and in accepting the premises in a patently defective condition, assumes the risk. The landlord's liability for latent defects has traditionally been limited to situations where the landlord, having knowledge or notice of the hidden danger and an opportunity to repair, has either failed to make repairs or concealed the condition from the tenant. *Cf.* Coleman v. Steinberg, 54 N.J. 58, 63, 253 A.2d 167, 170 (1969); Faber v. Creswick, 31 N.J. 234, 242, 156 A.2d 252, 256 (1959); Schnatterer v. Bamberger & Co., 81 N.J.L. 558, 560-61, 79 A. 324, 325 (Ct. Err. & App. 1911). *See generally* Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 260, 264-75 (1927).

5 123 N.J. Super. at 51, 301 A.2d at 464.

6 The case was tried before the Honorable Paul R. Huot, J.D.C., in the Bergen County District Court on May 3, 1972.

7 123 N.J. Super. at 51, 301 A.2d at 464.

8 123 N.J. Super. 48, 301 A.2d 463 (App. Div.), *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973).

fendant landlord,[9] holding that there was no liability for the personal injuries suffered by a tenant from a defective condition under the control of the landlord when the landlord neither knew nor could have discovered the condition.[10] The court held that the landlord's implied covenant or warranty of habitability[11] concerned only issues of rent and eviction and had no applicability to a personal injury action.[12] The court specifically rejected the plaintiff's alternative theory that the landlord is strictly liable in tort for a tenant's injuries, finding no basis in analogy or policy for the extension of products liability principles to the lessor of dwelling houses.[13] After granting plaintiff's petition for certification,[14] the Supreme Court of New Jersey in a memorandum opinion affirmed "substantially for the reasons expressed by the Appellate Division."[15]

In deciding the liability of a landlord to his tenant, the key element of judicial consideration has traditionally been the character of the lease. While the lessee's rights were originally contractual in nature[16] and his property interest was characterized as personal rather than real,[17] by the sixteenth century the lease was recognized as a conveyance

9 123 N.J. Super. at 56, 301 A.2d at 467.

10 *Id.* at 53, 301 A.2d at 465.

11 "Habitability" is not a boundless concept. Limits have been articulated by several courts. *See, e.g.*, Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 261 A.2d 413 (L. Div. 1970).

> [P]roof of breach of the warranty of habitability will not be an easy burden for the tenant to bear. Not every transient inconvenience of living attributable to the condition of the premises will be a legitimate subject of litigation. The warranty is one of habitability and is not a warranty against all inconvenience or discomfort.

Id. at 403, 261 A.2d at 417. *Accord*, Berzito v. Gambino, 63 N.J. 460, 469-70, 308 A.2d 17, 22 (1973).

> Not every defect or inconvenience will be deemed to constitute a breach of the covenant of habitability. The condition complained of must be such as truly to render the premises uninhabitable in the eyes of a reasonable person.

Id. at 469, 308 A.2d at 22.

12 123 N.J. Super. at 54-55, 301 A.2d at 466.

13 *Id.* at 55-56, 301 A.2d at 466-67.

14 63 N.J. 427, 307 A.2d 613 (1973).

15 63 N.J. 577, 311 A.2d 1 (1973).

16 The lease originated as a contract made in an attempt to evade the usury laws:

> Considerably before 1200, terms of years appear to have had some use among important landowners as devices for securing the repayment of loans. This function disappeared and husbandry leases gradually became frequent as a device whereby important landowners contracted for the working of their lands by the nonlandowning "lower classes."

2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 221 [1], at 177 (1973) (footnote omitted). *See also* 1 AMERICAN LAW OF PROPERTY § 3.11, at 202 (A.J. Casner ed. 1952); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 111-12 (2d ed. 1898); 3 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1016, at 7 (repl. 1959).

17 For purposes of descent and distribution and execution of judgments, leases are

of real property.[18] The principal purpose of the medieval English lease was to convey land for such agrarian uses as sheep grazing, and consequently little significance was attached to dwellings or buildings on the land.[19] It was the land itself that was important in landlord-tenant law.

Since the lease was deemed to be a sale of an interest in land, the courts have historically applied the principles of real property law rather than those of contract law to conflicts between lessor and lessee.[20] Consequently, the doctrine of *caveat emptor*—let the buyer beware—long a significant facet of the law of real property, became ingrained in the lease.[21] While the landlord covenanted that he had the

still treated as personal property. *See, e.g.*, Sheaffer v. Baeringer, 346 Pa. 32, 29 A.2d 697 (1943).

> A lease for years is only a chattel, or, as it is called, a chattel real; it is personal not real estate; it is not subject to the lien of a judgment and has none of the attributes of real property.

Id. at 34, 29 A.2d at 698. *See also* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.1, at 176; 2 F. POLLOCK & F. MAITLAND, *supra* note 16, at 115-16; 2 R. POWELL, *supra* note 16, ¶ 221 [2], at 185; 3 G. THOMPSON, *supra* note 16, at 7-8.

18 2 R. POWELL, *supra* note 16, ¶ 221 [1], at 177-78.

> The course of events by which, between 1200 and 1500, the lessee became recognized as the owner of an interest in land protected both against his lessor and against third persons is a fascinating tale of legal evolution . . . .

Id. at 177 (footnote omitted).

19 *See* Grimes, *Caveat Lessee*, 2 VALPARAISO U.L. REV. 189, 192 (1968); Indritz, *The Tenants' Rights Movement*, 1 NEW MEXICO L. REV. 1, 41 (1971); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225, 227 (1969).

20 *See* Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958).

> Historically a lease was viewed as a sale of an interest in land. The concept of *caveat emptor*, applicable to such sales, seemed logically pertinent to leases of land.

Id. at 382, 140 A.2d at 201. *See also* 3 G. THOMPSON, *supra* note 16, § 1209, at 87; *cf.* 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890, at 587 (3d ed. W. Jaeger 1962).

21 It is the established general rule in this state that, upon the letting of a house or lands, there is no implied warranty or condition that the premises are fit and suitable for the purpose specified, or for the use to which the lessee proposes to devote them, or indeed for any purpose . . . . The rule of *caveat emptor* governs generally.

La Freda v. Woodward, 125 N.J.L. 489, 492-93, 15 A.2d 798, 800 (Ct. Err. & App. 1940). *See also* Grimes, *supra* note 19, at 192; Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENVER L.J. 387 (1967); *cf.* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.45 at 267; 2 R. POWELL, *supra* note 16, ¶ 225 [2], at 230.

The history and development of *caveat emptor* is based on a theory of bargaining at arm's length with the ability and opportunity to gain information about the property involved in the transaction. *See generally* Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931). The doctrine of *caveat emptor* is directly contrary to the position taken by the civil law, where it is the seller who must beware. *See* Comment, *Builder-Vendor's Implied Warranty of Good Workmanship and Habitability*, 1 TEX. TECH L. REV. 111, 113-14 n.13 (1969) (quoting from COKE, FIRST INSTITUTE 102 (3d ed. 1633)), which states:

power to transfer possession to the tenant and that he would leave the tenant in quiet enjoyment of the leasehold,[22] there was no implied covenant or warranty of the fitness of the premises for any particular purpose.[23] Under the rule of *caveat emptor*, the prospective tenant was expected either to inspect the premises and make a determination of fitness himself or to bargain with the landlord for an express warranty against defects.[24] *Caveat emptor* provided the landlord with broad

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> Note that by the Civil Law every man is bound to warrant the thing that he selleth or conveyeth, albeit there is no expresse Warranty, but the Common Law bindeth him not, unlesse therebe a warranty, either in Deed or in Law for Caveat emptor . . . .

