1-1-1983


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I. INTRODUCTION

An issue recently presented to the Massachusetts Supreme Judicial Court was whether a landlord could be held liable for a tenant's emotional distress. This issue arose in *Simon v. Solomon*, along with questions involving warranty of habitability, the covenant of quiet enjoyment, and Chapter 186, Section 14 of the Massachusetts General Laws.

Celeste Solomon was a tenant in a federally subsidized basement apartment, managed by Gem Realty Company (Gem). On thirty separate occasions, between April 1974 and November 1976, raw sewage and water ran into her apartment, covering the floors of the livingroom, bedroom and hallway. With flooding ankle deep, Ms. Solomon testified that she sometimes left her bed at night to check on her young children only to step into cold sewage and water. On each occasion, Ms. Solomon would spend the rest of the night awake, waiting to call Gem so that workers would come to pump out the apartment. Although Ms. Solomon suffered no actual physical injury, she became withdrawn, depressed, and unable to care for her children. Because of the persistent flooding of the apartment, Ms. Solomon sent her children to live with relatives and claimed that she spent much of her time in her bedroom crying,

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2. *Id.* at 93, 431 N.E.2d at 560.
4. 385 Mass. at 93, 431 N.E.2d at 560. Gem was controlled by Maurice Simon, the original plaintiff, now deceased. *Id.* at n.1, 431 N.E.2d at 560 n.1. The rent was $313 per month and Ms. Solomon paid $73 under the subsidy program. *Id.* at 110 n.13, 431 N.E.2d at 569 n.13.
6. *Id.* at 4.
7. *Id.*
8. *Id.* at 16.
shunning the outside world.9

As a result of these conditions, Ms. Solomon stopped paying rent in November 1976 and, within one month, Gem instituted summary eviction proceedings.10 Ms. Solomon counterclaimed that Gem had negligently failed to maintain the apartment and breached its implied warranty of habitability and implied covenant of quiet enjoyment, thereby causing Ms. Solomon to suffer emotional distress.11 Additionally, she claimed that Gem inflicted this emotional distress either intentionally or recklessly.12

In a jury trial before the Housing Court, City of Boston, summary judgment was granted to the landlord regarding the claim of negligent maintenance.13 The jury, however, found Gem liable on the remaining counts and assessed damages of $1000 for the breach of warranty of habitability, $10,000 for breach of quiet enjoyment, and $35,000 for intentional or reckless infliction of emotional distress.14 In addition, Ms. Solomon was awarded $40,000 in attorney fees pursuant to section 14.15

Gem appealed and the supreme judicial court affirmed the summary judgment on the negligence claim as well as the damage awards for emotional distress, breach of implied warranty of habitability, and attorney fees.16 The jury award of damages in the amount of $10,000 for the breach of implied covenant of quiet enjoyment was vacated on the basis that it was redundant.17

This note will trace the development of the warranty of habitability and discuss the history of the tort claim of emotional distress in Massachusetts landlord-tenant law. The purpose and provisions of section 14, designed to provide safe and sanitary housing, will then be discussed and the Simon court's application of section 14 will be evaluated. Additionally, the rejection of the claim for negligent infliction of emotional distress will be considered as well as the Simon court's refusal to hold Gem strictly liable for its breach of the warranty of habitability.

9. Id. at 17.
10. 385 Mass. at 93, 431 N.E.2d at 560.
11. Id.
12. Id.
13. Id. at 94, 431 N.E.2d at 560.
14. Id. at 94, 431 N.E.2d at 560-61.
16. 385 Mass. at 95, 431 N.E.2d at 561.
17. Id. at 111, 431 N.E.2d at 569-70.
II. BACKGROUND

A. Landlord-Tenant Law in Massachusetts

Landlord-tenant law has changed substantially from the draconian principle that in the lease of a building as a dwelling, there was no covenant implied that the building was fit for habitation. At common law, a tenant was required to pay rent, even if the premises were destroyed, because the land underneath the premises was considered the primary aspect of the lease. As a result of this very strict rule and its harsh results, the doctrine of constructive eviction evolved. This doctrine "relieved the tenant of his rent obligation if he could show that he had vacated the premises due to a severe failure of maintenance services amounting to a breach of the landlord's duty to assure quiet possession." The doctrine of constructive eviction, however, did not help a tenant who desired a habitable dwelling. Thus, another exception was carved out of the common law rule: If the tenant's clear purpose was to obtain habitable housing, then the independent covenants rule did not apply.

