1986

The Foreseeable Risks of Apartment Living: Pennsylvania Defines a Landlord's Duty to Provide Security

John P. McLaughlin

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Criminal Law Commons, and the Property Law and Real Estate Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol31/iss2/5

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
Only during the last two decades have courts extended a landlord's tort liability to include injuries to tenants caused by the foreseeable criminal acts of third parties. The courts' longstanding reluctance to impose a duty of protection upon landlords has been founded on traditional property and tort concepts. In recent years, however, courts have relied on a variety of theories to bring down the legal barrier that for centuries has shielded landlords from such liability. As a result of this change, some tenants have recovered from their landlords for injuries inflicted by criminal intruders.

1. See, e.g., Ramsay v. Morrissette, 252 A.2d 509 (D.C. 1969). In Ramsay, a tenant sued her landlord for injuries resulting from a criminal assault that occurred in her apartment. Id. at 510. The tenant alleged that the landlord had maintained the building negligently and carelessly, in disregard of representations made at the beginning of the lease. Id. The court held that allegations that the landlord had negligently maintained the premises and thereby had caused the plaintiff's injuries precluded summary judgment in favor of the landlord. Id. at 512. See also Comment, The Landlord's Emerging Responsibility for Tenant Security, 71 COLUM. L. REV. 275, 284 (1971) ("Ramsay went further than any case prior to Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) in extending the lessor's duty to protect tenants from foreseeable criminal acts"). See generally Moore, The Landlord's Liability to His Tenants for Injuries Criminally Inflicted by Third Persons, 17 AKRON L. REV. 395, 395 (1984) (citing Comment, supra) ("Until approximately fifteen years ago a landlord was never held civilly liable to his tenants for injuries inflicted by the criminal acts of third persons... ").

2. For a discussion of the combination of tort and property law that has shielded a landlord from liability, see infra notes 18-40 and accompanying text.

In *Feld v. Merriam*, the Pennsylvania Supreme Court for the first time addressed the issue of a landlord's duty to protect his tenants. 

411 So. 2d 384 (Fla. 1981); Whelan v. Docoma Enters., Inc., 394 So. 2d 506 (Fla. Dist. Ct. App. 1981) (liability imposed for defects in locking mechanism of plaintiff's apartment door); Holley v. Mt. Zion Terrace Apartments, 382 So. 2d 98 (Fla. Dist. Ct. App. 1980) (duty imposed because landlord charged tenant for security but did not maintain security); Razden v. Parzen, 157 Ga. App. 848, 278 S.E.2d 687 (1981) (imposing duty on landlord to take reasonable precautions against reasonably foreseeable criminal conduct); Warner v. Arnold, 133 Ga. App. 174, 210 S.E.2d 350 (1974) (imposing duty on landlord to use reasonable or ordinary care to reduce unreasonable risk of criminal incident); Phillips v. Chicago Hous. Auth., 91 Ill. App. 3d 544, 414 N.E.2d 1133 (1980) (landlord may be liable to tenant if criminal assault results from condition of premises or landlord's negligence in safeguarding premises), aff'd, 89 Ill. 2d 122, 431 N.E.2d 1038 (1982); Stribling v. Chicago Hous. Auth., 34 Ill. App. 3d 551, 340 N.E.2d 47 (1975) (because facts made future criminal assault foreseeable, landlord had duty to take reasonable precautions); Thompson v. Cane Gardens Apartments, 442 So. 2d 1296 (La. Ct. App. 1983) (landlord breached promise that security measures would be provided); Day v. Castilow, 407 So. 2d 510 (La. Ct. App. 1981) (tenant may recover from landlord if she can prove landlord's conduct facilitated concealed presence of intruders); Carline v. Lewis, 400 So. 2d 1167 (La. Ct. App. 1981) (landlord may be liable if security guard was not properly performing his duty); Scott v. Watson, 278 Md. 160, 359 A.2d 548 (1976) (landlord may be liable if he fails to secure areas within his control against criminal intrusion); Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 408 (1972) (landlord may be liable for failing to reasonably secure common area against criminal intrusion); Samson v. Saginaw Professional Bldg., Inc., 393 Mich. 393, 224 N.W.2d 843 (1975) (following *Johnston*); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980) (landlord may be liable based on traditional negligence principles, breach of warranty of habitability, and breach of statute or ordinance); Braitman v. Overbrook Terrace Corp., 68 N.J. 568, 346 A.2d 76 (1975) (landlord may be liable for creating unreasonable risk of harm for his tenants); Miller v. State, 62 N.Y.2d 506, 467 N.E.2d 493, 478 N.Y.S.2d 829 (1984) (providing locked doors falls within the state's function as landlord of dormitories at state university); Loeser v. Nathan Hale Gardens, Inc., 73 A.D.2d 187, 425 N.Y.S.2d 104 (1980) (landlord has duty to take reasonable precautions to deter foreseeable criminal conduct in common areas); Sherman v. Concourse Realty Corp., 47 A.D.2d 194, 365 N.Y.S.2d 239 (1975) (landlord may be liable for failure to repair lock on lobby door which allowed criminal access to building); Brownstein v. Edison, 103 Misc. 2d 316, 425 N.Y.S.2d 773 (1980) (security provided by landlord was within warranty of habitability to degree it was an essential service for habitability); Skalski v. Baumboltz, 1 Phila. 332 (Pa. C.P. 1977) (landlord has duty to take reasonable precautions against foreseeable crime), aff'd, 256 Pa. Super. 595, 389 A.2d 208 (1978) (per curiam); Nixon v. Mr. Property Management Co., 690 S.W.2d 546 (Tex. 1985) (landlord may be liable for rape of 10-year-old girl due to violation of city ordinance). For a discussion of the legal theories utilized by courts to impose a duty of protection upon landlords, see infra notes 36-113 and accompanying text. 


5. See id. at 397, 485 A.2d at 749 (Zapalla, J., concurring) ("We are called to decide an issue of first impression."). In its decision below, the superior court also stated that the case was one of first impression in Pennsylvania. 314 Pa. Super. 414, 426, 461 A.2d 225, 231 (1983). The Pennsylvania Superior Court’s statement was not accurate, however. The superior court already had addressed the question. See Skalski v. Baumboltz, 256 Pa. Super. 595, 389 A.2d 208 (1978) (per curiam), aff'd, 1 Phila. 332 (Pa. C.P. 1977) (landlord has duty to take reason-
from the foreseeable acts of third parties. The case arose from the armed abduction of a couple in the garage of their apartment building. The court held that a landlord has no general duty to protect his tenants from criminal intrusion, but that a landlord may incur such a duty if he provides a "program of security" in order to attract new tenants or to keep existing tenants.

The Feld court indicated that it did not wish to follow the modern trend of imposing on landlords a duty to provide some type of security for their tenants. Instead, the Feld court echoed the traditional view

6. 506 Pa. at 390, 485 A.2d at 745. The court also addressed the scope of the landlord's duty to protect his tenants from such foreseeable criminal acts. Id.

7. Id. at 389, 485 A.2d at 744. For a further discussion of the facts of Feld, see infra notes 114-34 and accompanying text.

8. Justice McDermott wrote the majority opinion and was joined by Justices Nix, Flaherty, and Hutchinson. 506 Pa. at 388, 485 A.2d at 744. Justice Zappala joined the majority, but also filed a concurring opinion. Id. at 397, 485 A.2d at 748-49 (Zappala, J., concurring). Former Chief Justice Roberts and Justices Papadakos and Lauser did not participate in the decision. Id. at 397, 785 A.2d at 749.

9. Id. at 393, 485 A.2d at 747. Although the court noted that Pennsylvania law recognizes a landlord's duty to protect tenants from harm resulting from physical defects on the premises of which the landlord knew or should have known, the court emphasized that injuries resulting from physical defects are caused by the landlord's own negligence while injuries resulting from criminal activity are caused by an independent third party. Id. at 390, 485 A.2d at 745. The court also recognized that there may be an analogy between the landlord-tenant relationship and the relationship of property owner-business invitee, but distinguished the two relationships. Id. at 390-91, 485 A.2d at 745. For a discussion of the court's distinction and reasoning, see infra notes 127-34 and accompanying text.

10. 506 Pa. at 394, 485 A.2d at 747. The court acknowledged the general rule that absent a pre-existing duty a person is not under a duty to protect another from criminal assault by a third party, but the court relied on an exception to that principle which imposes liability where a person assumes a duty of protection and performs negligently. Id. at 392, 485 A.2d at 746 (citing Pascarella v. Kelley, 378 Pa. 18, 105 A.2d 70 (1954); Rehder v. Miller, 35 Pa. Super. 344 (1908); RESTATEMENT (SECOND) OF TORTS § 323 (1965)). The court emphasized that if a landlord agrees to provide tenants with a program of security, the landlord incurs a duty to maintain that program in a reasonable manner under the circumstances. Id. at 393-94, 485 A.2d at 747.

11. See 506 Pa. at 390-95, 485 A.2d at 746-48. This modern trend appears in the Restatement (Second) of Property:

For the purpose of this section, the unreasonable risk of harm from criminal intrusion constitutes a dangerous condition, so that where the landlord could by the exercise of reasonable care have discovered the unreasonable risk of criminal intrusion and could have made the condition safe from such unreasonable risk of criminal intrusion, he is subject to liability for physical harm caused by criminal intrusion if he has not taken the necessary precautions. As regards parts of the property
that, unless the landlord makes an agreement to provide security, he has no obligation to protect his tenants against criminals.\(^{12}\)

The *Feld* opinion contains ambiguities which may make the opinion difficult for courts to apply in the future.\(^{13}\) Before discussing these ambiguities, however, this note will examine the modern trend of imposing a duty of protection upon landlords, review the legal theories supporting this trend, and examine the analytical problems underlying these theories.\(^{14}\) The note will then discuss the *Feld* court’s reaction to the trend of imposing a duty of protection on landlords and the resulting limited nature of this duty in Pennsylvania.\(^{15}\) In addition, this note will suggest that the *Feld* court overreacted in its attempt to limit a landlord’s duty.\(^{16}\) Finally, the note will suggest a future course of action for courts.

\(^{12}\) 506 Pa. 383, 390, 485 A.2d 742, 745. This traditional view has been discussed by several other courts. See, e.g., Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 481 (D.C. Cir. 1970) (general rule that private person does not have duty to protect another from criminal attack by third person has been applied to landlord-tenant relationship); Ramsay v. Morrissette, 252 A.2d 509, 511-12 (D.C. 1969) (“As a general rule, a landlord has no duty to protect a tenant, or a tenant’s property, from criminal acts of third persons.”); King v. Ilikai Properties, Inc., 632 P.2d 657, 661-62 (Hawaii Ct. App. 1982) (without special relationship or special circumstances landlord has no duty to protect his tenants from criminal intrusion).

\(^{13}\) For a discussion of the ambiguities in the *Feld* court’s decision, see infra notes 135-81 and accompanying text.

\(^{14}\) For a discussion of the legal theories supporting the trend of imposing liability upon landlords and the analytical problems underlying these theories, see infra notes 54-113 and accompanying text.

\(^{15}\) For a discussion of the *Feld* court’s decision, see infra notes 114-34 and accompanying text.

\(^{16}\) For a discussion of how the *Feld* court possibly overreacted in its attempt to limit a landlord’s duty of protection, see infra notes 135-81 and accompanying text.
NOTE

631

and legislatures addressing this issue.17

II. BACKGROUND

A. Overview of Traditional Landlord Tort Liability

Traditionally, the rule of law with regard to leases was caveat emptor.18 Under that rule, the tenant was deemed to be the owner of the leased premises for a term,19 and he was responsible for injuries resulting from the condition of the premises.20 The landlord, therefore, was not liable to the tenant or to others for any defective condition existing at the time of the lease.21 As the needs and views of society have changed, however, exceptions to this traditional view have emerged.22

17. For this suggested future course of action, see infra notes 182-90 and accompanying text.

18. See Pugh v. Holmes, 486 Pa. 272, 279, 405 A.2d 897, 900 (1979). The rule of caveat emptor as applied to landlord-tenant relationships developed in England in the sixteenth century and was adopted in Pennsylvania in the nineteenth century. Id. Under this doctrine, the landlord had no obligations to the tenant other than those made expressly, and the tenant’s obligation to pay rent was independent of the landlord’s covenants. Id. at 280, 405 A.2d at 901 (quoting Pugh v. Holmes, 253 Pa. Super. 76, 80, 384 A.2d 1234, 1237-38 (1978)). Underlying this doctrine was the historical assumption that the landlord and tenant have equal bargaining power, an assumption that developed, in part, from the agrarian tenant’s ability to fully inspect the dwelling and to make simple repairs. Id. at 280, 405 A.2d at 900 (quoting Pugh v. Holmes, 253 Pa. Super. 76, 80, 384 A.2d 1234, 1237-38 (1978)).

19. See id. at 280, 405 A.2d at 901. See also W. Prosser & W. Keeton, The Law of Torts § 63, at 434 (5th ed. 1984); Recent Development, Expanding the Scope of the Implied Warranty of Habitability: A Landlord’s Duty to Protect Tenants from Foreseeable Criminal Activity, 33 Vand. L. Rev. 1493, 1495-96 (1980) (lessee, as purchaser of real property, took premises “as is” and doctrines of caveat emptor applied).


22. See Pugh v. Holmes, 486 Pa. 272, 279-80, 405 A.2d 897, 900-01 (1979) (recognizing that, in changed times, caveat emptor has outlived its usefulness); Browder, supra note 20, at 102-09 (acknowledging that exceptions to caveat emptor “some appearing long ago, have eroded the old rule and are now generally accepted as part of the traditional law”). These exceptions to the traditional nonliability of landlords are stated in the Second Restatement of Torts:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other

Published by Villanova University Charles Widger School of Law Digital Repository, 1986
These exceptions include the duty of a landlord to use reasonable care to keep common areas\(^{23}\) safe,\(^{24}\) to disclose latent defects,\(^{25}\) to inspect and repair those portions of the leased premises used by the public,\(^{26}\) and to use reasonable care in endeavoring to repair the portions of the

for physical harm resulting from his failure to exercise reasonable care
to perform his undertaking, if
(a) his failure to exercise such care increases the risk of such
harm, or
(b) the harm is suffered because of the other's reliance upon the
undertaking.