While *caveat emptor* originally applied to all transfers of property, it is no longer recognized in the sale of personal property and goods, where extensive warranties of fitness have been imposed by statute. *See* UNIFORM COMMERCIAL CODE §§ 2-314, 2-315; N.J. STAT. ANN. §§ 12A:2-314, 2-315 (1962); *cf.* Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493 (1962). *Caveat emptor* has also been eroded in the law of real property in the area of new house sales, one of its principal strongholds. *See, e.g.*, Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 91-92, 207 A.2d 314, 326-27 (1965); Humber v. Morton, 426 S.W.2d 554, 562 (Tex. 1968). *See generally* Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961); Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965); Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967). Thus, the leasing of real property is one of the last vestiges of the ancient maxim of *caveat emptor*. The doctrine as applied to landlord-tenant law has also been called "*caveat lessee*"—let the lessee beware. *See, e.g.*, Grimes, *supra* note 19, at 189; Harkrider, *supra* note 4, at 260.

22 Quinn & Phillips, *supra* note 19, at 227.

> Inherent in the conveyance of a possessory estate for a term was the duty of the landlord to leave the tenant in possession for the term of the lease without interference. It was in return for this estate and the continuing right to quietly possess the land that the tenant covenanted to pay the rent. This inherent duty of the landlord was imposed by the law through the device of an implied covenant. Thus, every lease contained by implication, if not expressly, the landlord's covenant not to oust the tenant from possession of the demised premises or any part thereof during the term of the lease.

Id. at 229 n.5. The landlord's obligations under this covenant of quiet enjoyment clearly are not of an affirmative nature but rather negative in character: merely to leave the tenant in possession.

23 Naumberg v. Young, 44 N.J.L. 331, 344-45 (Sup. Ct. 1882).

> Nor will a warranty, such as has been sued on, be implied from the contract of letting. The general doctrine of the law is, that upon a demise there is no implied contract that the property is fit for the use for which the lessee requires it, whether for habitation, occupation or cultivation.

Id. at 344. *Accord*, La Freda v. Woodward, 125 N.J.L. 489, 492-93, 15 A.2d 798, 800 (Ct. Err. & App. 1940); Siggins v. McGill, 72 N.J.L. 263, 264, 62 A. 411, 411 (Ct. Err. & App. 1905). *See also* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.45, at 267; 2 R. POWELL, *supra* note 16, ¶ 225 [2], at 230.

24 Franklin v. Brown, 53 N.Y. Super. 474, 479 (1886), *aff'd*, 118 N.Y. 110, 23 N.E. 126 (1889).

> [I]n the absence of any covenant in the lease itself, as to the fitness of the leased premises for occupation as a dwelling, no covenant of the lessor can be implied on the subject, and that unless by reason of direct or constructive fraud

immunity from liability both for the unusability of the property and for injuries resulting from its defective condition.[25] Moreover, regardless of injury or unsuitability, the tenant was required to pay the rent. He had what he had bargained for—possession of the land. Under property law principles, as opposed to those of contract, the covenant by the tenant to pay rent was generally deemed independent of any covenant made by the landlord.[26] Despite the criticisms of both jurists and legal commentators[27] and the exceptions which developed to ameliorate the harshness of the doctrine's application,[28] *caveat emptor* remained fully embedded in the law of landlord and tenant.

> or culpable negligence on the part of the lessor, the tenant hires at his peril; and a rule similar to that of *caveat emptor* applies, and throws on the lessee the responsibility of examining as to the existence of defects in the premises and of providing against their ill effects.

53 N.Y. Super. at 479; *cf.* Coleman v. Steinberg, 54 N.J. 58, 63, 253 A.2d 167, 170 (1969). *See generally* Grimes, *supra* note 19, at 193; Comment, *Demise of the Traditional Doctrine of Caveat Emptor*, 20 DEPAUL L. REV. 955, 971 (1971).

25 *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.45, at 267.

> There is no implied covenant or warranty that at the time the term commences the premises are in a tenantable condition or that they are adapted to the purpose for which leased. The tenant, then, cannot use such unfitness either as a defense to an action for rent or as a basis for recovery in tort for damages to person or property.

Id. (footnotes omitted).

26 *See, e.g.*, Stewart v. Childs Co., 86 N.J.L. 648, 650-51, 92 A. 392, 393 (Ct. Err. & App. 1914). *Accord*, Duncan Development Co. v. Duncan Hardware, 34 N.J. Super. 293, 298, 112 A.2d 274, 277 (App. Div.), *cert. denied*, 19 N.J. 328, 116 A.2d 829 (1955). *See also* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.45, at 267; Quinn & Phillips, *supra* note 19, at 233-35; Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?*, 40 FORDHAM L. REV. 123, 123-24 (1971); *cf.* 6 S. WILLISTON, *supra* note 20, § 890, at 589.

27 *See, e.g.*, Bowles v. Mahoney, 202 F.2d 320, 325-28 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 935 (1953), wherein the dissent stated:

> The key to the decision of the court, relieving both the landlord and the District of Columbia from liability, lies in its adherence to the rule at common law that "[a]bsent any statutory or contract duty, the lessor is not responsible for an injury resulting from a defect which developed during the term." I think that rule is an anachromism [*sic*] which has lived on through stare decisis alone rather than through pragmatic adjustment to "the felt necessities of [our] time." I would therefore discard it and cast the presumptive burden of liability upon the landlord. This, I think, is the command of the realities and mores of our day.

202 F.2d at 325 (Bazelon, J., dissenting) (footnotes omitted). *See also* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 108, 150 (1921); Grimes, *supra* note 19, at 225; Quinn & Phillips, *supra* note 19, at 225; Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 558 (1966); Skillern, *supra* note 21, at 397-98.

28 Two exceptions to the general rule of *caveat emptor* relieved the tenant of liability for rent because of the defective condition of the premises. The first exception, developed in Smith v. Marrable, 152 Eng. Rep. 693, 694 (Ex. 1843), found an implied warranty of habitability where the landlord leased a furnished house for a short term. The

While the view of the lease as a sale of an interest in land may have been appropriate in the rugged agrarian environment in which it developed, the modern lease, especially in the urban residential setting, more closely resembles a contract for services.[29] The needs of con-

reasoning behind this exception for furnished dwellings was articulated in Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892), wherein the court stated:

> 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. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind.

Id. at 350, 31 N.E. at 286-87. *Accord*, Young v. Povich, 121 Me. 141, 143-44, 116 A. 26, 27 (1922). The second exception, also an implied warranty of fitness, arose where the lease restricted the tenant to a particular use and the agreement was reached before construction of the premises was completed. The rationale was that the tenant did not have an opportunity to inspect for defects at the time the lease was executed. *See, e.g.*, Woolford v. Electric Appliances, Inc., 24 Cal. App. 2d 385, 390-91, 75 P.2d 112, 114 (Dist. Ct. App. 1938); Hardman Estate v. McNair, 61 Wash. 74, 76-77, 111 P. 1059, 1061 (1910).