**Restatement (Second) of Torts § 323 (1965).** The Pennsylvania Supreme Court observed in *Feld* that § 323 has been the law in Pennsylvania for some time. 506 Pa. at 392-93, 485 A.2d at 746-47 (citing Cradel v. Inouye, 491 Pa. 534, 541, 421 A.2d 674, 677 (1980); DeJesus v. Liberty Mut. Ins. Co., 423 Pa. 198, 201, 233 A.2d 849, 850 (1966)). See generally W. Prosser & W. Keeton, *supra* note 19, § 63, at 435 (discussing exceptions to landlord's nonliability under common law). For a further discussion of the exceptions to the traditional view, see infra notes 22-35 and accompanying text.

23. Common areas are those areas of a multiple unit dwelling over which the landlord retains control and which do not pass to the tenant, including those areas that may be used by all the tenants of an apartment building. See Baldwin v. McElDowney, 324 Pa. 399, 403, 188 A. 154, 155 (1936).


25. Kolojeski v. John Deisher, Inc., 429 Pa. 191, 195, 239 A.2d 329, 331 (1968) (dictum) (landlord liable if injury results from dangerous condition of which landlord knew and lessee had no knowledge). See also Restatement (Second) of Torts § 358 (1965). Section 358 provides:

(1) A lessor of land who conceals or fails to disclose to his lessee any condition, whether natural or artificial, which involves unreasonable risk of physical harm to persons on the land, is subject to liability to the lessee and others upon the land with the consent of the lessee or his sublessee for physical harm caused by the condition after the lessee has taken possession, if
(a) the lessee does not know or have reason to know of the condition or the risk involved, and
(b) the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk.

(2) If the lessee actively conceals the condition, the liability stated in Subsection (1) continues until the lessee [or] discovers it and has reasonable opportunity to take effective precautions against it. Otherwise, the liability continues only until the vendee [lessee] has had reasonable opportunity to discover the condition and to take such precautions.

*Id.*

26. Miller v. Atlantic Refining Co., 393 Pa. 466, 143 A.2d 380 (1958) (landlord liable to third party injured on leased premises since landlord owes duty to public to protect it from dangerous conditions); Folkman v. Lauer, 244 Pa. 605, 91 A. 218 (1914) (owner of rented baseball park liable for injuries to spectators when grandstand collapsed).
premises retained by the tenant. 27 Recently, many courts and legislatures have adopted the view that a warranty of habitability 28 is implied in every residential lease. 29 In Pugh


28. In Pennsylvania the implied warranty of habitability requires, at a minimum, that the leased premises be safe and sanitary; however, there is no obligation on the landlord to supply a perfect or aesthetically pleasing dwelling. Pugh v. Holmes, 486 Pa. 272, 289, 405 A.2d 897, 905 (1979). The Pugh court stated that the warranty is breached if a defect exists that prevents the use of the dwelling for its intended purposes. Id. In order to establish a breach, the tenant must prove he gave notice of the defect to the landlord, that the landlord had a reasonable time to repair the defect, and that the landlord failed to do so. Id. at 290, 405 A.2d at 906 (1979).

The leading case analyzing the purpose of the warranty of habitability is Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970). The Javins court explained that, today, unlike the feudal era, the land is no longer the most important part of a leasehold, and the modern urban tenant is less capable of making repairs than his predecessor. 428 F.2d at 1074-79. The court, therefore, required the landlord in Javins to warrant the habitability of the urban multi-unit residential premises. Id. at 1074. The Javins court decided that satisfaction of the warranty was dependent upon compliance with applicable housing codes. Id. at 1080. Moreover, under Javins, the tenant's obligation to pay rent is dependent upon the landlord providing habitable premises, and the duties imposed by the warranty cannot be waived through contract. Id. at 1081-82. In addition, the warranty continues to operate throughout the length of the lease. Id. at 1081.

The trend that led to the landmark decision in Javins started with Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). In Pines, the court stated:

To 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 rapid population increases is too important to be rebuffed by the obnoxious legal cliche, caveat emptor. Id. at 596, 111 N.W.2d at 412-13.

v. Holmes, the Pennsylvania Supreme Court adopted the warranty of habitability in response to the modern tenant’s lack of bargaining power, the acute housing shortage, and the reality that a modern


30. 486 Pa. 272, 405 A.2d 897 (1979). In Pugh, the landlord had brought an action against the tenant to regain possession of the premises and to collect unpaid rent. Id. at 278, 405 A.2d at 900. In defense, the tenant asserted that the landlord had breached the implied warranty of habitability, and the tenant claimed as a set-off the amount spent to repair a broken lock. Id. at 279, 405 A.2d at 900. The Pennsylvania Supreme Court held that a lease is in essence a contract and that a warranty of habitability is implied in every residential lease. Id. at 284, 405 A.2d at 903. The court also held that the tenant’s rent obligations under the lease and the landlord’s obligation to provide a habitable premises are mutually dependent. Id.

31. Id. at 282, 405 A.2d at 902. The idea that a tenant had inferior bargaining power in relation to his landlord was first stated in Edwards v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969). In Edwards, the court relied on the tenant’s lack of bargaining power to conclude that a landlord could not evict a tenant for utilizing the remedy of constructive eviction. Id. In Javins v. First Nat’l Realty Corp., the United States Court of Appeals for the District of Columbia also discussed the tenants’ lack of bargaining power. 428 F.2d at 1079 (D.C. Cir.) (citing Edwards v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969); 2 R. Powell, THE LAW OF REAL PROPERTY ¶ 221[1], at 179 (1967), cert. denied, 400 U.S. 925 (1970). The Javins court reasoned that tenants have very little leverage to enforce demands for better hous-
lease should be viewed as a contract in which the tenant expects to exchange periodic payments for "a bundle of goods and services." In light of these developments, and especially with the advent of the warranty of habitability, a few courts have held that the common law tort immunity of landlords is outdated and have instead imposed on the landlord a duty of reasonable care under all of the circumstances. Recently, the California Supreme Court went even further and held a landlord liable on a theory of strict liability for latent structural defects in the premises.

33. 486 Pa. at 282, 405 A.2d at 902 (quoting Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970)). This language indicates that, because of the trend to interpret leases according to contract law, the common law view of leases is no longer applicable to the modern urban landlord-tenant relationship. See 486 Pa. at 282, 405 A.2d at 902.

34. Brennan v. Cockrell Invs., Inc., 35 Cal. App. 3d 796, 800-01, 111 Cal. Rptr. 122, 125 (1973) (requiring landlord to use reasonable care under all circumstances is sound social policy); Mansur v. Eubanks, 401 So. 2d 1328, 1330 (Fla. 1981) (landlord has continuing duty of reasonable care in maintaining and repairing leased premises unless waived by tenant); Young v. Garwacki, 380 Mass. 162, 169, 402 N.E.2d 1045, 1049 (1980) (landlord has duty to act with reasonable care under all circumstances); Sargent v. Ross, 113 N.H. 388, 397, 308 A.2d 528, 534 (1973) (a landlord must act as reasonable person under all circumstances); Pagelsdorf v. Stafeco Ins. Co., 91 Wis. 2d 734, 741, 284 N.W.2d 55, 59 (1979) (social policy dictates adoption of rule requiring landlords to exercise ordinary care in maintaining premises).

By imposing a standard of reasonable care upon landlords, the courts have applied the general principles of tort law to landlords, a dramatic reversal of the common law rule of landlord nonliability in tort. See Sargent, 113 N.H. 388, 308 A.2d 528; W. PROSSER & W. KEETON, supra note 19, § 63 at 446. In addition, the California Court of Appeals recently held that a landlord's duty to maintain his premises was nondelegable. Cordet v. Robert Christopher Co., 164 Cal. App. 3d 384, 392, 210 Cal. Rptr. 517, 521 (1985). Thus, according to the Cordet court, a landlord cannot escape liability by retaining an independent contractor to maintain the leased premises. Id.

35. Becker v. IRM Corp., 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985). In Becker, a tenant fell against an untempered, frosted glass shower door, severely breaking and lacerating his arm. Id. at 457, 698 P.2d at 117, 213 Cal. Rptr. at 214. The landlords were not aware of the fact that the doors were made of untempered glass and, therefore, were not aware of any risk to tenants until the injury to the plaintiff. Id. at 458, 698 P.2d at 117-18, 213 Cal. Rptr. at 214-15. The court observed that landlords "are an integral part of the enterprise of producing and marketing rental housing" and "have more than a random or accidental role in the marketing enterprise." Id. at 467, 698 P.2d at 124, 213 Cal. Rptr. at 221. The court concluded that since landlords are an integral part of the rental business "they should bear the cost of injuries resulting from such defects rather than injured persons who are powerless to protect themselves." Id. (citing Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 576, 337 P.2d 897, 27 Cal. Rptr. 697 (1962)). The court also held that under traditional
B. Theories Utilized to Impose a Duty of Protection

Modern courts increasingly view leases as contracts in which the tenant's rental obligation is dependent on the landlord's performance of certain duties. Nevertheless, courts still rely, in part, on traditional property law to avoid imposing liability on landlords for injuries to tenants that result from criminal intrusion. The courts' reluctance to impose a duty of protection on landlords also derives from the tort principle that a person is rarely under a duty to protect another person from the criminal conduct of a third party. This principle reflects the legal

negligence theory a landlord, when purchasing a rental premises, has a duty to exercise due care in inspecting the premises for dangerous conditions in existence at the time of purchase. Id. at 469, 698 P.2d at 125, 213 Cal. Rptr. at 222. Moreover, the court indicated that the lack of knowledge of the dangerous condition does not preclude liability. Id. For a recent discussion of California law concerning landlords' and landowners' tort liability, see Comment, Cordet, Preston and Becker: Recent California Decisions Impacting Landowner Tort Liability, 13 W. ST. U.L. REV. 279 (1985).

36. See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir.) ("trend toward treating leases as contracts is wise and well considered"). cert. denied, 400 U.S. 925 (1970); Pugh, 486 Pa. at 284, 405 A.2d at 903 (a lease is in the nature of a contract).

37. For a discussion of the treatment of leases under traditional property law, see supra notes 18-21 and accompanying text.

38. See, e.g., Feld, 506 Pa. 383, 485 A.2d 742 (landlord has no general duty to provide protection for tenants); King v. Ilikai Properties Inc., 632 P.2d 657 (Hawaii Ct. App. 1982) (absent "special circumstances" landlord has no duty of protection). See also Haines, supra note 11, at 305 (treatment of lease as conveyance was reason for judicial reluctance to impose duty of protection upon landlords).

39. See Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 481 (D.C. Cir. 1970) (noting general rule that individuals are rarely under duty to protect another from criminal attack). Under tort law there is no duty to protect another from criminal assault unless a special relationship exists between the parties, and courts have been reluctant to find a special relationship between landlord and tenant. See, e.g., Trice v. Chicago Hous. Auth., 14 Ill. App. 3d 97, 99, 302 N.E.2d 207, 209 (1973). In addition, while some courts have imposed liability on landlords for tenants' injuries resulting from criminal assaults in common areas which the landlords have a duty to keep safe, other courts have been unwilling to accept this analysis, maintaining that a landlord's duty to keep common areas safe extends only to keeping the common areas free of physical defects and not to preventing criminal activity. See Feld, 506 Pa. at 392, 485 A.2d at 746 (1984); Trice, 14 Ill. 3d at 99, 302 N.E.2d at 209.

The theory that an individual has no duty to protect another from criminal attack is also stated in § 315 of the Restatement (Second) of Torts. Section 315 provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Restatement (Second) of Torts § 315 (1965).
distinction between misfeasance and nonfeasance, which weighs against imposing on landlords a duty to protect tenants from criminal intrusion.40

Section 314A of the Restatement explains the types of special relationships that give rise to the duty of protection mentioned in § 315:

1. A common carrier is under a duty to its passengers to take reasonable action
   (a) to protect them against unreasonable risk of physical harm, and
   (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
2. An innkeeper is under a similar duty to his guests.
3. A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
4. One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Id. § 314A. In addition, under § 323 of the Restatement a person may be held to a duty of protection if he or she voluntarily assumes such a duty. Id. § 323. For the text of § 323, see supra note 22.

40. Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970) (citing Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 186 A.2d 291 (1962)). In explaining the development of the legal distinction between misfeasance and nonfeasance, one commentator has stated:

This distinction is founded on that attitude of extreme individualism so typical of anglo-saxon legal thought.

... In the case of active misfeasance the victim is positively worse off as a result of the wrongful act. In cases of passive inaction plaintiff is in reality no worse off at all. This situation is unchanged; he is merely deprived of a protection which, had it been afforded him, would have benefited him.


According to one court, the reasons for applying the misfeasance-nonfeasance distinction to the landlord-tenant relationship are the following: judicial reluctance to tamper with the traditional common law concept of the landlord-tenant relationship; the notion that the act of a third person in committing an intentional tort or crime is a superseding cause of the harm to another...; the... difficult problem of determining foreseeability of criminal acts; the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty [to provide security]; and conflict with the public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector.

Kline, 439 F.2d at 481. The economic impact of imposing on landlords a duty of providing criminal protection was first recognized by the New Jersey Supreme Court. Goldberg, 38 N.J. at 591-92, 186 A.2d at 298-99. The Goldberg court pointed out that the burden of imposing this duty would fall on those people who could least afford it. Id. at 591, 186 A.2d at 298. The court stated, "the bill will be paid, not by the owner, but by the tenants. And if, as we apprehend, the incidence of crime is greatest in the areas in which the poor must live, they, and they alone, will be singled out to pay for their own police protection." Id. For a
1. The Kline Decision

Bringing the law into line with the modern landlord-tenant relationship, the leading case to impose on landlords a duty to provide tenants with security is *Kline v. 1500 Massachusetts Avenue Apartment Corp.*


In applying the legal distinction between misfeasance and nonfeasance, the courts have been reluctant to require landlords to act affirmatively to protect tenants from criminal intrusion. *See, e.g.*, Cross v. Chicago Hous. Auth., 74 Ill. App. 3d 921, 393 N.E.2d 580 (1979), aff'd sub nom. Cross v. Wells Fargo Alarm Servs., 82 Ill. 2d 313, 412 N.E.2d 472 (1980). *See also* Haines, *supra* note 11, at 306 (*"Absent active wrongdoing on the part of (the) landlord, courts have encountered difficulty in defining the circumstances that warrant imposing a duty of protection on landlords . . ."*).

41. *See* Browder, *supra* note 20, at 145; Haines, *supra* note 11, at 299 (stating that *Kline* opinion constituted significant departure from established rules).

Although *Kline* is often cited as the leading case in this area of law, the basis for the *Kline* decision was developing for several years prior to the *Kline* court's decision. *See Comment, supra* note 1, at 284 (noting two prior cases with holdings similar to *Kline*).

42. 439 F.2d 477 (D.C. Cir. 1970). In *Kline*, the plaintiff was injured in a common hallway of her apartment building. *Id.* at 478. The plaintiff had moved into the apartment building in 1959 when the security measures included a 24-hour doorman and at least one employee in the lobby who could observe the elevators. *Id.* at 479. The plaintiff testified that she had moved into the building because she was interested in security. *Id.* at 479 n.1. At the time of the assault, however, most of the security measures in effect at the start of her lease had been discontinued. *Id.* at 479. The court held that a landlord of an urban, multi-unit apartment complex had a duty to protect his tenants from criminal attack. *Id.* at 483. The court stated that this duty was based on three theories: (1) the theory that the landlord was in a better position than the tenant to provide the necessary level of protection; (2) the theory that where the tenant continues to pay the same level of rent, the landlord has a duty to continue to provide the same level of security; and (3) the theory that the landlord-tenant relationship was analogous to the innkeeper-guest relationship where the innkeeper has a duty to protect his guest from foreseeable criminal assault. *Id.* at 483-85.

In dissent, Judge McKinnon pointed out that at the time of the assault the plaintiff's original lease had expired, rendering her a month-to-month tenant. *Id.* at 492 (McKinnon, J., dissenting). The plaintiff knew, therefore, of the decline in the apartment's security services, and, according to Judge McKinnon, the degree of security that the landlord was required to provide and that the tenant reasonably could expect should not have been measured by the standards in effect at the beginning of the expired lease. *Id.*

43. The court system of the District of Columbia was restructured in 1971, after the *Kline* decision. *See* District of Columbia Reform and Criminal Procedure Act of 1970 (codified as amended at D.C. Code Ann. §§ 11-101 to -204, 23-101 to -1705 (1981)). Under the act of February 1, 1971, the District of Columbia Court of Appeals became the highest court of review for the District, and the United States Court of Appeals for the District of Columbia Circuit could no longer review the decisions of the District of Columbia Court of Appeals. *Id.* § 11-102. The District of Columbia Court of Appeals was no longer bound by
ruled that a landlord has a duty "to take . . . steps which are within his power to minimize the predictable risk [of crime] to his tenants." The Kline court offered three reasons for its landmark holding. First, the court stated that landlords, not tenants, are in a position to implement security measures. Second, relying in part on the warranty of habitability, the court stated that there was implied in every lease an obligation on the landlord to provide protective measures within his reasonable capacity. Third, the court compared the modern landlord-tenant relationship to the common law relationship between an innkeeper and a guest, in which the innkeeper has a duty to protect his guests from criminal attacks by third persons.

Despite the apparent acceptance of Kline by courts and scholars, some commentators have criticized the decision for its unnecessary and unsatisfactory mixture of tort and contract analysis, and for its failure to apply the decision of the District of Columbia Circuit rendered after the effective date of the bill. Id. Decisions announced prior to that date, such as Kline, remain the law of the District of Columbia. Id. However, the District of Columbia Court of Appeals has decided that it may refuse to follow such a decision, but only after a decision by the court sitting en banc. See M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. 1971). The Kline decision remains unimpaired by the reorganization. See Spahr v. Obwoya, 369 A.2d 173 (D.C. 1977). For a discussion of the District of Columbia Court Reform Act, see Williams, District of Columbia Reorganization, 1970, 59 Geo. L.J. 477, 493-94 (1971).

44. 439 F.2d at 481. In reaching its decision, the Kline court noted that it is no longer appropriate to view leases as a conveyance of land for a term. Id. at 481. The court said that Javins had "clear[ed] away some of the legal underbrush from medieval common law obscuring the modern landlord-tenant relationship." Id. at 482.

45. Id. at 483-84. The court stated that "[n]ot only as between landlord and tenant is the landlord best equipped to guard against the predictable risk of intruders, but even as between the landlord and the police power of government is the landlord in the best position to take the necessary protective measures." Id. at 484.

46. Id. at 485. The court ruled that based on the facts of Kline, the protective measures that were within the landlord's reasonable capacity were those measures which were in existence at the commencement of the lease. Id. For a brief discussion of the warranty of habitability, see supra notes 28-33 and accompanying text. For a further discussion of how the warranty of habitability has been applied to impose a duty of protection upon landlords, see infra notes 73-88 and accompanying text.

47. 439 F.2d at 482, 485. See also Annot., 70 A.L.R.2d 628 (1960) (discussing liability of innkeeper or restauranteur). For a further discussion of the innkeeper-guest relationship, see infra notes 64-66 and accompanying text.

48. See Browder, supra note 20, at 145 (Kline is the leading case on this, and subsequent courts have relied on a variation of the Kline court's contract and tort theories to impress a duty of protection upon landlords); Haines, supra note 11, at 300 (Kline decision has generally received favorable criticism from legal scholars, although it took a few years before other courts were persuaded by its analysis).

49. See Note, Landlord Has Duty to Take Reasonable Precautions to Protect His Tenants Against Criminal Acts of Third Parties, 45 N.Y.U. L. Rev. 943, 954 (1970) (suggesting that Kline court could have relied solely on tort theory and that its "analysis of the landlord's contractual obligation was unsatisfactory").
to render a precise theory of landlord liability.\textsuperscript{50} It also has been suggested that the \textit{Kline} decision may have limited precedential value because of its vagueness.\textsuperscript{51} The accuracy of this criticism is evidenced by the fact that many courts have chosen to limit \textit{Kline} strictly to its facts.\textsuperscript{52} Moreover, other courts have virtually ignored the \textit{Kline} court's analysis and, instead, have relied on alternative theories in resolving the question of a landlord's duty to provide protection for his tenants.\textsuperscript{53}

2. \textit{Special Relationship Theory}

Since the \textit{Kline} decision, some courts have relied on the special relationship between a landlord and tenant to impose on landlords an affirmative duty to provide some degree of security for tenants.\textsuperscript{54} The

\textsuperscript{50} See Comment, supra note 1, at 286 ("The alternative lines of reasoning used by the \textit{Kline} court in arriving at its holding leave a large element of ambiguity as to the precise scope and applicability that may be expected to be given to the case as precedent."); Note, \textit{Emerging Landlord Liability: A Judicial Reevaluation of Tenant Remedies}, 37 Brookly L. Rev. 387, 396 (1971) [hereinafter cited as Note, \textit{Emerging Landlord Liability}] (\textit{Kline} court failed to specify basis for its holding as either tort or contract); Note, supra note 19, at 1512-13 ("If the \textit{Kline} duty to protect was actually a duty only to maintain existing security measures, then \textit{Kline} did not really impose any new obligations on a landlord; instead, it merely held him liable under traditional notions of misfeasance.") (emphasis in original) (footnote omitted).

\textsuperscript{51} See Note, \textit{Emerging Landlord Liability}, supra note 50, at 395 (failure to rely on clean legal analysis places future application of \textit{Kline} in question because if its underlying theory is in the contract, the services that the landlord afforded at the time of the signing of the lease are implied in the terms of that lease, but if the theory is tort-based, it might be inferred that every landlord has a duty to provide protection against third parties). See also Comment, \textit{The Landlord's Duty in New York to Protect His Tenant Against Criminal Intrusions}, 45 Alb. L. Rev. 988, 1001 (1981) ("Although the \textit{Kline} case developed several new approaches to the question of whether a landlord owes a duty of security to his tenant, its precedential value remains uncertain.").


\textsuperscript{53} See, e.g., Spar v. Obwoya, 369 A.2d 173 (D.C. 1977). The court in \textit{Spar} stated that the facts of that case were "in sharp contrast" to those of \textit{Kline} and held that the landlord had a duty to use reasonable care in maintaining common areas, which included a duty to provide security. \textit{Id.} at 177. See also Scott v. Watson, 278 Md. 160, 359 A.2d 548 (1976) (finding no special relationship between landlord and tenant but imposing on landlord a duty to take reasonable measures against crime existing on landlord's premises).

Kline court led the way in developing this theory, but later decisions by other courts, such as the Michigan Supreme Court in Johnston v. Harris and Samson v. Saginaw Professional Building, arguably have gone even further by utilizing a form of the special relationship theory to impose a duty of protection upon landlords.


55. See 439 F.2d at 841-43. For a discussion of the Kline decision, see supra notes 41-53 and accompanying text.

56. 387 Mich. 569, 198 N.W.2d 409 (1972). In Johnston, a tenant brought an action against his landlord for injuries he sustained when he was attacked in the hall of his apartment building as he approached his apartment's front door. Id. at 572, 198 N.W.2d at 409. The plaintiff asserted that the hall was unlocked and dimly lit. Id. The plaintiff argued that in a high crime district it was reasonably foreseeable that inadequate lighting and an unlocked door would create a risk of criminal assault. Id. at 573, 198 N.W.2d at 410. In holding that the tenant could maintain his action against the landlord, the court reasoned that after the landlord had been informed of similar assaults in the neighborhood, he had a duty to provide adequate lighting and locks in common areas. Id. at 575, 198 N.W.2d at 411.

57. 393 Mich. 393, 224 N.W.2d 843 (1975). In Samson, an employee of a tenant company in the Saginaw Professional Building was attacked by a patient of a mental health clinic that was also a tenant of the building. Id. at 398-99, 224 N.W.2d at 845. The court affirmed a jury verdict for the plaintiff and stated: "[T]he existence of this relationship between the defendant and its tenants and invitees placed a duty upon the landlord to protect them from unreasonable risk of physical harm." Id. at 407, 224 N.W.2d at 849 (citing RESTATEMENT (SECOND) OF TORTS § 314A(3) (1965)).

58. It is noted that neither the Johnston nor Samson courts explicitly stated that the special relationship theory was the basis for its holding. An examination of the courts' reasoning, however, suggests that the special relationship theory underlies both decisions.

The Johnston court relied heavily upon § 302B of the Restatement (Second) of Torts. See Johnston, 387 Mich. at 575-76, 198 N.W.2d at 410-11. Section 302B states that "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm even though such conduct is criminal." RESTATEMENT (SECOND) OF TORTS § 302B (1965). Comment a to § 302B, however, explains that comment a of § 302 is also applicable to § 302B. Id. § 302B comment a. Section 302 comment a states that the duties of an individual who omits to act are confined to situations where a special relationship exists between the parties, and specifically refers to § 314 of the Restatement which explains what type of special relationships are or should be recognized. Id. § 302 comment a (emphasis added). Thus, as the Restatement indicates, when employing § 302B to analyze the duties of an individual who omits to act, as the Johnston court did, that section must be read in conjunction with comment a to § 302 and § 314. As a result of this analysis, it is clear that an individual cannot be held liable under a § 302B analysis for omitting to act for the benefit of another person unless a special relationship exists. See id. § 302 comment a.

In Samson, the Michigan court first noted that the case required the court to
Most courts, however, have been hesitant to adopt the view that the landlord-tenant relationship is a special one that imposes on the landlord an affirmative duty to protect tenants from criminal intrusion.59 This reluctance may be attributed to the fact that the landlord-tenant relationship is not one of the special relationships in which the law traditionally has imposed a duty of protection.60 Policy considerations, however, support the conclusion that the landlord-tenant relationship is a special one,61 and some courts, such as the Kline court,62 have suggested “revisit” Johnston. Samson, 393 Mich. at 402, 224 N.W.2d at 847. As in Johnston, the court in Samson relied on § 302B of the Restatement. Id. at 404, 224 N.W.2d at 848. The Samson court then stated that in order to require a person to protect another, the parties must share a relationship that society views as “sufficiently strong.” Id. at 406, 224 N.W.2d at 849 (citing Restatement (Second) of Torts §§ 314-324A (1965)). The court then concluded that “this relationship between the defendant and its tenants and invitees placed a duty [of protection] upon the landlord.” Id. at 407, 224 N.W.2d at 849 (citing Restatement (Second) of Torts § 314A(3)).

While the special relationship theory seems implicit in the Johnston and Samson opinions, both courts also seem to have relied on the common area theory. In Johnston, the assault occurred in a common area, and the court failed to specify the precise theory upon which it was relying. Johnston, 387 Mich. at 573-76, 198 N.W.2d at 410-11. See Browder, supra note 20, at 148 (Johnston decision “leaves unclear whether the court would have extended the landlord’s duty beyond the familiar obligation to keep common areas in proper condition”). In Samson, the court likewise confused its opinion by stating that the landlord has responsibility to keep common areas “in good repair and reasonably safe for the use of tenants . . .” Samson, 393 Mich. at 407, 224 N.W.2d at 849.

59. See, e.g., Pippin v. Chicago Hous. Auth., 78 Ill. 2d 204, 208, 399 N.E.2d 596, 598 (1979) (“this case does not fall into the ‘special relationship’ exception’); Cross v. Chicago Hous. Auth., 74 Ill. App. 3d 921, 925, 393 N.E.2d 580, 584 (1979) (“A landlord-tenant relationship is not one which [is a special relationship] . . . in this jurisdiction’), aff’d, Cross v. Wells Fargo Alarm Servs., 82 Ill. 2d 313, 412 N.E.2d 472 (1980); Scott v. Watson, 278 Md. 160, 167, 359 A.2d 548, 553 (1976) (“we decline to impose a special duty on a landlord to protect his tenants from criminal activity’); Gulf Reston, Inc. v. Rogers, 215 Va. 155, 158, 207 S.E.2d 841, 844 (1974) (“we have found no relevant case imposing a duty on a landlord to protect a tenant from isolated criminal acts of third persons merely because of the relationship of landlord and tenant”). See also Haines, supra note 11, at 327 (few jurisdictions have imposed duty of protection upon landlords based on special relationship theory).