Contrary to the immunity provided under *caveat emptor*, tort liability has been based upon the implied warranty of habitability in a furnished dwelling. *See* Fisher v. Pennington, 116 Cal. App. 248, 250-51, 2 P.2d 518, 520 (Dist. Ct. App. 1931); Horton v. Marston, 352 Mass. 322, 325-26, 225 N.E.2d 311, 313 (1967); Ackarey v. Carbonaro, 320 Mass. 537, 539-40, 70 N.E.2d 418, 420 (1946); Hacker v. Nitschke, 310 Mass. 754, 757, 39 N.E.2d 644, 646 (1942).

While liability for personal injuries under the implied warranty of habitability is clearly a minority view, tort liability has broken through the *caveat emptor* barrier on several theories which have been more widely accepted. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 63, at 400-12 (4th ed. 1971); Grimes, *supra* note 19, at 209-24; Harkrider (pts. 1 & 2), *supra* note 4, at 260, 383. The liability of a landlord to his tenant for injury caused by the condition of the leased premises is summarized in 2 R. POWELL, *supra* note 16, ¶ 234 [2], at 332-33 as follows:

> (1) In cases of fraudulent concealment of a dangerous condition existing at the time of leasing;
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> (2) In cases based upon negligence as to parts of the premises remaining under the lessor's control;
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> (3) Incidents involving negligence in the making of repairs;
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> (4) Situations involving the lessor's failure to perform his agreement to repair;
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> (5) Instances involving the lessor's failure to discharge his statutorily imposed duty to repair . . . .

(footnotes omitted).

29 Bennett, *The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach and Interdependency of Covenants)*, 16 TEXAS L. REV. 47 (1937).

> While the English tenant was primarily interested in the use of the land, from which the rent was said to "issue," the modern urban lessee is most vitally interested in the buildings thereon. The lease as a grant of an "estate in land" has given way to the lease as a business contract wherein both parties make numerous covenants, some of which may be classed as essential. In addition to the usual covenants of seisin and quiet enjoyment, the lessor often promises to keep the premises

temporary urban society called out for a reconsideration of the fundamental character of the lease. Only in the last fifteen years, however, have the courts begun to react to these pressures.

One of the first courts to respond to the manifest need for reconsideration of the nature of the lease was the Wisconsin supreme court in deciding *Pines v. Perssion*.[30] The plaintiffs in *Pines*, four university students, leased a furnished home from the defendant landlord for residential use during the academic year. Prior to the beginning of the lease term, three of the plaintiffs inspected the premises and found it to be in a "filthy condition."[31] The plaintiffs claimed that at the time of the inspection the defendant represented that he would clean and repair the premises before the students planned to take possession the following fall. When the plaintiffs arrived at the premises to begin the lease term, however, the house was still filthy and unsuited for student occupancy.[32] Upon the advice of counsel, the plaintiffs had the premises inspected by the municipal building department, and the inspection revealed several violations of the building code.[33] After attempting to clean the premises themselves, the plaintiffs brought an action against the lessor to recover their security deposit and the reasonable value of their services. On appeal, the Wisconsin court held for the plaintiffs by enlarging the recognized exception to the doctrine of *caveat emptor* which implied a warranty of habitability when the subject of the lease was a furnished house leased for a short term.[34] After noting that prior courts had indicated that the furnished house exception to the general no warranty theory was " *'a warranty to be extended rather than restricted,'* "[35] the court considered current public policy as reflected in building and housing codes, and reasoned that

> [t]o follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of

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in repair and in tenantable condition, to furnish heat, hot water, elevator service, *et cetera*; so that it cannot always be said that the lessor has substantially performed, merely by executing the lease and allowing the lessee to take possession of the premises. In keeping with this profound change in the nature of the lease, so also must its legal effects be altered.

Id. at 47-48 (footnotes omitted). *See also* 2 R. POWELL, *supra* note 16, ¶ 221 [1], at 178-79.

30 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

31 *Id.* at 591, 111 N.W.2d at 410.

32 *Id.* at 591-92, 111 N.W.2d at 411.

33 *Id.* at 592-93, 111 N.W.2d at 411.

34 *See* note 28 *supra*.

35 14 Wis. 2d at 595, 111 N.W.2d at 412 (quoting from Collins v. Hopkins, 2 K.B. 617 (1923)) (emphasis by the court).

> rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*.[36]

Because of the numerous housing code violations,[37] the court found "a failure of consideration"[38] on the part of the landlord, thus relieving the tenant of any liability for rent under the lease. The landlord's implied warranty of habitability and the tenant's covenant to pay rent were deemed mutually dependent.[39] While *Pines* may be viewed as only an expansion of the furnished house exception to *caveat emptor*,[40] its recognition of contemporary social needs in resolving landlord-tenant disputes provided a useful point of departure for other courts.

Although courts generally continued to analyze the landlord-tenant relationship in terms of real property principles, an increasing sensitivity to social and economic realities induced some courts to recognize contract theories as possible alternatives for sustaining tenants' insistence upon habitable premises. In *Reste Realty Corp. v. Cooper*,[41] for example, the New Jersey supreme court, while deciding the case on the basis of the trial court's finding of a constructive eviction of the tenant,[42]

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36 14 Wis. 2d at 596, 111 N.W.2d at 412-13.

37 Among the housing code violations found by the city inspector were "inadequate electrical wiring, kitchen sink and toilet in disrepair, furnace in disrepair, handrail on stairs in disrepair, screens on windows and doors lacking." *Id.* at 593, 111 N.W.2d at 411.

38 *Id.* at 597, 111 N.W.2d at 413. RESTATEMENT OF CONTRACTS § 274, comment *a* at 400 (1932) defines failure of consideration as

> a generic expression covering every case where an exchange of values is to be made and the exchange does not take place, either because of the fault of a party or without his fault.

See also 1 A. CORBIN, CORBIN ON CONTRACTS § 133, at 572 (1963); 1 S. WILLISTON, *supra* note 20, § 119A, at 490.

39 14 Wis. 2d at 596, 111 N.W.2d at 413. Mutuality of covenants is a clear departure from traditional property rules where all covenants were deemed independent. See note 26 *supra* and accompanying text.

40 The Wisconsin court in implying the warranty of habitability extended the definition of "short term" to include a one year lease. While the duration of a "short term" had not been defined in any case relied upon by the *Pines* court, none had applied the warranty to a lease of that length. Although the court began its analysis with the exception to *caveat emptor*, there is no explicit holding that limits the warranty to furnish dwellings rented for a year or less. On the contrary, the social policies recognized by the court suggest a basis for broad application of the implied warranty of habitability.

41 53 N.J. 444, 251 A.2d 268 (1969).

42 *Id.* at 462-63, 251 A.2d at 278. The doctrine of "constructive eviction" relieves the tenant of liability for rent because he has "constructively" been deprived of possession—the *quid pro quo* for his payment of rent.

> Under this rule any act or omission of the landlord or of anyone who acts under authority or legal right from the landlord, or of someone having superior title to that of the landlord, which renders the premises substantially unsuitable for the purpose for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises, is a breach of the covenant of quiet enjoyment and constitutes a constructive eviction of the tenant.

recognized that the landlord's failure to provide suitable premises could also be characterized as a failure of consideration.[43]

The defendant in *Reste Realty* leased the ground floor of a commercial building for office use,[44] but a concealed defect in a driveway which ran alongside the building caused continual flooding of the defendant's offices.[45] Although the landlord's agent took steps to remove the water on numerous occasions, the "crowning blow"[46] occurred when five inches of water flooded the premises just before an important sales meeting.[47] When the defendant vacated the premises, the landlord sued to recover rent for the balance of the lease term. In sustaining the tenant's defense that the constant flooding amounted to a constructive eviction,[48] the court stated that the tenant's right to vacate leased premises could also be expressed in contract terms:

> In our view, therefore, at the present time whenever a tenant's right to vacate leased premises comes into existence because he is deprived of their beneficial enjoyment and use on account of acts chargeable to the landlord, it is immaterial whether the right is expressed in terms of breach of a covenant of quiet enjoyment, or material failure of consideration, or material breach of an implied warranty against latent defects.[49]

Thus, in addition to recognizing a limited warranty of habitability[50] which is not dependent upon existing exceptions to the usual *caveat emptor* approach, the New Jersey court suggested that the contemporary lease has other contractual features.

Building upon the foundation established in *Reste Realty*, other

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Id. at 457, 251 A.2d at 274. *See generally* 1 AMERICAN LAW OF PROPERTY, *supra* note 16, § 3.51, at 280-82; 2 R. POWELL, *supra* note 16, ¶ 225 [3], at 232.5-40; 6 S. WILLISTON, *supra* note 20, § 892, at 646-60.

43 53 N.J. at 460-61, 251 A.2d at 276-77. See note 38 *supra*.

44 53 N.J. at 448, 251 A.2d at 270.

45 *Id.*

46 *Id.* at 450, 251 A.2d at 271. The tenant's original landlord had made good faith attempts to remove the water flooding the basement when notified. However, he died and complaints to the subsequent lessor were ignored. The defendant tenant and her personnel attempted to remove the water. On some occasions the flooding was so bad that the tenant moved her business to a nearby inn. *Id.* at 448-50, 251 A.2d at 270-71.

47 *Id.* at 450, 251 A.2d at 271.

48 *Id.* at 462-63, 251 A.2d at 278.

49 *Id.* at 461, 251 A.2d at 276-77.

50 The court observed that

> present day demands of fair treatment for tenants with respect to latent defects remediable by the landlord, either within the demised premises or outside the demised premises, require imposition on him of an implied warranty against such defects. . . . Such warranty might be described as a limited warranty of habitability.

Id. at 454, 251 A.2d at 273 (citations omitted).

courts have extended the "limited" theory of implied warranties of habitability and have discarded the constructive eviction doctrine as a judicial fiction arising out of the "wooden rules of property law."[51] In *Lemle v. Breeden*,[52] the plaintiff sued the landlord to recover a security deposit and rental payments because of the rat-infested condition of a residential dwelling. After observing that warranties of habitability and constructive eviction were "two very distinct doctrines,"[53] the Hawaii court examined the *Reste Realty* decision and concluded that the application of an implied warranty of habitability

> affirms the fact that a lease is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship. From that contractual relationship an implied warranty of habitability and fitness for the purposes intended is a just and necessary implication.[54]

By rejecting the theory of constructive eviction in favor of "the more flexible concept of implied warranty of habitability,"[55] the *Lemle* court obviated the often risky requirement[56] that the aggrieved tenant abandon the premises in favor of less drastic contract remedies.[57]

The first major case to deal with the implied warranty concept in an urban multiple-dwelling context was *Javins v. First National Realty Corp.*[58] *Javins* was an action for possession instituted by the landlord on the ground that the tenants had defaulted in rent payments. The tenants admitted the default but offered to prove approximately 1,500 violations of the District of Columbia Housing Regulations by way of set-off.[59] Holding that a warranty of habitability, measured by the

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51 Lemle v. Breeden, 51 Hawaii 426, 433, 462 P.2d 470, 474 (1969).

52 *Id.*

53 *Id.* at 429, 462 P.2d at 472.

54 *Id.* at 433, 462 P.2d at 474 (footnote omitted). *See also* Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968), in which the court characterized a lease with substantial housing violations at the inception of the term as an illegal contract. *Id.* at 836-37.

55 51 Hawaii at 434, 462 P.2d at 475.

56 *Id.* at 434-35, 462 P.2d at 475. The remedy of constructive eviction has serious drawbacks from a tenant's point of view.

> If the conduct of a landlord is later found by a court not to have justified the tenant in vacating the premises, he will remain liable for unpaid rent. Furthermore he may be unable to find other quarters that he can afford and that he wishes to rent and in any event he will be saddled with the not inconsiderable expenses of moving.

Berzito v. Gambino, 63 N.J. 460, 466, 308 A.2d 17, 20 (1973).

57 51 Hawaii at 436, 462 P.2d at 475. Under the implied warranty of habitability the tenant could remain in possession of the premises and have a choice of "the basic contract remedies of damages, reformation, and rescission." *Id.*

58 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

59 428 F.2d at 1073.

standards set forth in the housing code regulations, was implied in a lease,[60] the court stated that "leases of urban dwelling units should be interpreted and construed like any other contract."[61] By analogizing the plight of the urban tenant to an injured plaintiff in a products liability context,[62] and by recognizing the unequal bargaining power inherent in the modern landlord-tenant relationship,[63] the court found strong public policy reasons for imposing the warranty.

New Jersey extended the implied warranty of habitability engendered by *Reste Realty* to residential dwellings in *Marini v. Ireland.*[64] In *Marini*, an action for dispossess, the tenant of a two-family house was allowed to offset the cost she incurred in repairing a leaking toilet against the rent due under the lease. Recognizing both the trend toward

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[60] *Id.* at 1082.

> We therefore hold that the Housing Regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing that they cover.

Id.

[61] *Id.* at 1075 (footnote omitted).

[62] *Id.* at 1075-76, 1079. The court compared the landlord and the tenant to the seller and the buyer of goods and services in an industrialized society.

> The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his building. Moreover, the tenant must rely upon the skill and *bona fides* of his landlord at least as much as a car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant's position corresponds precisely with "the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose."

Id. at 1079 (quoting from Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 375, 161 A.2d 69, 78 (1960)) (footnote omitted).

[63] *Id.* at 1079.

> Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock.

Id. (footnotes omitted). The average contemporary tenant, unlike the feudal English lessee, can neither adequately inspect the premises nor secure an express warranty of fitness from his landlord. Modern social conditions require the imposition of the warranty of habitability. This warranty applies both to conditions existing at the inception of the lease and to those arising during the term. *Id. See generally* Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEO. L.J. 909 (1971). *See also* Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489 (1971); Note, *D.C. Housing Regulations, Article 290, Section 2902: Construed pursuant to Brown v. Southall Realty Co. and Javins v. First National Realty Corp.—A New Day for the Urban Tenant?*, 16 HOW. L.J. 366 (1971).