60. See Restatement (Second) of Torts § 314A (1965). Traditionally, the special relationships in which a duty of protection has been imposed include: innkeeper-guests, common carrier-passenger, business invitor-invitee, landowner-invitees, and employer-employee. Id. Comment b to § 314A provides that this list is not exclusive and states that the “law appears . . . to be working slowly toward a recognition of the duty to . . . protect in any relation of dependence or of mutual dependence.” Id. § 314A comment b. The Kline court and others, in holding that the landlord-tenant relationship is a special one, have so held because of the landlord’s exclusive control over much of the premises and the tenant’s dependence on the landlord for repairs and security. See Kline, 439 F.2d at 482-83.

61. The fact that considerations of public policy may be utilized in expanding the traditionally accepted special relationships has been recognized by the Restatement (Second) of Torts:

The duties stated in this Section arise out of special relations between
that a special relationship exists because the general rule exonerating a third party from any duty to protect another from criminal attacks has no applicability to the modern landlord-tenant relationship in urban multi-dwelling apartment buildings where the tenant has little control over the premises and is dependent upon the landlord for repairs and security.\footnote{63} In addition, some courts have supported their adoption of the special relationship theory by developing the analogy between the landlord-tenant relationship and the traditional special relationships in which the law has imposed a duty of protection, such as the innkeeper-guest relationship.\footnote{64} Historically, an innkeeper owes his guests a high standard of care approaching that of an insurer.\footnote{65} Because such a standard, if applied to landlords, could make them insurers of tenants' safety and vulnerable to unlimited liability, some courts and commentators have rejected the analogy between the innkeeper-guest and landlord-tenant relationships.\footnote{66}

the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. . . . The law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.

RESTATEMENT (SECOND) OF TORTS § 314A comment b (1965) (emphasis added).

62. For a discussion of the \textit{Kline} decision, see \textit{supra} notes 41-53 and accompanying text.

63. \textit{See Kline}, 439 F.2d at 481.

64. \textit{Id.} at 482-83. The \textit{Kline} court reasoned that the traditional special relationships better reflect the modern landlord-tenant relationship where the tenant is dependent on the landlord for services relating to the use of the premises. \textit{Id.} \textit{See also} Feld v. Merriam, 314 Pa. Super. 414, 427, 461 A.2d 225, 231-32 (1983), rev'd, 506 Pa. 388, 485 A.2d 742 (1984). \textit{But cf.} Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 486 (1980). In \textit{Trentacost}, the court relied on the warranty of habitability to impose a duty of protection on the landlord without making an analogy to any of the traditional special relationships. \textit{Id.} at 225-29, 412 A.2d at 441-43. The court reasoned that an apartment was not habitable unless it was secure from criminal intrusions. \textit{Id.}

65. \textit{See Buck v. Hankin}, 217 Pa. Super. 262, 269 A.2d 344 (1970). Under common law in Pennsylvania, the fact that no negligence exists on the part of the innkeeper with respect to his guest’s property loss has not precluded liability. \textit{Id.} at 266, 269 A.2d at 346; Walsh v. Potterfield, 87 Pa. 376, 378 (1878) (innkeeper is bound to pay for goods stolen from guest unless stolen by servant or companion of guest). \textit{See also} Shubart v. Hotel Astor, 168 Misc. 431, 435, 5 N.Y.S.2d 203, 207 (Sup. Ct.) (“[a] person entering a hotel ‘is entitled to expect that far greater preparations to secure his safety will be made than one entering a private building’ ” (citing Greene v. Sibley, Lindsay Curr Co., 232 A.D. 53 (1931)), aff’d, 255 A.D. 1012, 8 N.Y.S.2d 567 (1938), aff’d, 281 N.Y. 597, 22 N.E.2d 167 (1939); Annot., 28 A.L.R. 4th 120, 122 (1984) (innkeepers are held to strictest standard of care or diligence or to standard of care of insurer).

Some jurisdictions have enacted a statutory limitation on innkeepers' liability. \textit{See, e.g.}, 37 Pa. Cons. Stat. Ann. § 61 (Purdon 1954) (innkeeper not liable for guests’ property loss provided vault or safe is available for guests’ valuables, windows and doors are equipped with suitable locks, and copy of statute is displayed in 10 conspicuous places in hotel).

66. \textit{See, e.g.,} \textit{Kline}, 439 F.2d at 487 (1970); \textit{Trentacost v. Brussel}, 82 N.J.
Courts that have adopted this analogy, however, have avoided making landlords insurers of their tenants’ safety by imposing a standard of care based upon foreseeability and reasonableness under the circumstances, thus taking into consideration the neighborhood and the practices of landlords of similar buildings. By basing the standard of care on such considerations, these courts have imposed a standard that is comparable to other areas of tort law. Such a standard of care was applied in *Ten Associates v. McCutchen*. In *Ten Associates*, the court upheld a jury verdict that the landlord had been negligent in failing to maintain adequate security devices and in failing to warn the tenant of known risks. Explaining its holding, the court pointed to developing law in Florida to the effect that “the landlord’s duty of reasonable care may include the duty to protect a tenant from . . . reasonably foreseeable criminal conduct.”


68. See Goldberg v. Housing Auth. of Newark, 98 N.J. 578, 605, 186 A.2d 291, 305 (1962) (Jacobs, J., dissenting) (duty to take reasonable care under the circumstances is “no more vague than is the test of reasonableness throughout our law generally”).

69. 398 So. 2d 860 (Fla. Dist. Ct. App.), review denied, 411 So. 2d 389 (Fla. 1981). In *Ten Associates*, a tenant who had been raped in her apartment brought an action against her landlord for failure to provide adequate security and for failing to warn of the risk of intrusion when the landlord knew such a risk existed. 398 So. 2d at 861. The court affirmed a jury verdict that the negligence of the landlord was the proximate cause of the plaintiff’s injuries. Id.


Because most courts do not view the landlord-tenant relationship as a special one, however, only a few courts have faced the problem of how to limit a landlord’s liability under the special relationship theory.

3. Warranty of Habitability Theory

Some courts, although refraining from characterizing the landlord-tenant relationship as a special one, have utilized the warranty of habitability to impose a duty of protection on landlords. These courts have done so either by interpreting the warranty of habitability to require a reasonable or minimum level of security, or by interpreting the warranty to mean that every lease implies a promise by the landlord to maintain the level of security that was in existence at the commencement of a lease. According to these analyses, the failure to maintain an adequate level of security constitutes a breach of the warranty of habitability.

In *Trentacost v. Brussel*, the New Jersey Supreme Court employed

72. Haines, *supra* note 11, at 327. For a listing of cases which reject the special relationship theory, see *supra* note 59.

73. See *Trentacost v. Brussel*, 82 N.J. 214, 412 A.2d 436 (1980). In *Trentacost*, a tenant brought suit against her landlord after she was mugged in the hallway of her apartment building. *Id.* at 218, 412 A.2d at 438. The court held that since criminal activity “affecting” the apartment building was reasonably foreseeable, the landlord was negligent in not providing adequate security measures. *Id.* at 219-20, 412 A.2d at 441. The court, however, also imposed liability because the landlord breached the implied warranty of habitability by not furnishing reasonable security measures. *Id.* at 227-28, 412 A.2d at 443. In addition, the court imposed liability because the landlord had violated administrative regulations. *Id.* at 229-31, 412 A.2d at 444-45. See also *Brownstein v. Edison*, 103 Misc. 2d 316, 425 N.Y.S.2d 773 (Sup. Ct. 1980) (once installed, security devices are within scope of warranty of habitability statute to extent that such security is essential service to building). *Accord* Secretary of Hous. & Urban Dev. v. *Layfield*, 88 Cal. App. 3d Supp. 28, 152 Cal. Rptr. 342 (1978) (landlord’s duty to provide security measures can be part of warranty of habitability allowing tenant to deduct rent for breach).

74. See, e.g., *Kline*, 439 F.2d at 485. The *Kline* court stated: “[T]here is implied in the contract between landlord and tenant an obligation on the landlord to provide those protective measures which are within his reasonable capacity . . . . Since the lessees continue to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their bargaining condition during the lease term. It is precisely such expectations that the law now recognizes as deserving of formal, legal protection.” *Id.* (citing *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970)).

75. See, e.g., *Flood v. Wisconsin Real Estate Inv. Trust*, 503 F. Supp. 1157, 1160 (D. Kan. 1980) (failure “to maintain the level of security imposed at the beginning of plaintiff’s lease term result[ed] in a breach of an implied warranty to maintain the conditions”); *Trentacost v. Brussel*, 82 N.J. 214, 228, 412 A.2d 436, 443 (1980) (“By failing to provide adequate security, the landlord has impaired the habitability of the tenant’s apartment. He has therefore breached his implied warranty of habitability.”).

76. 82 N.J. 214, 412 A.2d 436 (1982).
the warranty of habitability to impose a duty of protection on a landlord, but only after the court imposed liability based on traditional negligence principles. In utilizing the warranty of habitability theory, the court stated that “[s]ince the landlord’s implied undertaking to provide adequate security exists independently of his knowledge of any [security] risks, there is no need to prove notice of a defective and unsafe condition to establish the landlord’s contractual duty.” This statement, however, has caused concern among legal scholars because it implies that a landlord could be held strictly liable for criminal assaults upon his tenants.

77. Id. at 220-21, 412 A.2d at 440-43. The Trentacost court noted that in previous cases it had utilized traditional negligence principles to hold a landlord liable. Id. at 220-24, 412 A.2d at 440-41 (citing Braitman v. Overlook Terrace Apartments, 68 N.J. 268, 346 A.2d 76 (1975)). Under the traditional negligence analysis, the Trentacost court stated that if a reasonable, prudent person would foresee danger resulting from another's voluntary criminal acts, the fact that such acts are beyond the defendant’s control does not preclude liability. Id. at 222, 412 A.2d at 440. “Foreseeability of harm, not the fact of another’s intervention, is the crucial factor in determining ‘whether a duty exists to take measures to guard against [criminal activity].’” Id. at 223, 412 A.2d at 441 (quoting Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 583, 186 A.2d 291, 293 (1962)) (emphasis provided by Goldberg court).

The Trentacost court also noted that its Braitman decision raised the possibility that a landlord could be held liable for unsafe premises based upon the warranty of habitability. Id. at 223-24, 412 A.2d at 441. The court then “[took] this opportunity to clarify the scope of a residential landlord’s duty to his tenant,” and ruled that by failing to provide adequate security, the landlord had impaired the warranty of habitability and was liable to the plaintiff. Id. at 224, 412 A.2d at 441.

78. Id. at 228, 412 A.2d at 443.


It is submitted, however, that it was unclear whether the Trentacost decision was intended to impose strict liability upon landlords. In addition to the fact that no New Jersey cases have interpreted the Trentacost decision in such a way, the language of the New Jersey opinion which adopted the warranty of habitability makes such a conclusion virtually untenable. See Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

Given the Marini court’s requirement that a tenant notify the landlord before he may utilize the remedies for the landlord’s breach of the warranty of habitability, it is submitted that a New Jersey landlord could not be held liable under the Trentacost warranty of habitability theory for criminal assault upon a tenant unless the landlord had some type of notice that the premises did not have adequate security. Although the Trentacost court stated that the landlord does not need notice to establish his duty to provide protection under the warranty of habitability, it is submitted that, based on the language of Marini, the landlord would need notice of defective security before the tenant could exercise his remedies for breach of the warranty of habitability. Compare Trentacost, 82 N.J. at 228, 412 A.2d at 443 with Marini, 56 N.J. at 146, 265 A.2d at 35. Based on these inconsistencies between the Marini and Trentacost opinions, it is submit-
In Brownstein v. Edison,80 New York also appeared to adopt the warranty of habitability theory for imposing a duty of protection on landlords.81 The Brownstein court stated that where a landlord assumes the duty of installing security devices and increases the rent to recover the costs of installation, the added security devices become a part of the warranty of habitability if they can be considered an "essential service affecting the habitability [of the building]."82

A troublesome problem with utilizing the implied warranty theory to impose a duty of protection on landlords arises from the fact that the remedies available for a breach of warranty are based on a contract theory,83 whereas the plaintiffs who bring actions against their landlords to recover for injuries inflicted by a criminal intruder normally seek to recover that a landlord in New Jersey is not strictly liable under the Trentacost warranty of habitability theory.

80. 103 Misc. 2d 316, 425 N.Y.S.2d 773 (Sup. Ct. 1980). In Brownstein, the plaintiff brought a wrongful death action against the executors of the landlord's estate, alleging that the death of a tenant (plaintiff's decedent) was caused by the landlord's failure to replace and maintain locks on the front door of the apartment building. Id. at 317, 425 N.Y.S.2d at 774. The plaintiff amended his complaint to allege that the landlord's conduct also breached the implied warranty of habitability. Id. The court held that where a landlord provides security, that degree of security which is an "essential service" of the building comes within the warranty of habitability. Id. at 318, 425 N.Y.S.2d at 775.

81. Id. at 318, 425 N.Y.S.2d at 775.

82. Id. The court noted that a landlord is not a guarantor of his tenant's safety. Id. The court also justified its decision by referring to the "burgeoning cancer of crime [which] has made our citizens veritable hermits in their homes." Id. (quoting People v. Gruenberg, 67 Misc. 2d 185, 188, 324 N.Y.S.2d 372, 376 (Crim. Ct. 1971)).

It is noted that the Brownstein court's holding may be read narrowly so that the warranty of habitability would include security devices only where the landlord has provided such devices and increased the rent as a result of the cost of increased security. See id. at 318, 425 N.Y.S.2d at 774.

83. See Pugh, 486 Pa. at 284, 295, 405 A.2d at 903, 908 (1979) (affirming lower court's holding that lease is contract and that traditional contractual remedies are available to enforce the implied warranty of habitability). See also Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.) (leases on urban dwelling units should be interpreted and construed like any other contract), cert. denied, 400 U.S. 925 (1970).