[64] 56 N.J. 130, 265 A.2d 526 (1970).

construing leases along contract guidelines and the growing rejection of the theory that a landlord has no duty to make repairs,[65] the court stated:

> In a modern setting, the landlord should, in residential letting, be held to an implied covenant against latent defects, which is another manner of saying, habitability and livability fitness . . . . It is a mere matter of semantics whether we designate this covenant one "to repair" or "of habitability and livability fitness."[66]

The court in *Marini* characterized the covenant of habitability and the covenant to pay rent as "dependent or independent according to the intention of the parties and the good sense of the case."[67] The tenant was allowed the self-help remedy of repair-and-deduct in addition to the previously recognized remedy of constructive eviction.[68] The court emphasized, however, that prior to availing himself of self-help, a tenant was required to give "timely and adequate notice to the landlord of the faulty condition in order to accord him the opportunity to make the necessary replacement or repair."[69]

With the recent decision of *Berzito v. Gambino*,[70] the New Jersey supreme court expanded the rationale of *Marini* by holding that the covenant to pay rent and the covenant of habitability must be viewed as mutually dependent.[71] Unlike either *Reste Realty* or *Marini*, the tenant in *Berzito* did not vacate the premises alleging constructive eviction,[72] nor did she make repairs and attempt to offset the cost against her rent obligation.[73] Rather, she chose to seek recovery for the difference between the rent actually paid and the reasonable rental value of the "uninhabitable" premises.[74] In recognizing the mutuality of the landlord's duty to maintain the premises in a livable condition and the tenant's corresponding duty to pay rent, the court clarified a statement

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65 *Id.* at 141-43, 265 A.2d at 532-33.

66 *Id.* at 144, 265 A.2d at 534. The court further stated that this covenant was actually 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 further it is a covenant that these facilities will remain in usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable. *Id.*

67 *Id.* at 145, 265 A.2d at 534.

68 *Id.* at 146, 265 A.2d at 535.

69 *Id.*

70 63 N.J. 460, 308 A.2d 17 (1973).

71 *Id.* at 469, 308 A.2d at 21.

72 *Id.* at 467, 308 A.2d at 20.

73 *Id.*

74 *Id.* at 464, 308 A.2d at 19.

in *Marini* that the aggrieved tenant had only the remedies of making the necessary repairs himself or of quitting the premises under a constructive eviction.[75] Under the *Berzito* formula, therefore, the tenant had a new remedy, since he could initiate

> an action against his landlord to recover either part or all of a deposit paid upon the execution and delivery of the lease or part or all of the rent thereafter paid during the term, where he alleges that the lessor has broken his covenant to maintain the premises in a habitable condition.[76]

While it was unlikely that the landlord in *Dwyer* could be held liable under negligence principles since the defective condition was latent and he had neither actual nor constructive knowledge of it,[77] both the plaintiff and the trial court maintained that the warranty of habitability enunciated in the *Marini* case gave rise to a continuing duty to repair and maintain the premises free from latent defects at all times during the lease term.[78] Failure to comply with this duty, it was

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[75] *Id.* at 468-69, 308 A.2d at 21. *See* Marini v. Ireland, 56 N.J. 130, 147, 265 A.2d 526, 535 (1970), where the court had stated that "[t]he tenant has only the alternative remedies of making the repairs or removing from the premises upon such a constructive eviction."

[76] 63 N.J. at 469, 308 A.2d at 22. Accordingly, the tenant was able to remain in the premises at a reduced rent. *Id.* The remedy of rent abatement had previously been fashioned for an urban tenant faced with a housing shortage and financially unable to make repairs in Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 480, 484, 488, 268 A.2d 556, 558, 560, 562 (Essex County Dist. Ct. 1970). The implied warranty of habitability and the remedy of rent abatement were extended to situations involving patent as well as latent defects in Samuelson v. Quinones, 119 N.J. Super. 338, 340, 343, 291 A.2d 580, 581, 583 (App. Div. 1972), discussed in Note, *Abatement of Rent Allowed for Breach of the Implied Warranty of Habitability in a Patent Defect Situation*, 4 SETON HALL L. REV. 714 (1973).

New Jersey now has a statute authorizing the withholding of rent because of uninhabitability. N.J. STAT. ANN. § 2A:42-85 *et seq.* (Supp. 1973-74). N.J. STAT. ANN. § 2A:42-88 provides in pertinent part:

> The public officer or any tenant occupying a dwelling may maintain a proceeding as provided in this act, upon the ground that there exists in such dwellings or in housing space thereof a lack of heat or of running water or of light or of electricity or of adequate sewage disposal facilities, or any other condition or conditions in substantial violation of the standards of fitness for human habitation established under the State or local housing or health codes or regulations or any other condition dangerous to life, health or safety.

If the court finds such conditions, the statute authorizes the payment of rents into the court. The court may then use those funds to remedy the condition or conditions. N.J. STAT. ANN. § 2A:42-92.

[77] 123 N.J. Super. at 53, 301 A.2d at 465. See notes 4 & 28 *supra* for the basis of a landlord's liability in negligence.

[78] 123 N.J. Super. at 51, 301 A.2d at 464. Plaintiff's Petition and Appendix for Certification at 5 states:

> The covenant as set forth in *Marini v. Ireland*, 56 N.J. 130 (1970), states that the facilities will remain in usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain these facilities in a condition which renders the property livable. It was this breach of duty by

argued, would give rise to tort liability.[79] The appellate division, however, rejected this view of the *Marini* doctrine.[80] Reviewing the circumstances under which *Marini* had been decided and the cases in which it had been followed, the court concluded that *Marini* only provided "a just and practical approach to the protection of the rights of tenants vis-a-vis landlords in the sphere of eviction and its dire social consequences."[81] The court then went on to hold:

> The development of this new "bill of rights" for tenants, however, does not necessarily lead to the imposition of liability in tort on a landlord bottomed upon a concept of a continuing warranty of habitability. We are of the opinion that the language of the Supreme Court in the context of the narrow issue in *Marini* was not intended to overturn existing principles of law applicable to tort actions for personal injuries by tenants versus landlords.[82]

While the *Dwyer* court limited the implied warranty of habitability to the context of rent abatement and eviction,[83] tort liability

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the landlord-appellant of an implied covenant against latent defects that the facilities remain in usable condition during the entire term of the lease, which made the landlord-appellant liable in damages to the tenant-petitioner.

[79] Liability in tort for breach of an express covenant to repair was found in Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958):

> We are satisfied that a landlord's covenant to repair gives rise to a duty in tort with liability to the tenant for damages consequential to a negligent failure to perform, and that such liability is not dependent upon nor limited by the tensile strength of the concept of reserved control.

Id. at 385, 140 A.2d at 202. The landlord in *Michaels* was found to be negligent in not making repairs when he had knowledge of the need for repairs and an opportunity to make them. *Id.* If the warranty of habitability had been construed as a "covenant to repair" giving rise to tort liability, the court still might have held against the plaintiff on the ground that while there was a duty to repair and keep the premises in repair, since there was no knowledge or notice of the defect, there was no negligence. 123 N.J. Super. at 52, 301 A.2d at 468. Such an interpretation of the implied warranty of habitability would merely judicially extend to all residential dwellings what the legislature had accomplished with remedial housing statutes applicable to buildings where three or more families reside. *See* Law of March 25, 1904, ch. 61, § 1-211, [1904] N.J. Laws 96-149, *repealed and superseded by* N.J. STAT. ANN. § 55:13A-1 *et seq.* (Supp. 1973-74). Law of March 25, 1904, ch. 61, § 144, [1904] N.J. Laws 131 provides in pertinent part:

> Every tenement-house hereafter erected or now existing and all the parts thereof, shall be placed and maintained in good repair . . . .

This statute has been liberally construed and negligent failure to keep "all the parts" in good condition creates tort liability. *See, e.g.*, Michaels v. Brookchester, Inc., *supra* at 386-87, 140 A.2d at 203; Altomare v. Cesaro, 70 N.J. Super. 54, 58, 174 A.2d 754, 756 (App. Div. 1961).

[80] 123 N.J. Super. at 55, 301 A.2d at 466.

[81] *Id.* at 54, 301 A.2d at 466.

[82] *Id.* at 54-55, 301 A.2d at 466.

[83] *But see* Fisher v. Pennington, 116 Cal. App. 248, 250-51, 2 P.2d 518, 520 (Dist. Ct. App. 1931); Horton v. Marston, 352 Mass. 322, 325-26, 225 N.E.2d 311, 313 (1967); Ackarey v. Carbonaro, 320 Mass. 537, 539-40, 70 N.E.2d 418, 420 (1946); Hacker v. Nitschke, 310

arising out of an implied warranty is not a new concept. The warranty, whereby the seller guarantees the quality and safe condition of his own goods, has been termed "a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law."[84] Although liability under a warranty was originally founded in tort,[85] by the end of the eighteenth century the warranty came to be viewed as an incident of the sales contract, whether it was express or implied.[86] While the remedy was in the form of a contract action, the obligation was distinctly tortious, since it was imposed upon the seller regardless of voluntary assent or agreement.[87]

Because of its contractual character, warranty liability was traditionally limited to the parties to the contract of sale.[88] However, the public interest in consumer protection ultimately led to the development of products liability law[89] which largely eliminated the privity defense. The landmark case of *Henningsen v. Bloomfield Motors, Inc.*[90] seized upon the representation of safety in the warranty concept and expanded it beyond the parties to the sales contract. The warranty of the defendant automobile manufacturer had previously reached only its immediate buyer, the dealer. However, the *Henningsen* court extended the implied warranty of fitness to the ultimate purchaser, members of his family, and other persons using the automobile, despite the lack of privity of contract.[91] Since the ultimate consumer had "neither the

Mass. 754, 757, 39 N.E.2d 644, 646 (1942); *see also* Quinn & Phillips, *supra* note 19, at 255-56; Comment, *Housing Codes and a Tort of Slumlordism*, 8 HOUSTON L. REV. 522, 533-36 (1970); Comment, *Tenant Remedies—The Implied Warranty of Fitness and Habitability*, 16 VILL. L. REV. 710, 725 (1971); Note, *Products Liability at the Threshold of the Landlord-Lessor*, 21 HASTINGS L.J. 458, 477 (1970).

84 W. PROSSER, *supra* note 28, § 95, at 634 (footnote omitted).

85 1 S. WILLISTON, THE LAW GOVERNING SALES OF GOODS § 195, at 501 (1948); Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888).

86 W. PROSSER, *supra* note 28, § 95, at 634-35; 1 S. WILLISTON, *supra* note 85, at 502.

87 W. PROSSER, *supra* note 28, § 95, at 635.

> Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties.

Id. § 92, at 613.

88 *Id.* § 93, at 622-23. The leading case precluding recovery by persons not in "privity" of contract is Winterbottom v. Wright, 152 Eng. Rep. 402, 403 (Ex. 1842).

89 Products liability law may be traced to MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), in which the court allowed recovery in negligence, notwithstanding the lack of privity on the ground that the manufacturer's duty of care extended to all persons who might foreseeably use the product. *Id.* at 389-93, 111 N.E. at 1051-54. *See generally* Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

90 32 N.J. 358, 161 A.2d 69 (1960).

91 *Id.* at 384, 414-15, 161 A.2d at 84, 100.

opportunity nor the capacity to inspect or to determine the fitness of an automobile for use"[92] and faced "gross inequality of bargaining position,"[93] the *Henningsen* court concluded that modern conditions required the imposition of the implied warranty against latent defects.[94]

While the warranty theory satisfied many of the policy considerations of consumer protection, the contract overtones of the warranty concept were troublesome and were often criticized as creating confusion in an area where the liability was clearly founded in tort.[95] Consequently, the doctrine of strict liability in tort evolved,[96] and it became clear that under certain circumstances liability would be imposed upon manufacturers and sellers of defective products apart from any contractual relations between the parties. The theory of strict liability in tort was adopted by the Supreme Court of New Jersey in *Santor v. A & M Karagheusian, Inc.*,[97] an action by the purchaser of a defective carpet to recover the purchase price from the manufacturer.[98] Recognition that liability was founded on a tort theory eliminated both the prior contract defense of privity and requirements of notice of defect.[99]

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92 *Id.* at 384, 161 A.2d at 83-84.

93 *Id.* at 391, 161 A.2d at 87.

94 *Id.* at 384, 161 A.2d at 83.

95 *See* Prosser, *supra* note 89, at 1134.

96 The first case to apply the concept of strict liability in tort was Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

Id. The California supreme court anticipated the RESTATEMENT (SECOND) OF TORTS § 402 A (1965) which provides for strict liability. Section 402 A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

97 44 N.J. 52, 64, 207 A.2d 305, 311 (1965).

98 *Id.* at 57, 207 A.2d at 307.

99 *Id.* at 63, 67-68, 207 A.2d at 310, 313.

The New Jersey courts have found no substantial difference between the implied warranty of fitness and strict liability in tort. *See id.* at 63-64, 207 A.2d at 311; Newmark v. Gimbel's Inc., 54 N.J. 585, 595, 258 A.2d 697, 702 (1969). Under both theories the defendant is strictly liable in the sense that no negligence or deviation from a standard of reasonable care need be shown. *See Santor, supra* at 66-67, 207 A.2d at 313; Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 452, 212 A.2d 769, 779 (1965). Since the purpose of this liability is

Although in New Jersey strict liability in tort has been applied to manufacturers and sellers of personal property,[100] to sellers of real property,[101] and to lessors of personal property,[102] the *Dwyer* court saw no basis for extending the doctrine to lessors of real property.[103] In

to insure that the cost of injuries or damage, . . . resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.