The remedies available for a breach of the implied warranty of habitability include:
   a) vacating the premises and terminating the obligation to pay rent;
   b) refusing to pay rent, remaining in possession of the premises, and using the warranty of habitability as a defense to an action by the landlord to collect unpaid rent;
   c) paying for necessary repairs from the rent due; and
   d) pursuing other traditional contract remedies, such as specific performance.

See Pugh, 486 Pa. at 291-95, 405 A.2d at 907-08. See also Trentacost, 82 N.J. at 226-27, 412 A.2d at 443 (breach of warranty of habitability gives tenant right to deduct reasonable cost of repairs to vital facility from his monthly rent and right of action for return or reduction of rent).
cover in tort.\textsuperscript{84} This problem, however, did not prevent the \textit{Trentacost} court from utilizing the warranty of habitability to impose a duty of protection on landlords.\textsuperscript{85} Although the \textit{Trentacost} court recognized that the tenant's traditional remedies for a breach of the warranty of habitability were contract remedies,\textsuperscript{86} the court stated that the warranty was "flexible enough" to obligate a landlord to furnish such security for his tenants as would safeguard them against foreseeable criminal conduct.\textsuperscript{87} The court then concluded that by failing to provide such security, the landlord had breached the warranty of habitability and was "liable to the tenant for the injuries attributable to that breach."\textsuperscript{88}

4. \textit{Common Area Theory}

A third theory employed by courts to impose a duty of protection upon landlords requires landlords to take reasonable measures to prevent foreseeable criminal activity from occurring in common areas of the leased premises.\textsuperscript{89} Under the common area theory, the landlord's duty

\textsuperscript{84} \textit{Feld}, 506 Pa. at 400 n.2, 485 A.2d at 750 n.2 (Zappala, J., concurring). In his concurring opinion, Judge Zappala stated that in actions against a landlord for breach of an alleged duty to provide security, the plaintiffs usually seek damages for personal injuries. \textit{Id.} (Zappala, J., concurring). Judge Zappala noted, however, that remedies under the warranty of habitability are contractual in nature and, thus, inconsistent with the remedies sought in a tort action for personal injury. \textit{Id.} For a discussion of the remedies generally available under the warranty of habitability, see \textit{supra} note 83.

\textsuperscript{85} 82 N.J. at 225-28, 412 A.2d at 441-43. For a discussion of the \textit{Trentacost} opinion, see \textit{supra} notes 76-79 and accompanying text.

\textsuperscript{86} 82 N.J. at 221, 412 A.2d at 440. The \textit{Trentacost} court noted that a breach of the implied warranty of habitability gave the tenant a right to deduct the reasonable cost of repairs to a vital facility from his monthly rent and a right of action for the return or reduction of rent. \textit{Id.} at 227, 412 A.2d at 443. For a discussion of the remedies for breach of warranty of habitability, see \textit{supra} note 83.

\textsuperscript{87} 82 N.J. at 227-28, 412 A.2d at 443 (citing Braitman v. Overlook Terrace Corp., 68 N.J. 368, 388, 346 A.2d 76, 97 (1975)).

\textsuperscript{88} \textit{id.} at 228, 412 A.2d at 443. The court did not address the question of how the plaintiffs could recover in tort on the basis of the warranty of habitability when the traditional remedies under the warranty were based on contract. \textit{See id.} at 225-29, 412 A.2d at 441-43. It is submitted that the court either considered the tenant's injuries as consequential damages for breach of contract or used the warranty of habitability only to impose the duty of protection upon the landlord, and then, after recognizing the existence of this duty, relied on traditional tort principles to allow the plaintiff to recover in tort because the duty had been breached. \textit{See id.} at 228, 412 A.2d at 443.


The common area theory was also expressed in \textit{Johnston}, 387 Mich. 569, 198 N.W.2d 409, and \textit{Samson}, 393 Mich. 393, 224 N.W.2d 843. But the analysis in
to keep common areas safe and free from dangerous conditions is extended to include the duty to prevent the unreasonable risk of harm from criminal assault. Thus, where the landlord could have discovered an unreasonable risk of criminal intrusion through the exercise of reasonable care and could have made the condition safe but did not do so, he is subject to liability for the injuries inflicted upon a tenant during a criminal intrusion. Some courts have stated that this theory could be utilized by a tenant who was attacked in his own apartment because in such a case the criminal probably gained access to the apartment through an entrance in a common area. Therefore, the common area theory is flexible enough to impose a duty of protection on landlords in a variety of situations without making landlords insurers of their tenants' safety.

these two Michigan cases relies on a much broader theory of liability based on a special relationship between a landlord and tenant. For a discussion of Johnston and Samson, see supra notes 56-58 and accompanying text.

The common area theory has been adopted by the Restatement (Second) of Property, Landlord & Tenant § 17.3 comment I, at 189 (1978). For the text of comment I to § 17.3, see supra note 11. This theory emanates from the common area exception to the traditional rule of nonliability for landlords. For a discussion of the common law exception to the traditional rule of nonliability of landlords, see supra notes 18-27 and accompanying text.

90. See Restatement (Second) of Property, Landlord & Tenant § 17.3 comment I at 197 (1977) ("For the purposes of this section, the unreasonable risk of harm from criminal intrusion constitutes a dangerous condition.").

91. Id. Accord Scott v. Watson, 278 Md. 160, 169, 359 A.2d 548, 554 (1976) ("If the landlord knows, or should know, of criminal activity against persons or property in the common areas, he then has a duty to take reasonable measures, in view of the existing circumstances, to eliminate the conditions contributing to the criminal activity.") (emphasis in original).

92. Kline, 439 F.2d at 480. See also O'Hara v. Western Seven Trees Corp. Intercoast Management, 75 Cal. App. 3d 798, 803, 142 Cal. Rptr. 487, 490 (1977) (failure to safeguard common areas substantially contributed to injuries of plaintiff who was assaulted in his own apartment); Holley v. Mt. Zion Terrace Apartments, Inc., 382 So. 2d 98, 101 (Fla. Dist. Ct. App. 1980) (intruder could have entered decedent’s apartment only through common walkway adjacent to decedent’s window).

93. Scott v. Watson, 278 Md. 160, 169, 359 A.2d 548, 554 (1976). The common area theory is flexible because the landlord has access to and control over common areas, and his duty is to provide reasonable security measures in view of the existing circumstances. Id. (emphasis added).

It has been suggested that the common area theory of imposing this duty upon landlords may only apply to multi-unit dwellings. Haines, supra note 11, at 332 n.314. This suggestion is based upon the fact that the landlord of a multi-unit dwelling, who is the only one with control over common areas, is in the position to provide the security. Kline, 439 F.2d at 481. In a single-unit dwelling, however, this reason for applying the common area theory is inapposite because the tenant has control of all areas of the dwelling. Henszey & Weisman, What Is the Landlord's Responsibility for Criminal Acts Committed on the Premises? 6 REAL ESTATE L.J. 104, 123-24 (1977). While it may not be clear that the landlord has no duty to provide security in a single-unit dwelling, it seems clear that in such a building his duty would be less. See Graham v. M & J Corp., 424 A.2d 103, 106
Most courts that have relied upon the common area theory in imposing a duty of protection on landlords have employed a standard of reasonableness and foreseeability under the circumstances. There is disagreement among the courts, however, regarding the degree of foreseeability necessary for a court to determine that the landlord's duty of protection has been triggered. In *Scott v. Watson*, the court took a narrow view of foreseeability, limiting the concept to include only the types of criminal acts that previously had occurred on the landlord's premises and of which the landlord knew or should have known. Other courts have taken a much broader view of foreseeability, expanding the concept to include not only crimes that had occurred on the landlord's premises but also crimes that had occurred in the surrounding area.

Not all courts have accepted the common area theory for imposing a duty of protection on landlords. These courts assert that the landlord's duty of care in common areas is restricted to keeping such areas free from physical defects and does not include keeping them free from criminal intrusion.

(D.C. 1980). In *Graham*, the court stated that the *Kline* court specifically singled out the landlord of an "urban multiple-unit apartment dwelling" as owing the duty of protection. The building here was [a duplex] not a 'multiple unit apartment,' so the duty owed may be less." *Id.* (citations omitted).

94. See, e.g., *Scott v. Watson*, 278 Md. 160, 169, 359 A.2d 548, 554 (1976). In *Scott*, the court stated that "[i]f the landlord knows, or should know, of criminal activity against persons or property in the common areas [of the leased premises], he then has a duty to take reasonable measures, in view of the existing circumstances, to eliminate the conditions contributing to the criminal activity." *Id.* (emphasis in original). The court stated that the reasonableness of the landlord's precautions are determined by the foreseeability of criminal conduct occurring on the leased premises. *Id.* See also *Restatement (Second) of Property, Landlord & Tenant* § 17.3 comment l, at 189 (1977) ("[W]here the landlord could by the exercise of reasonable care have discovered the unreasonable risk of criminal intrusion and could have made the condition safe from such unreasonable risk . . . he is subject to the liability . . . .") *Id.* (emphasis added).


96. *Id.* at 169, 359 A.2d at 554. The *Scott* court limited foreseeability to prior crimes occurring on the landlord's premises because "the landlord can affect the risk only within his own premises." *Id.* See also *Sherman v. Concourse Realty Corp.*, 47 A.D.2d 134, 135-36, 365 N.Y.S.2d 239, 240-41 (1975) (emphasizing criminal activity within landlord's building).

97. See, e.g., *Spar v. Obwoya*, 369 A.2d 173, 175 (D.C. 1977) (suggesting that crime in neighborhood created landlord's duty); *Trentacost*, 82 N.J. at 218, 220, 222, 412 A.2d at 436, 438, 440 (1980) (criminal activity in neighborhood affecting landlord's building created foreseeable risk of crime). See also *Restatement (Second) of Property, Landlord & Tenant* § 17.3 comment l, illustration 18, at 189-90 (1977) (where the landlord of apartment building located in high crime area could by exercise of reasonable care have discovered unreasonable risk of criminal intrusion). For a discussion of the problems involved in adopting the view that crime in the neighborhood creates the landlord's duty, see *Note*, supra note 40, at 1183-87.

98. See, e.g., *Deem v. Smith Mgt.*, Inc., 799 F.2d 944, 946 (4th Cir. 1986) (Virginia statute requiring landlords to keep premises safe applied only to physical defects not criminal intrusion); *Trice v. Chicago Hous. Auth.*, 14 Ill. App. 3d 0000.
5. Assumption of Duty Theory

Some of the courts that have found the foregoing theories inadequate to impose a duty of protection on landlords nevertheless have been willing to hold a landlord liable under an assumption of duty theory. Under this theory, a landlord is liable where he provides a security system but negligently maintains it, and his negligence is the proximate cause of a criminal assault upon a tenant. Under the assumption of duty theory, the landlord’s duty generally has been limited to the extent of his undertaking, and, thus, the tenant may rely only on that level of security which reasonably could have been expected from the program of security offered.

97, 100, 302 N.E.2d 207, 209 (1973) (landlord’s duty in common areas is normally associated with duty to repair and not to police); Feld, 506 Pa. at 392, 485 A.2d at 746 (distinguishing landlord’s duty to keep common areas free from physical defects from landlord’s duty to protect against criminal intruders). By rejecting the common area theory, these courts have implicitly rejected the position of the Second Restatement. See Restatement (Second) of Property, Landlord & Tenant § 17.3 comment l, at 189 (1977). For the text of comment l to § 17.3, see supra note 11.

99. See, e.g., Pippin v. Chicago Hous. Auth., 78 Ill. 2d 204, 209-10, 399 N.E.2d 596, 599 (1979) (citing Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 74, 199 N.E.2d 769, 773-74 (1964)) (liability can arise from negligent performance of voluntary undertaking, but liability is limited to extent of undertaking); Feld, 506 Pa. at 392-93, 485 A.2d at 746 (1984) (citing Pascarella v. Kelley, 378 Pa. 18, 105 A.2d 70 (1954)) (individual may be liable even when he has no duty if he assumes duty, whether gratuitously or for consideration, and so negligently performs that duty that another suffers damage). The Restatement (Second) of Torts summarizes the assumption of duty theory:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other’s reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965).

100. See, e.g., Pippin v. Chicago Hous. Auth., 78 Ill. 2d 204, 210, 399 N.E.2d 596, 599 (1979) (housing authority’s duty limited by extent of undertaking); Feld, 506 Pa. at 394, 485 A.2d at 747 (tenant may rely on program of protection only to extent of his reasonable expectations of the program). While Illinois generally follows the more traditional Pippin approach to imposing liability on landlords for criminal intrusion against tenants, the Illinois courts have made exceptions to this analysis. See Stribling v. Chicago Hous. Auth., 34 Ill. App. 3d 551, 340 N.E.2d 47 (1975). In Stribling, the Illinois Appellate Division held the Chicago Housing Authority liable when a burglar used the same vacant apartment three times to gain access to neighboring apartments. Id. at 555-56, 340 N.E.2d at 50. After acknowledging that the tenant had notified the authority of the unauthorized uses of the unoccupied apartment, the court stated:

Given the bizarre facts alleged in the complaint, it is our decision that defendants owed plaintiffs no duty to guard against the [first] burglary . . . . However, after defendants had notice of the original bur-
The limited extent of a landlord's duty under this theory was evident in *Pippin v. Chicago Housing Authority*,¹⁰¹ where a public housing authority,¹⁰² as landlord, had hired a third party to provide security services. Relying on the principle that a landlord has no duty to protect tenants or others from criminal intrusion unless he has assumed the duty to do so,¹⁰³ the *Pippin* court stated that since the authority had not undertaken to perform the guard service itself, the authority was not under a duty to protect Pippin.¹⁰⁴ The court explained that the housing authority could be held liable only to the extent of its undertaking, which was to use reasonable care in hiring a security service.¹⁰⁵ Therefore, the court stated that the authority could be held liable only for negligent hiring.¹⁰⁶

The means used in effecting the burglary, the fact that another burglary could happen in the same fashion became eminently foreseeable. *Id.* at 556, 340 N.E.2d at 50. The *Stribling* court concluded that the defendants owed the plaintiffs a duty to guard against the second and third burglaries. *Id.* ¹⁰¹. 78 Ill. 2d 204, 399 N.E.2d 596 (1979).