Santor, supra at 65, 207 A.2d at 312. This statement of purpose has led to the characterization of the doctrine of strict liability in tort as *enterprise liability. Cintrone, supra* at 450, 212 A.2d at 778; Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965) (quoting from Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 65, 207 A.2d 307, 312 (1965)). One of the subsisting rationales of enterprise liability is risk distribution, that is, that the seller can bear the loss better than the injured buyer because the seller's economic position allows him to pass along the cost of the loss as an incident of the enterprise's doing business. *See Schipper, supra* at 91, 207 A.2d at 326. An in-depth examination of the theoretical basis for risk distribution can be found in Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) and Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961).

100 Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 64, 207 A.2d 305, 311 (1965); *cf.* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 384, 161 A.2d 69, 84 (1960).

101 Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965).

[T]here are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles and . . . the pertinent overriding policy considerations are the same.

Id.

102 45 N.J. 434, 450, 212 A.2d 769, 777 (1965).

By means of a bailment parties can often reach the same business ends that can be achieved by selling and buying. The goods come to the user for the time being and he benefits by their use and enjoyment without the burdens of becoming and remaining the owner. The owner-lessor benefits by receiving the rent for the temporary use.

Id. at 447, 212 A.2d at 776.

103 123 N.J. Super. at 55, 301 A.2d at 466-67. The argument that strict liability in tort should be applied to landlords was previously presented to two New Jersey courts which found for the plaintiff on other grounds. In Ellis v. Caprice, 96 N.J. Super. 539, 556, 233 A.2d 654, 663 (App. Div. 1967), the court held the doctrine could not be applied because it had not been pleaded in the complaint or set up as an issue in the pre-trial order.

Aside from this, we are not persuaded that the facts of this case [a six year old child playing with matches in a building with inadequate fire escapes] bring it within the ambit of the *Cintrone-Schipper* rationale.

Id. In Conroy v. 10 Brewster Ave. Corp., 97 N.J. Super. 75, 81-82, 234 A.2d 415, 418 (App. Div. 1967), the court held strict liability inapplicable because the lease was an "isolated transaction." Apparently the defendant was not in the leasing business. The implied representation of safety and the risk distribution rationales that provide the basis for strict enterprise liability are lacking where the seller is not in the business of selling that product. *See* RESTATEMENT (SECOND) OF TORTS § 402 A, comment *f* (1965); *cf.* UNIFORM COMMERCIAL CODE § 2-314; N.J. STAT. ANN. § 12A:2-314 (1962), applying only to "merchants" defined in UNIFORM COMMERCIAL CODE § 2-104; N.J. STAT. ANN. § 12A:2-104 (1962) as

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved . . . .

declining to apply the theory of strict liability in tort, the court held that

> [t]he underlying reasons for the enforcement of strict liability against the manufacturer, seller or lessor of products or the mass builder-vendor of homes do not apply to the ordinary landlord of a multiple family dwelling.[104]

The court found no mass production or mass marketing features in the type of landlord-tenant situation which it confronted in *Dwyer*. The court reasoned that a landlord is not the "manufacturer" of a product with a defect which could have been prevented by greater care in the manufacture or assembly. In the court's view, the landlord does not have the expertise to know and correct defective conditions and, therefore, should not be liable without proof of fault.[105] Because an apartment is usually constructed by numerous people and subject to deterioration from many causes, the *Dwyer* court found no analogy between a multiple dwelling and a product which the consumer could reasonably expect to leave the control of the manufacturer with an implied representation of safety:[106]

> The tenant may expect that at the time of the letting there are no hidden dangerous defects known to the landlord and of which the tenant has not been warned. But he does not expect that all will be perfect in his apartment for all the years of his occupancy with the result that his landlord will be strictly liable for all consequences of any deficiency regardless of fault. He expects only that in the event anything goes wrong with the accommodations or the equipment therein, the landlord will repair it when he knows or should know of its existence; and that if injury results liability will attach.[107]

In declining to extend the application of strict liability in tort to

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104 123 N.J. Super. at 55, 301 A.2d at 467.

105 *Id. But see* Reste Realty Corp. v. Cooper, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969), wherein the court stated:

> It has come to be recognized that ordinarily the lessee does not have as much knowledge of the condition of the premises as the lessor. Building code requirements and violations are known or made known to the lessor, not the lessee. He is in a better position to know of latent defects, structural and otherwise, in a building which might go unnoticed by a lessee who rarely has sufficient knowledge or expertise to see or to discover them. A prospective lessee, such as a small businessman, cannot be expected to know if the plumbing or wiring systems are adequate or conform to local codes. Nor should he be expected to hire experts to advise him. Ordinarily all this information should be considered readily available to the lessor who in turn can inform the prospective lessee.

Id.

106 123 N.J. Super. at 55-56, 301 A.2d at 467.

107 *Id.* at 56, 301 A.2d at 467.

the landlord-tenant context, the *Dwyer* court took the position that a tenant's remedy for personal injuries resulting from defective conditions should continue to be founded only on negligence principles. The court reasoned that an extension of strict liability would place too great a burden upon the landlord since it would subject him to liability "for every injury claim resulting from any untoward condition in every cranny of the building, whether it is reasonably foreseeable or not."[108] Since the landlord could not foresee, prevent or discover latent defects, the *Dwyer* court found the application of strict liability in tort to be without justice or reason.[109]

The New Jersey courts, in resolving *Dwyer*, have apparently slowed their advancement of the rights of tenants and consumers. The landlord's implied warranty of habitability, unlike most other warranties which provide a basis for tort liability, has apparently become a word of art. By limiting the landlord's warranty to the context of rent abatement and eviction, the court has robbed the concept of its vitality and potential for expansion.

Through its interpretation and application of the doctrine of strict liability in tort, New Jersey has, in the past, been in the forefront of the movement toward judicial protection of consumers injured by defective products. New Jersey has not limited the doctrine of strict liability in tort to the sales of products, but has expanded its application to reach sales of realty,[110] leases of personal property,[111] and performance of services.[112] The *Dwyer* decision is to be questioned both for its rejection of tort liability under the warranty of habitability theory and its failure to extend strict liability in tort to the lessor of residential premises.

The *Dwyer* opinion is especially unsatisfactory in grounding its rejection of strict liability on the purported inapplicability of products

108 *Id.*

109 *Id.* The rejection of strict liability in tort seems to rest upon the premise that the defendant in *Dwyer* was an "ordinary landlord of a multiple family dwelling." *Id.* at 55, 301 A.2d at 467. The opinion does not define or explain the parameters of a landlord's characterization as "ordinary." However, it would seem a legitimate inference that presented with an "extraordinary" landlord, strict liability would be imposed. Such a landlord might be similar to the builder-vendor in *Schipper* in whose mass construction and sales of homes the court found an analogy to the manufacture and distribution of automobiles. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965). One attribute that the "extraordinary" landlord must evidently demonstrate, however, is that he is in fact "in the business of selling" living space through the device of the residential lease. Consequently, there would be a firm basis for reliance upon an implied representation of skill and safety. *See* RESTATEMENT (SECOND) OF TORTS § 402 A, comment *f* (1965). *See also* notes 99 & 103 *supra.*

110 Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

111 Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).