¹⁰². In *Pippin*, although the defendant housing authority was a public corporation, no issue of immunity was raised. *See id.* The issue of municipal immunity is beyond the scope of this note. It is submitted that housing authorities generally will be judged by legal principles applicable to private property owners, either because municipal immunity has been abrogated by statute or because its operations will be deemed proprietary rather than governmental, thus rendering it liable under common law. *See, e.g.*, W. Prosser & W. Keeton, *supra* note 19, § 131 (discussing governmental immunity of municipal corporations); *Love, Landlord's Liability for Defective Premises: Caveat Lessee, Negligence or Strict Liability?*, 1975 Wis. L. Rev. 19, 78-81 (discussing governmental immunity as applied to public housing authorities); Annot., 43 A.L.R. 3d 331, 341-62 (1972) (discussing landlord's duty to protect against crime); Annot., 61 A.L.R.2d 1246, 1246-53 (1958) (discussing liability of public housing authorities).

¹⁰⁳. 78 Ill. App. 2d at 208, 399 N.E.2d at 598.

¹⁰⁴. *Id.* at 208, 399 N.E.2d at 599. Pippin was visiting a resident of a housing project owned by the Chicago Housing Authority. *Id.* at 206, 399 N.E.2d at 597. The resident asked security guards to remove Pippin from her apartment, but to do so was beyond the guards' authority. *Id.* at 206, 399 N.E.2d at 597-98. After Pippin voluntarily entered the lobby, a scuffle ensued between Pippin and the resident, and Pippin was stabbed before the guards could stop the fight. *Id.* at 206, 399 N.E.2d at 598. The fact that Pippin was not a tenant but a guest did not affect the court's analysis because generally a landlord owes the same duty to his tenants' guests as he owes to his tenants. *See, e.g.*, Williams v. Alfred N. Koplin & Co., 114 Ill. App. 3d 482, 448 N.E.2d 1042 (1983) (landlord's duty to maintain premises is same whether injured party is tenant, tenant's employee, or tenant's guest).

¹⁰⁵. 78 Ill. App. 2d at 211-12, 399 N.E.2d at 599.

¹⁰⁶. *Id.* It should be noted that this is the same type of theory and analysis adopted by the Pennsylvania Supreme court in *Feld*. See 506 Pa. at 394, 485 A.2d at 746-47. The *Feld* court stated:

A tenant may rely upon a program of protection only within the reasonable expectations of the program. He cannot expect that a landlord will defeat all the designs of felony. He can expect, however, that the program will be reasonably pursued and not fail due to its negligent exercise. If a landlord offers protection during certain periods of the
6. Violation of Statute or Ordinance Requiring Security

Another theory used to impose a duty of protection on landlords depends on a landlord's violation of a regulation requiring landlords to provide a minimum degree of security. In *Trentacost v. Brussel* 107 an applicable regulation108 required landlords to equip the entranceways and doors of multiple-unit apartment buildings with heavy-duty lock sets.109 The landlord had provided faulty locks, and the court relied on the landlord's violation of the regulation as evidence of the landlord's negligence.110 Questions have arisen, however, as to whether such statutes day or night a tenant can only expect reasonable protection during the periods offered. If, however, during the periods offered, the protection fails by a lack of reasonable care, and that lack is the proximate cause of the injury, the landlord can be held liable.

Id. at 394, 485 A.2d at 747.


110. *Trentacost*, 82 N.J. at 230-31, 412 A.2d at 444-45 (1980). The court stated: “The statutory and regulatory scheme governing the habitability of multifamily dwellings establishes a standard of conduct for landlords. It is thus available as evidence for determining the duty owed by landlords to tenants.” Id. (citing Braitman v. Overlook Terrace Corp., 68 N.J. 368, 383, 346 A.2d 76, 84 (1975). See also *Restatement (Second) of Torts* § 288B (1965). Section 288B explains that a violation of a statute may be used in proving negligence:

(1) The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.

(2) The unexcused violation of an enactment or regulation which is not so adopted may be relevant evidence bearing on the issue of negligent conduct.

Id. The *Trentacost* court considered the landlord’s violation of an enactment as evidence of negligence. *Trentacost*, 82 N.J. at 299-31, 412 A.2d at 444.

In *Nixon v. Mr. Property Management Co.*, the Texas Supreme Court reversed summary judgment in favor of the defendant landlord, and held that a landlord who violated a Dallas city ordinance could be held liable for the rape of a 10-year-old girl which occurred in a vacant apartment of the defendant's building. 690 S.W.2d 546 (Tex. 1985). The applicable ordinance required that a property owner keep the doors and windows of a vacant structure or a portion of a vacant structure secured to prevent unauthorized entry. Id. at 548 (citing *Dallas Rev. Code of Civil & Criminal Ordinances* § 27.11(a)(6)). Even though the victim was not a resident of the defendant's apartment building but was forcibly taken there by her assailant, the Texas Supreme Court reasoned that since the ordi-
apply only to common areas. Moreover, if such a statute is unclear, a court may interpret a requirement that a building be kept "safe" and "decent" as applicable to physical defects only and not to the provision of security. Since the statute in Trentacost explicitly required a landlord to equip doors with heavy-duty locks, the problem of interpreting an ambiguous statute did not arise.

III. THE FELD DECISION

In Feld, the Pennsylvania Supreme Court refused to depart from the traditional view that landlords owe no general duty of protection to tenants. The case arose after Peggy and Samuel Feld were accosted at gunpoint by three armed men in the parking garage of the Cedarbrook Apartments where they lived. The Felds were forced into a car.

nance was designed to prevent the type of harm which the victim suffered, the ordinance created a duty of protection in the defendant. Id. at 549. The court concluded that if the trier of fact were to find that the defendant unjustifiably violated the Dallas city ordinance, the defendant would be negligent per se. Id.

111. See Trentacost, 82 N.J. 214, 412 A.2d 436 (1980). See also Michaels v. Brookchester, Inc., 26 N.J. 379, 386-87, 140 A.2d 199, 203 (1958) (court ruled that statute covered not only common area but "all parts" which the landlord provided). It is noted that the Restatement (Second) of Property classifies door locks on the entrances to tenants' apartments as within the landlord's control because he is the only one with the authority to make the necessary changes to avoid an unreasonable risk of harm. Restatement (Second) of Property § 17.3 comment (1977).

112. Deem v. Smith Mgt., Inc., 799 F.2d 944, 946 (4th Cir. 1986) (Virginia statute requiring landlords to keep premises safe applied only to physical defects not criminal intrusion); Pippin v. Chicago Hous. Auth., 78 Ill. 2d 204, 399 N.E.2d 596 (1979) (language in statute requiring housing authority to provide "decent, safe and sanitary dwellings" was construed to apply only to physical condition of premises).

113. See 82 N.J. 214, 412 A.2d 436.


116. 506 Pa. at 389, 485 A.2d at 744. The Cedarbrook Apartment Complex comprised approximately 1000 apartment units located on a 36-acre tract of land in Cheltenham, Pennsylvania. Feld v. Merriam, 314 Pa. Super. 414, 423, 461 A.2d 225, 229 (1983). Access to the grounds could be gained by vehicle through two entrances, each of which was manned by security guards from 3:00 p.m. to 9:00 a.m. every day. Id. at 423 & n.2, 461 A.2d at 229 & n.2. Security personnel were also stationed at the entrances to each building. Id. at 423, 461 A.2d at 229. One guard patrolled the premises on foot and another patrolled the premises by car at irregular intervals. Id. All security services were provided by Globe Security Services. Id.
and driven past a security guard who was on duty at the entrance of the apartment complex.\textsuperscript{117} After leaving the complex with the Fields, the assailants raped Mrs. Feld several times before they released her.\textsuperscript{118} Before the assault on the Fields, the incidence of crime had been rising, both in the area surrounding the complex and on the complex grounds.\textsuperscript{119} Although the tenants' association had suggested that more security measures be installed, the apartment management had refused to provide more.\textsuperscript{120} After the incident, the Fields sued the owners of the Cedarbrook Apartments,\textsuperscript{121} alleging that they had breached a duty of protection and, thereby, had caused the Fields' injuries.\textsuperscript{122} The jury returned a verdict for the Fields.\textsuperscript{123}

On appeal, the Pennsylvania Superior Court determined that it was consistent with current Pennsylvania landlord-tenant law to require landlords to provide adequate security for tenants.\textsuperscript{124} The court explained that the landlord's duty is to take reasonable care in protecting tenants from criminal intrusion that is foreseeable under the circumstances.\textsuperscript{125} The court concluded that sufficient evidence had been

\begin{itemize}
\item \textsuperscript{117} 314 Pa. Super. at 424 n.6, 461 A.2d at 230 n.6.
\item \textsuperscript{118} Id. at 424-25, 461 A.2d at 230. Before raping Mrs. Feld, the assailants threatened to lock Mr. Feld in the trunk of the car. \textit{Id.} at 424, 461 A.2d at 230. Mrs. Feld told the men that because of Mr. Feld's emphysema he would be unable to breath if he were put into the trunk. \textit{Id.} The assailants released Mr. Feld after Mrs. Feld said she would do anything they wished if they promised not to harm her husband. \textit{Id.}
\item \textsuperscript{119} Id. at 423, 461 A.2d at 229.
\item \textsuperscript{120} Id. at 424, 461 A.2d at 230. Globe Security Services also had suggested the use of additional security measures. \textit{Id.} at 423, 461 A.2d at 230. The company's recommendations included better lighting in the garages, installation of mechanical garage doors, more security guards to patrol the complex, and decals for tenants' cars so the guards could better screen the cars entering the complex. \textit{Id.} at 424, 461 A.2d at 230.
\item \textsuperscript{121} 506 Pa. at 289, 485 A.2d at 744. Cedarbrook Apartments was owned by John W. Merriam and Thomas Wynne, Inc. \textit{Id.} at 389 n.2, 485 A.2d at 744 n.2. Merriam owned all of the stock of Thomas Wynne, Inc., and was treated as its sole owner. \textit{Id.}
\item \textsuperscript{122} Id. at 389, 485 A.2d at 744-45.
\item \textsuperscript{123} Id. at 390 n.3, 485 A.2d at 745 n.3. The jury in the trial court awarded Mr. Feld one million dollars in damages and one and one-half million dollars in punitive damages. \textit{Id.} Mrs. Feld was awarded two million dollars in compensatory damages and one and one-half million dollars in punitive damages. \textit{Id.}
\item \textsuperscript{124} Feld v. Merriam, 314 Pa. Super. 414, 427, 461 A.2d 225, 230 (1983). In the Pennsylvania Superior Court the Feld case was heard by Judges Hester, Cirillo, and Johnson. Judge Cirillo wrote the opinion of the court.
\item \textsuperscript{125} Id. at 427-28, 461 A.2d at 232. The court stated that "[a]n act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." \textit{Id.} (quoting \textsc{Restatement (Second) of Torts} § 302B (1965)).
\end{itemize}

The Pennsylvania Superior Court also stated that, in order to establish a prima facie case of negligence against a landlord for his failure to provide security, a plaintiff must present evidence showing that the landlord had notice of criminal activ-
presented for the jury to determine that the attack on the Felds was reasonably foreseeable and that the landlord's duty of protection had been activated. 126

In reversing and remanding the superior court's decision, the Pennsylvania Supreme Court observed that crime is a social problem that can affect anyone at any time and in any place. 127 The supreme court stated that imposing a general duty of protection on landlords would make them insurers of their tenants' safety. 128

Addressing the argument that the landlord had a duty of protection under the special relationship theory, 129 the supreme court acknowledged similarities between the landlord-tenant and property owner-business invitee relationship. 130 The court, however, proceeded to distinguish these relationships and explained the different duties imposed

by which posed risk of harm to his tenants, that he had the means to take precautions to protect the tenant against this risk of harm, and that his failure to do so was the proximate cause of the tenant's injuries. 130

126. Id. at 428, 461 A.2d at 232.

127. See Feld, 506 Pa. at 392, 485 A.2d at 746 (crime can be expected anywhere at any time); id. at 402-03, 485 A.2d at 751 (Zappala, J., concurring) (crime is social problem not peculiar to landlord-tenant relationship).

128. Id. at 392, 485 A.2d at 746. Explaining its decision, the supreme court distinguished the risk of harm from physical defects in the leased property and the risk of harm from the criminal conduct of third persons. 130 Id. The court stated that the risk of harm from a physical defect is a risk caused by the landlord whereas the risk of harm from criminal activity arises from the conduct of an unpredictable independent agent. 130 Id. The court, therefore, reasoned that the duty to protect tenants from physical defects could not be extended to include a duty to protect tenants from crime. 130 Id. The supreme court concluded that in failing to make this "crucial" distinction, the superior court had made a landlord an insurer of his tenants' safety. 130 Id.

129. For a discussion of the special relationship theory of imposing a duty of protection upon landlords, see supra notes 54-72 and accompanying text.

130. 506 Pa. at 390, 485 A.2d at 745 (citing Leary v. Lawrence Sales Corp., 442 Pa. 389, 275 A.2d 32 (1971) (where owner of real estate leases various parts of property to tenants but retains control of common areas used by tenants' invitees, owner is liable to invitees for injuries caused by negligent maintenance of premises).

In Pennsylvania, the landowner-business invitee relationship imposes special obligations on the landlords, as summarized in the Second Restatement of Torts: A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
by each. Describing the property owner-business invitee relationship, the court stated that an owner who invites the public onto his property reasonably may expect that some people will misbehave and fail to act with reasonable care while on his land; the owner, therefore, incurs a duty to protect his invitees from such misbehavior. In contrast, the court explained that the landlord does not invite the public into his apartment building and does not profit from the public's presence there. The landlord, therefore, is not obligated to "bear what loses that public may create." Relying on this distinction, the court concluded that a landlord generally has no duty to protect tenants against criminal intrusion, but held that a landlord may incur a duty of protection if he voluntarily or by express agreement provides a program of security.

IV. ANALYSIS AND IMPACT OF FELD

In Feld, the Pennsylvania Supreme Court in effect applied the policy of holding a landlord liable only for misfeasance and not for nonfeasance.

(a) discover that such acts are being done or are likely to be done, or
(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Restatement (Second) of Torts § 344 (1965) (adopted in Pennsylvania along with comment f to § 344 in Moran v. Valley Forge Drive-In Theater, Inc., 431 Pa. 432, 435-36, 246 A.2d 875, 878 (1968)).

131. 506 Pa. at 391, 485 A.2d at 745.
132. Id.
133. Id.

134. Id. at 392-93, 485 A.2d at 747 (citing Restatement (Second) of Torts § 323 (1977)). For the text of section 323, see supra note 100. The court stressed that absent an agreement or voluntary undertaking a landlord has no duty of protection. Id. at 393, 485 A.2d at 747. The court defined a program of security as something more than the normal precautions that a reasonable homeowner would take, such as personnel specifically charged to patrol the premises, which could induce the tenants' reliance on the landlord's efforts. Id. at 394, 485 A.2d at 747.

In his concurring opinion, Justice Zappala recognized that leases are viewed today as contracts that contain a warranty of habitability, but nevertheless stated that "[o]nly the most fainthearted and exclusive could accept the proposition that lack of [security] services would render a residence uninhabitable." Id. at 400, 485 A.2d at 750 (Zappala, J., concurring). Justice Zappala also noted that there is a clear distinction between a duty to keep common areas physically safe and a duty to keep common areas safe from criminal intrusion. Id. at 401, 485 A.2d at 750.

He explained that a landlord may be liable when a tenant is injured as a result of a defective physical condition in the leased premises because in such a situation the landlord's conduct created the risk. Id. at 402, 485 A.2d at 751. When a tenant is injured as a result of the criminal conduct of another, however, Justice Zappala stated that the landlord is not liable because he did not cause the injury. Id. Justice Zappala also concluded that a landlord may incur such a duty of protection by providing security services. Id. at 403, 485 A.2d at 751 (Zappala, J., concurring).
and indicated its reluctance to depart from the traditional rule that a landlord has no duty to protect his tenants against criminal assault. With the Feld decision, Pennsylvania joined the jurisdictions that have refused to accept the position adopted by the Second Restatement of Property that the landlord’s duty to keep common areas safe implies a duty to keep tenants safe from criminal intrusion.

The Feld court elected to impose only a narrow duty of protection on landlords, in part, because of the court’s express fear that the imposition of a general duty of protection would make landlords the insurers of their tenants’ safety. It is submitted that the court’s reluctance to impose a general duty on landlords was also based on the court’s recognition that the foreseeability standard is a vague and uncertain guide for fashioning landlords’ conduct.

135. See 506 Pa. at 392, 485 A.2d at 746. It is submitted that the distinction between misfeasance and nonfeasance is implicit in the Feld court’s distinction between liability for injuries caused by defects in the premises and liability for the criminal acts of third persons. See id. The court stated that, by not repairing a known physical defect, the landlord has perpetrated the injury while injury from a criminal intruder results not from an act by the landlord but from an independent third party. Id. The Feld court implied that in the former situation, the landlord could be liable because his “perpetration” of the injury amounts to misfeasance. Id. In the latter situation, however, the landlord could not be liable because his conduct amounts to nonfeasance. Id.

136. See id. at 391, 485 A.2d at 746. For a discussion of the traditional rule regarding a landlord’s duty to provide protection against criminal intrusion, see supra notes 37-40 and accompanying text.

137. For a discussion of the common area theory and of those jurisdictions rejecting this theory, see supra notes 89-98 and accompanying text.

138. See Restatement (Second) of Property § 17.3 comment 1 (1977). For the text of comment 1 to § 17.3, see supra note 11.

139. See 506 Pa. at 392, 485 A.2d at 746. The court stated, “To impose a general duty ... would effectively require landlords to be insurers of their tenants’ safety: a burden which could never be completely met given the unfortunate realities of modern society.” Id. This concern is not unique to the Feld court. See Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 186 A.2d 291 (1962). Accord Kline, 439 F.2d at 484 (landlord is not insurer of tenants’ safety). For a related discussion of the possibility of making a landlord an insurer of his tenants’ safety by imposing a general duty of protection, see supra notes 65-66 & infra notes 140-46 and accompanying text.


It is noted, however, that this problem arguably is not unique to defining a landlord’s duty of protection because all of tort law can be viewed as similarly vague. See Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 605, 186 A.2d 291, 305 (1962) (Jacobs, J., dissenting) (duty to take reasonable precautions is no more vague than test of reasonableness throughout law). See also Note, supra.
Because crime can be expected "anywhere any time" in modern society, the main issue for courts using the foreseeability standard is determining when to consider a particular crime foreseeable. Recognizing this issue, the Kline court defined as foreseeable those crimes that are predictable and probable. Because it is impossible to predict exactly where and when a crime will occur, however, even this seemingly clear guide is uncertain. Recognizing this uncertainty, courts applying a foreseeability analysis have narrowed the definition of foreseeability to limit the burden on landlords.

In spite of the Pennsylvania Supreme Court's fear that imposing a duty of protection upon landlords would make landlords insurers of their tenants' safety, the court's reluctance to impose such a duty upon landlords is somewhat puzzling in light of the court's landmark decision in Pugh v. Holmes, where the court held that the warranty of habitability is...

Opponents of the foreseeability standard contend that the lack of guidance under the standard makes it impossible for the landlord to realize the scope of his duty. See Goldberg, 38 N.J. at 583-84, 186 A.2d at 293. Therefore, it is generally accepted that foreseeability alone is not a proper basis for imposing liability upon the landlord. Id. at 585, 186 A.2d at 293. Rather, "whether a duty exists is . . . a question of fairness, . . . the relationship of the parties, the nature of the risk and the public interest in the proposed solution." Id. (emphasis in original). The Pennsylvania Superior Court in Feld did not cite Goldberg, but it did weigh the interests suggested by the Goldberg court before reaching its holding. See 314 Pa. Super. at 427-30, 461 A.2d at 231-33.

Courts and commentators also have recognized another problem with the foreseeability standard—any case which goes to a jury under general instructions on the foreseeability of a heinous crime which has been committed inevitably results in a verdict for the plaintiff. See Browder, supra note 20, at 153 ("Most people are angry and frustrated about the prevalence of violent crime, and about the inability of victims to do anything about it; they are likely to take any means offered to shift the burden of crime prevention from innocent victims."). See also Riley v. Marcus, 125 Cal. App. 3d 103, 109, 177 Cal. Rptr. 827, 831 (1981) ("It would be intolerable and grossly unfair to permit a lay jury, after the fact, to determine in any case that security measures were 'inadequate,' especially in light of the fact that the decision would always be rendered in a case where the security had in fact proved to be inadequate.") (quoting 1735 Hollywood Blvd. Venture v. Superior Court, 116 Cal. App. 3d 901, 905, 172 Cal. Rptr. 528, 532 (1981)). The problem is that with hindsight, juries find that more security measures should have been made available because the security in place at the time of intrusion was inadequate. See Riley, 125 Cal. App. 3d at 109, 177 Cal. Rptr. at 830.

141. See, e.g., Feld, 506 Pa. at 391, 485 A.2d at 746.
142. For a discussion of this issue and how other courts have approached it, see supra notes 94-97 and accompanying text.
143. Kline, 439 F.2d at 483 (citing Lilie v. Thompson, 332 U.S. 459 (1947)). For a discussion of Kline, see supra notes 41-53 and accompanying text.
144. For a discussion of the unpredictability of urban crime and why it is unpredictable, see Note, supra note 40, at 1183-87.
145. See, e.g., Scott, 278 Md. 160, 359 A.2d 548 (foreseeability limited to crimes which had occurred in premises and of which landlord had notice).
implied in every residential lease.\textsuperscript{146} In adopting the warranty of habitability, the Pennsylvania Supreme Court recognized that "times have changed"\textsuperscript{147} in the landlord-tenant relationship and that, as between the two parties, the landlord has more bargaining power and greater control.\textsuperscript{148} In essence, by adopting the warranty of habitability, courts and legislatures have impliedly recognized that the landlord-tenant relationship is a special one in which the landlord dominates the tenant and the tenant needs protection.\textsuperscript{149} Because the Pennsylvania Supreme Court has adopted the warranty of habitability, it is unclear why the court decided that, absent a special agreement, a landlord has no duty to provide security against criminal intrusion.\textsuperscript{150}

\textsuperscript{146} 486 Pa. 272, 284, 405 A.2d 897, 903 (1979). \textit{Pugh} imposed on landlords a duty to provide secure \textit{windows and doors} and held that this duty is breached only if the premises are unfit for habitation. \textit{Id.} at 289, 405 A.2d at 905 (emphasis added). For a discussion of the \textit{Pugh} decision, see supra notes 30-33 and accompanying text.

\textsuperscript{147} \textit{Pugh}, 486 Pa. at 280, 405 A.2d at 901.

\textsuperscript{148} See id. at 282-83, 405 A.2d at 902 (tenants today can have vastly inferior bargaining power as compared with landlords); \textit{Javins v. First Nat'l Realty Corp.}, 428 F.2d 1071, 1079 (D.C. Cir.) (severe housing shortage increases landlord's bargaining position), \textit{cert. denied}, 400 U.S. 925 (1970). For a discussion of the warranty of habitability, see supra notes 30-33 and accompanying text.

\textsuperscript{149} See \textit{Javins v. First Nat'l Realty Corp.}, 428 F.2d 1071 (D.C. Cir. 1970), \textit{cert. denied}, 400 U.S. 925 (1970); \textit{Pugh}, 486 Pa. 272, 405 A.2d 897; Note, supra note 79, at 427-28. One commentator has suggested that when security is inadequate a tenant's health and safety are in jeopardy, which is exactly the type of situation the warranty of habitability was designed to prevent. \textit{See Comment, supra note 71, at 707.}

\textsuperscript{150} It is submitted that the \textit{Feld} court could have based the imposition of such a duty on either the special relationship theory or common area theory. For a discussion of why courts that have adopted the warranty of habitability theory should impose a duty of protection upon landlords, see Note, supra note 79, at 427-28 (implied warranty of habitability recognizes that landlord-tenant relationship is special one in which tenant needs protection).

The Pennsylvania Superior Court, in its \textit{Feld} opinion, stated that its opinion was consistent with current trends in Pennsylvania landlord-tenant law. \textit{Feld}, 314 Pa. Super. at 427, 461 A.2d at 231. The superior court emphasized that "[w]hen American city dwellers . . . seek shelter today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but adequate heat, light and ventilation, serviceable plumbing facilities, secure \textit{windows and doors}.") \textit{Id.} at 426-27, 461 A.2d at 231 (quoting \textit{Pugh}, 486 Pa. at 282, 405 A.2d at 902) (emphasis added by \textit{Feld} court). The superior court indicated that the reference to secure doors and windows in \textit{Pugh} led to the conclusion that a landlord, while not an insurer of his tenant's safety, is under a duty to provide adequate security measures in all areas of his leasehold, particularly areas under his control. \textit{Id.}

In \textit{Pugh}, the Pennsylvania Supreme Court also recognized that a lease should be viewed as a contract rather than a conveyance of land and held that the warranty of habitability was implied in all residential leases in the Commonwealth. 486 Pa. at 279-84, 405 A.2d at 900-03. For a further discussion of \textit{Pugh}, see supra notes 30-33 and accompanying text. The \textit{Feld} decision, however, reflects the traditional view that a landlord has no duty to protect his tenants absent agreement or a special relationship. \textit{See} 506 Pa. at 392, 485 A.2d at 746. For a discussion of the traditional view regarding a landlord's duty to provide...
Although the precise impact of the *Feld* decision is unclear, there are several aspects of the court's decision that could create problems for Pennsylvania courts and litigants. First, by limiting a landlord's liability for the results of criminal intrusion to those cases where a landlord has provided a program of security, the court is punishing landlords who recognize a potential risk and try to eliminate it, while sparing landlords who provide no security programs. Such a policy could have the obvious effect of discouraging landlords from providing any security at all. It is arguable, of course, that the free marketplace will eliminate this problem because competition to attract and retain tenants will induce landlords to provide security while protecting themselves with insurance and passing the costs on to their tenants. Although such a solution may be viable in affluent housing markets, it is problematic in poorer areas where tenants cannot afford to absorb increased rents, where insurance is more expensive and more difficult to obtain, and where security is even more necessary because poorer neighborhoods generally have higher crime rates.

Protection against criminal intrusion, see *supra* notes 37-40 and accompanying text.

151. The Pennsylvania Supreme Court remanded the case. 506 Pa. at 397, 485 A.2d at 748. Although the supreme court generally commended the trial court, the supreme court stated that the jury instructions imposed a greater duty than Pennsylvania was prepared to recognize. *Id.* at 385, 485 A.2d at 747. With regard to the defendant landlord, the issues on remand will be (1) whether the defendants agreed or volunteered to provide a “program of security;” (2) if so, whether the defendant performed that task in a reasonable manner; and (3) if he did not perform the program of security in a reasonable manner, whether the injuries suffered by the Felds were proximately caused by the defendant's breach of duty. *Id.* at 396, 485 A.2d at 747.

152. See, e.g., *Riley v. Marcus*, 125 Cal. App. 3d 103, 109-10, 177 Cal. Rptr. 827, 831 (1981). The *Riley* court stated that a landlord's efforts to secure his premises and protect his tenants against criminal intrusion should not automatically render him liable if such efforts fail. *Id.* Rather, the court indicated, a landlord should incur no liability by attempting, albeit unsuccessfully, to make his premises less vulnerable to criminal intrusion. *Id.* at 110, 177 Cal. Rptr. at 831. See also *Haines*, supra note 11, at 337 (landlords may be discouraged from providing any security at all for fear of liability if they fail).

153. See, e.g., *Feld*, 506 Pa. at 393-94, 485 A.2d at 747 (landlord may provide security even without duty to do so in order to attract and to keep tenants).

154. For a discussion of how landlords can protect themselves with insurance and the problems involved, see Note, *supra* note 40, at 1198.

155. *See Kline*, 439 F.2d at 488 (in imposing duty of protection on landlords, court is likely to allow landlords to pass increased costs of added security measures and insurance on to tenants).