112 Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969).

liability principles. In direct contradiction, many other courts and legal commentators have found a close analogy between the situation of the consumer and the residential tenant.[113] Much of the reasoning invoked by the courts in developing the landlord's implied warranty of habitability has been based upon products liability precedents.[114] These cases recognize not only the inability of the consumer/tenant to inspect the premises for fitness and the greater skill of the seller/landlord, but also the inequality of bargaining power as well. Moreover, the frequent use of adhesive lease "agreements," and the greater ability of the seller/landlord to bear and distribute losses arising out of personal injuries suffered by consumer/tenants, both militate toward expanding rather than limiting the landlord's liability in the current housing market.

There may be unarticulated reasons for the court's refusal to extend the landlord's tort liability. Burdens of repair and maintenance are already imposed on landlords through the application of the warranty of habitability to the payment of rent. Further burdens in the form of personal injury judgments may cause landlords to abandon their properties as unprofitable. Moreover, the payment of tort judgments or liability insurance premiums will increase the expenses of the landlord. These expenses would be passed on to the tenants in general in the form of higher rent, thus arguably depriving many people of the opportunity for adequate housing.[115]

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113 *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Lemle v. Breeden, 51 Hawaii 426, 432, 462 P.2d 470, 473-74 (1969); Grimes, *supra* note 19, at 210; Quinn & Phillips, *supra* note 19, at 254; Comment, *Demise of the Traditional Doctrine of Caveat Emptor*, *supra* note 24, at 982-83; Comment, *Housing Codes and a Tort of Slumlordism*, *supra* note 83, at 533-37; Note, *Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem*, 22 CASE W. RES. L. REV. 739, 772-73 (1971); Note, *supra* note 83, at 479-82; Note, *The Doctrine of Caveat Emptor as applied to Both the Leasing and Sale of Real Property: The Need for Reappraisal and Reform*, 2 RUTGERS-CAMDEN L.J. 120, 137-39 (1970).

114 *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Lemle v. Breeden, 51 Hawaii 426, 432, 462 P.2d 470, 473-74 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 453-54, 251 A.2d 268, 272-73 (1969); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 483-84, 268 A.2d 556, 560 (Essex County Dist. Ct. 1970).

115 *See* Grimes, *supra* note 19, at 225-26; Comment, *Demise of the Traditional Doctrine of Caveat Emptor*, *supra* note 24, at 982; Note, *Emerging Landlord Liability: A Judicial Reevaluation of Tenant Remedies*, 37 BROOKLYN L. REV. 387, 400-01 (1971); Note, *The Doctrine of Caveat Emptor as Applied to Both the Leasing and Sale of Real Property: The Need for Reappraisal and Reform*, *supra* note 113, at 136. However, this trading off of compensation of the injured tenant in favor of protection of the private landlord's continued participation in the housing market through profit incentives may be based on a fallacious assumption. Imposition of strict liability in tort upon manufacturers of defective consumer goods has apparently not driven great numbers of producers out of business. *See, e.g.*, Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 91-92, 207

Despite the advances made in the recognition of tenants' rights in recent years, the court's resolution of *Dwyer* shows the continued vitality of the dubious maxim of *caveat emptor*. This "obnoxious legal cliché"[116] has no place in a contractual relationship for the provision of housing services, particularly in urban areas which suffer from chronic housing shortages. Legislation implying a warranty of habitability and providing tort liability, based on civil law models,[117] might be an alternative solution to this recurring problem. In this way, both landlord

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A.2d 314, 326 (1965); Brody v. Overlook Hosp., 121 N.J. Super. 299, 311, 296 A.2d 688, 674-75 (L. Div. 1972), *appeal docketed*, Nos. A 1150-72, A 1153-72, App. Div., Jan. 9, 1973, discussed in Note, *New Jersey Court Applies Theory of Strict Tort Liability to Hospitals and Blood Banks for Transfusion-Related Hepatitis*, 4 SETON HALL L. REV. 730 (1973). *But see* G. STERNLIEB & R. BURCHELL, RESIDENTIAL ABANDONMENT (1973). This empirical study sought the causes of abandonment of slum housing in the city of Newark by landlords:

> Why then is residential abandonment taking place? In a limited economic sense it is simply a reflection of a market reality wherein revenues do not equal or exceed costs. There is a limited level of rent available to a landlord within the core [city], yet at the same time he is faced by uncontrollable increases in operating costs: taxes, repairs, insurance costs, security of repair, and collection personnel, all combined to make immediate yields precarious.

Id. at xxviii. The interviewed landlords named the cost and unavailability of fire and accident insurance for their properties as one of their major operating problems. *Id.* at 302. Unable to make a profit or sell their property, the landlord simply abandons the building. *Id.* at xxviv.

While the *Dwyer* court asserted that "the policy considerations underlying the adoption of strict liability . . . are non-existent in the landlord-tenant relationship," 123 N.J. Super. at 56, 301 A.2d at 467, it seems more accurate to state that the countervailing public policy favoring the continued presence of the private landlord precludes the imposition of strict tort liability. However, while the profit of a core city tenement landlord may be marginal, with increased likelihood of tort judgments possibly precipitating abandonment, *quaere* whether the same can be said of all residential landlords not sharing the slumlord's peculiar problems of taxes, maintenance and low income tenants.

116 Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961).

117 Under the civil law, an implied warranty is the rule and not the exception. See note 21 *supra*. The civil law places an obligation to repair on the landlord and, in contrast to common law principles, the landlord is conclusively presumed to know of any defects that make the leased property unsafe or uninhabitable. The landlord is absolutely liable for injury caused by defects in the premises that are not the result of the tenant's own actions. *See generally* Note, *Liability of Lessor or Property Owner to Third Persons for Accidental Personal Injury Caused by Defective Premises*, 4 TULANE L. REV. 611, 615 (1930).

See LA. CIV. CODE ANN. art. 2695 (West 1952), which reads as follows:

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

See, e.g., Anslem v. Travelers Ins. Co., 192 So. 2d 599, 600 (La. Ct. App. 1966).

and tenant lobbies could participate in formulating the scope of the landlord's liability.

Nevertheless, judicial imposition of strict liability in tort through an analogy to the law of products liability seems to have a basis in logic and fairness.[118] Strict liability in tort does not mean absolute liability for every injury or harm simply by virtue of the ownership of property on which a tenant is injured.[119] The courts and legislature have recognized the social and moral need for safe, decent housing. While rent abatement and the other traditional remedies provide important weapons in the tenant's fight for fair treatment, the imposition of tort liability in appropriate circumstances would provide a great incentive for the landlord to maintain his premises in habitable condition.[120]

John Zen Jackson

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118 An excellent argument for the imposition of strict tort liability and an analysis of the movement of the California courts in that direction is presented in Note, *Products Liability at the Threshold of the Landlord-Lessor, supra* note 83, at 479-90.

119 The landlord could avoid or limit such "absolute" liability through inspection, recourse against the original builder or supplier/manufacturer of a defective product in the building, established products liability defenses such as assumption of the risk and misuse and abuse of the product, and the requirement that the injury result from a defect. *See generally* Note, *Products Liability at the Threshold of the Landlord-Lessor, supra* note 83, at 485-89.

120 Comment, *Housing Codes and a Tort of Slumlordism, supra* note 83, at 526.