156. It is noted that the *Kline* court stated that a landlord could pass the costs of security on to his tenants. 439 F.2d at 488. The *Feld* court, however, did not address this issue. One commentator has observed that in poorer neighborhoods it may not be realistic to raise rents either because of the tenants' limited finances or because of rent control legislation. *Haines*, supra note 11, at 351. That commentator suggested that if liability is imposed on landlords for inadequate security, the financial burden of providing more security could force landlords of poorer tenants out of business, promoting urban decay and decreasing...
A second part of the Feld decision that raises questions is the court's definition of a "program of security." The Feld court distinguished a program of security from the normal precautions a reasonable homeowner would take to protect his property. A program of security, the Feld court explained, "is an extra precaution, such as personnel specifically charged to patrol and protect the premises." It is suggested, however, that this definition begs the question of whether a landlord has a duty to provide basic security devices such as door locks or adequate lighting; and, if the landlord does provide such devices, whether he will be liable if a device fails and a criminal incident occurs in which a tenant is injured.

It is submitted that in finding "no general duty of a landlord to protect tenants against criminal intrusion," the Feld court could have relieved landlords of the duty to provide even basic security devices. Such a conclusion, however, is contrary to the Pennsylvania Supreme Court's holding in Pugh, which mandated that all residential landlords have a duty under the warranty of habitability to provide "secure windows and doors." The ambiguity of the court's position regarding such basic security devices was increased by Justice Zappala's concurring opinion in Feld rejecting the Kline court's suggestion that a landlord is required "in the first instance to provide any form of 'security services' or prote-
tive measures to meet the 'warranty of habitability.'”\textsuperscript{164} Although it has been suggested that \textit{Feld} can be read consistently with \textit{Pugh},\textsuperscript{165} it is at best unclear exactly what is required of landlords in Pennsylvania after \textit{Feld}.

The real irony of the supreme court’s opinion in \textit{Feld}, however, is that even if a landlord has a duty to provide standard security devices under the warranty of habitability, the landlord may not be liable in tort to his tenants if those basic devices fail. This conclusion is based on the \textit{Feld} court’s holding that a landlord is not liable in tort unless he provides a “program of security”, and under \textit{Feld} the provision of basic security devices does not constitute a program of security.\textsuperscript{166} It is submitted, however, that because \textit{Feld} involved a situation in which the landlord provided a “program of security,”\textsuperscript{167} the decision can be limited to its facts, and not applied to a case where a landlord has failed either to provide or to maintain basic security devices, such as door locks and lighting.

A third ambiguity in \textit{Feld} is the court’s statement that a landlord may incur a duty to protect his tenants against criminal intrusion by either volunteering or agreeing to provide a program of security.\textsuperscript{168} Exactly when this duty begins, when it ends, and what conduct it involves are questions the \textit{Feld} court left unanswered.\textsuperscript{169} As soon as a security system has been installed, the landlord’s duty is clearly triggered.\textsuperscript{170}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{164.} 506 Pa. at 399, 485 A.2d at 749 (Zappala, J., concurring) (emphasis in original). Justice Zappala stated that it would be a “gross distortion” to apply the \textit{Pugh} reasoning to the \textit{Feld} case. \textit{Id.} at 400, 485 A.2d at 750 (Zappala, J., concurring). The justice concluded that “[o]nly the most fainthearted and seclusive could accept the proposition that the lack of [security] would render a residence uninhabitable.” \textit{Id.} (footnote omitted).
\item \textsuperscript{165.} See \textit{Note, Absent Agreement, Landlord Has No General Duty to Provide Tenant with a Security Program}, 58 TEMP. L.Q. 493 (1985) (suggesting that landlords may be required to provide minimum security devices such as secure locks, doors, windows, and bars on windows).
\item \textsuperscript{166.} A similar conclusion was reached by a California court. Riley v. Marcus, 125 Cal. App. 3d 103, 177 Cal. Rptr. 827 (1981). In \textit{Riley}, the plaintiffs argued that even though the landlord had no duty to protect the tenant against unforeseeable criminal acts, the landlord should be held liable for failing to maintain door locks, windows, and outside lighting. \textit{Id.} at 109-10, 177 Cal. Rptr. at 831. The court, however, rejected this argument because “[t]he items were common place and furnished by virtually every landlord to every tenant.” \textit{Id.} The \textit{Riley} court, however, may have been influenced by the fact that by imposing such liability they would punish landlords who try to make their premises more secure. \textit{See id.} For a discussion of this consideration with regard to the \textit{Feld} case, see supra notes 151-56 and accompanying text.
\item \textsuperscript{167.} See 506 Pa. at 394, 485 A.2d at 747.
\item \textsuperscript{168.} \textit{Id.} at 393-94, 485 A.2d at 747.
\item \textsuperscript{169.} See Leary v. Lawrence Sales Corp., 442 Pa. 389, 397, 275 A.2d 32, 36 (1971) (quoting W. PROSSER, THE LAW OF TORTS § 54, at 340 (3d ed. 1969)). The \textit{Leary} court noted that “[t]he quantity of evidence required to show a voluntary assumption of duty is not easily stated.” \textit{Id.} at 397, 275 A.2d at 36.
\item \textsuperscript{170.} See W. PROSSER & W. KEETON, supra note 19, § 56, at 379 (where per-
\end{enumerate}
\end{footnotesize}
But under what circumstances and at what point prior to the final installation of the program does this duty arise? Will a landlord be liable if he merely promises to provide a security system? At what point can a tenant justifiably rely on such a program? If a landlord volunteers to perform this duty, how can he effectively terminate this duty? If a landlord raises the rent to provide a security program, will he be required to decrease the rent if the program is discontinued or will it suffice simply to notify his tenants? In light of the Feld court's concern that the landlord's assumption of the duty will create reliance by the tenant, it seems that the landlord's duty under Feld arises when the tenant reasonably relies on the landlord's assumption of responsibility for providing security services. It is submitted, however, that such an analysis neither gives tenants adequate protection from criminal assault, nor assists landlords in determining clearly when they have incurred a duty of protection.

The final ambiguity under the Feld opinion is whether a landlord in Pennsylvania who elects to provide a "program of security" must provide one which is reasonably designed to reduce the foreseeable risks of crime or must merely use reasonable care in providing whatever program of security he elects to provide. The Feld court stated that a landlord who offers a program of security owes his tenants a duty to use "reasonable care under the circumstances." This statement can lead to the conclusion that if a landlord undertakes to provide a program of security clearly has begun, there is no doubt that duty of care exists. In addition, the conclusion that a duty is activated when a security system has been installed may be inferred from the Feld court's statement that a landlord incurs a duty if he "provides a program of security." See 506 Pa. at 394, 485 A.2d at 747 (emphasis added) (footnote omitted).

171. For a general discussion of the issue of justifiable reliance, see W. Prosser & W. Keeton, supra note 19, § 56, at 378-82. 172. See 506 Pa. at 393, 485 A.2d at 747. The Feld court stated that comment a to § 323 of the Restatement (Second) of Torts is "relevant in a situation . . . where a landlord undertakes to secure the areas within his control and possibly fosters reliance by his tenants on his efforts." Id. It is submitted that by raising rent and installing security devices a landlord would create reliance by the tenant that the security devices will be adequately maintained, and that the only way to diminish such reliance would be by adjusting rent if the security is discontinued. See Holley v. Mt. Zion Terrace Apartments, Inc., 382 So. 2d 98 (Fla. Dist. Ct. App. 1980) (portion of tenant's rent used for security created landlord's contractual responsibility to maintain security).

173. See 506 Pa. at 394, 485 A.2d at 747 (court stated that tenant may rely upon program within reasonable expectations of program and may not expect more than is offered).

174. See 506 Pa. at 393, 485 A.2d at 747 (citing Restatement (Second) of Torts § 323 comment a (1965) ("[this section of the restatement] is . . . relevant in a situation . . . where a landlord undertakes to secure areas within his control and possibly fosters a reliance by his tenants on his efforts").

175. 506 Pa. at 394, 485 A.2d at 747 (emphasis added). For a further discussion of the Feld court's decision, see supra notes 114-134 and accompanying text.
ity, he must do so reasonably in order to reduce the risk of foreseeable crime.\textsuperscript{176} Such a conclusion is further supported by Justice Zappala’s concurring opinion, which states that “[l]iability is to be imposed only where the measures taken by the landlord either are unreasonable to reduce the risk of harm or have the effect of increasing the risk of harm.”\textsuperscript{177} However, if this is what the court intended, the court failed to give any guidelines regarding how it would define foreseeability\textsuperscript{178} or how it would determine whether a program of security was adequate in light of a foreseeable risk.

Conversely, it is suggested that the majority opinion in \textit{Feld} can lead to the conclusion that a landlord who provides a program of security merely must operate with reasonable care whatever program of security he offers, even if it is inadequate.\textsuperscript{179} This conclusion is supported by the court’s statements that a tenant may justifiably rely on a program of security only within the reasonable expectations of the program,\textsuperscript{180} and that the tenant “can only expect the benefits reasonably expected of the program as offered.”\textsuperscript{181}

\textbf{IV. Conclusion}

The Pennsylvania Supreme Court has already recognized that in the modern landlord-tenant relationship the tenant is in need of legal protection.\textsuperscript{182} The court, therefore, has held that the warranty of habitability is implied in every residential lease.\textsuperscript{183}

It is suggested that in holding that a landlord has no general duty to

\textsuperscript{176} See generally W. Prosser \& W. Keeton, \textit{supra} note 19, at 173-94 (standard to act as reasonable person requires individual to do what is necessary or what ideal individual would do in light of surrounding circumstances).

\textsuperscript{177} 506 Pa. at 403, 485 A.2d at 751 (Zappala, J., concurring).

\textsuperscript{178} For a discussion of how other courts have defined foreseeability in this context, see \textit{supra} notes 94-97 and accompanying text.

\textsuperscript{179} See 506 Pa. at 394, 485 A.2d at 747 (tenant may justifiably rely on program of security only within reasonable expectations of the program offered).

\textsuperscript{180} Id.

\textsuperscript{181} Id.

\textsuperscript{182} See Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 467-68, 329 A.2d 812, 820-21 (1974) (quoting Javins v. First Nat’l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.) (“when American city dwellers, both rich and poor, seek ‘shelter’ today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance.”), cert. denied, 400 U.S. 925 (1970)); Reitmeyer v. Specher, 431 Pa. 284, 290, 243 A.2d 395, 398 (1968) (“No longer does the average prospective tenant occupy a free bargaining status and no longer do the average landlord-to-be and tenant-to-be negotiate a lease on an ‘arm’s length’ basis.”). For a discussion of the reasoning supporting Pennsylvania’s decision that tenants are in need of protection, see \textit{supra} notes 30-33 and accompanying text.

\textsuperscript{183} See Pugh, 486 Pa. 272, 284, 405 A.2d 897, 906. For a discussion of \textit{Pugh}, see \textit{supra} notes 30-33 and accompanying text.
protect his tenants from criminal intrusion unless he decides to provide security services, the Feld court has taken a position inconsistent with Pennsylvania landlord-tenant law.\(^{184}\) While it is understandable that the Pennsylvania Supreme Court was concerned that the imposition of a general duty of protection would make landlords insurers of their tenants' safety,\(^{185}\) and thus would deter landlords from providing housing in less affluent areas, it is submitted that the court took a step backward in Feld and left tenants of urban multiple-unit dwellings unnecessarily vulnerable to criminal assault.\(^{186}\) It is submitted that the best way to balance the interests of landlords and tenants and society's need for adequate, safe housing is to impose a clear duty on landlords to provide basic security measures, such as secure locks on doors and windows, proper lighting, and possibly a buzzer or magnetic card entry system at the building's entrance. While this duty could be imposed either judicially or legislatively, the latter method has the advantage of giving landlords notice of the pending bill and a chance to procure new equipment and insurance before the duty is imposed.\(^{187}\) It is submitted that this limited duty will prevent landlords from becoming insurers of their tenants' safety and will also provide tenants with basic security. Of course, market forces may encourage a landlord to provide more comprehensive security measures, especially in affluent housing markets.\(^{188}\) If a landlord chooses to do this, it is submitted that he could then be held liable in tort based on an assumption of duty theory.\(^{189}\) Moreover, it is submitted that these basic security devices should be considered part of the implied warranty of habitability, so that a tenant


\(^{185}\) For a discussion of the supreme court's fear that the imposition of the superior court's holding in Feld could make a landlord an insurer of his tenants' safety, see supra notes 139-45 and accompanying text.

\(^{186}\) See Comment, supra note 66, at 1109 ("There is no doubt that apartment dwellers are in need of greater protection in their buildings."). For a discussion of the changes in Pennsylvania law from which the Feld court retreated, see supra notes 23-33 and accompanying text.

\(^{187}\) Note, Responsibility of Landlords for Criminal Acts of Third Persons, 48 N.C.L. Rev. 713, 718 (1970) (resolution of this problem may require type of intensive study that only legislature can provide).

\(^{188}\) See Feld, 506 Pa. at 393-94, 485 A.2d at 749. The Feld court noted that landlords sometimes provide security measures in order to attract new tenants and keep old ones. Id.

\(^{189}\) For a discussion of the assumption of duty theory, see supra notes 99-106 and accompanying text. The assumption of duty theory would apply here because even though the landlord would only have a duty to provide a basic level of security, he could be held liable for not properly maintaining any additional security he decided to provide. See Restatement (Second) of Torts § 323 & comment a (1965).
can use contract remedies to compel a landlord to fix a malfunctioning security device.\textsuperscript{190} This would give tenants a means to take action before a crime occurs, thereby preventing crime and reducing the landlord's potential tort liability. Finally, it is suggested that the imposition on landlords of a duty to provide basic security measures would be the least costly and most efficient way for landlords of urban multi-unit dwellings to protect tenants from criminal intrusion without becoming subject to unlimited liability. Such a solution would offer adequate protection for tenants, and would not discourage individuals who have the necessary resources from performing the important social function of providing housing.

\textit{John P. McLaughlin}

\textsuperscript{190} See generally Haines, \textit{supra} note 11, at 354-55 ("Tenants should be able to avail themselves of contract or tort remedies in asserting their rights to reasonable protection."). For a discussion of the contract remedies available in Pennsylvania under the warranty of habitability, see \textit{supra} note 84.