The independent covenants rule meant that the tenant's promise to pay rent was made independently of the landlord's promise to keep the dwelling habitable; this rule, therefore, prohibited a tenant from...
withholding rent on the basis that the landlord had breached some obligation.

It was the early rule of *Ingalls v. Hobbs*;\(^\text{25}\) that held the independent covenants rule did not apply in a short term lease of a furnished house as "[i]ts fitness for a particular use . . . [was] a far more important element [in] entering into the contract than when there [was] a mere lease of real estate."\(^\text{26}\) The court believed the purpose of the tenant's leasing was well understood to be for use as habitation.\(^\text{27}\) The limited holding of *Ingalls* prevailed\(^\text{28}\) until 1973 when the court, in *Boston Housing Authority v. Hemingway*;\(^\text{29}\) held that the *Ingalls* exception to the common law rule "must now become the rule in an urban industrial society where the essential objective of the leasing transaction is to provide a dwelling suitable for habitation."\(^\text{30}\) In addition to holding that the rental of any dwelling

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26. Id. at 350, 31 N.E. at 286. This holding was limited to the special facts of the short term lease for a furnished room or house. Additionally, the ruling showed a willingness by the court to apply the standard of warranty of habitability when it was obvious that the contract was a promise by the landlord to "deliver premises suitable to the tenant's purpose in return for the tenant's promise to pay rent." Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 191, 293 N.E.2d 831, 838 (1973).
28. In Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 129, 163 N.E.2d 4, 7 (1959), the court recognized that a tenant was entitled to damages when a breach of quiet enjoyment went "to the essence" of the contract even though the tenant had not abandoned the premises. The court stated:

> [s]uch relief is more nearly adequate than the incomplete and hazardous remedy at law which requires that the lessee (a) determine at its peril that the circumstances amount to a constructive eviction, and (b) vacate the demised premises, possibly at some expense, while remaining subject to the risk that a court may decide that the lessor's breaches do not go to the essence of the lessor's obligation.

Id. at 129-30, 163 N.E.2d at 7.
30. Id. at 196-97, 293 N.E.2d at 841. The court noted that the urban tenant had no concern over the land or property interest, but rather, was concerned with the premises. *Id.* In addition, the court relied on the rationale advanced in Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078-79 (2d Cir. 1970). The *Hemingway* court stated that the tenant is no longer a "jack-of-all-trades" like the agrarian farmer and the length of the tenancy may not justify requiring the tenant to undertake repairs. Further, the court expressed concern over the complexity of homes and stated that repairs are often expensive and difficult, and many times the object in need of repair is totally within the control of the landlord. *Hemingway*, 363 Mass. at 197-98, 293 N.E.2d at 841-42 (citing *Javins*, 428 F.2d at 1078-79). The court further stated that the holdings in *Ingalls* and Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 163 N.E.2d 4 (1959); see *supra* note 8, as well as legislation establishing minimum sanitary requirements and the statutes developed to enforce those standards, showed a retreat from the "fundamental common law assumption on which the independent covenants rule [was] based. . . ." 363 Mass. at 194, 293 N.E.2d at 840. In further justification for the change from common law, the
had an implied warranty of habitability that the premises were suitable for habitation, the court stated further that a warranty, to the extent that it was based on state sanitary codes and local health regulations, could not be waived by any provision of a rental agreement.\textsuperscript{31} After these decisions, the court was then faced with delineating the scope of this warranty.

Within a year after \textit{Hemingway}, the court made clear in \textit{DiMarzo v. S & P Realty Corp.},\textsuperscript{32} that \textit{Hemingway} did not apply to situations involving the tort liability of a landlord.\textsuperscript{33} When faced with this same issue in \textit{Crowell v. McCaffrey} five years later, however, the court held that the "extension of the warranty [of habitability] to the ordinary residential tenancy at will, in accordance with the \textit{Hemingway} decision, logically carries with it liability for personal injuries caused by a breach."\textsuperscript{35} There have been no major changes from this position in landlord-tenant law in Massachusetts.

\textsuperscript{31} Id. at 199, 293 N.E.2d at 843. The court also stated that conditions not covered by the Sanitary Code might also be a breach of the warranty of habitability and that "fitness for human habitation" was not necessarily limited to minimum Code standards. \textit{Id.} at 200-01 n.16, 293 N.E.2d at 844 n.16. The court did set forth several factors that were to be considered in determining whether there had been a breach of the implied warranty of habitability:

\begin{itemize}
\item[(a)] the seriousness of the claimed defects and their effect on the dwelling's habitability;
\item[(b)] the length of time the defects persist;
\item[(c)] whether the landlord or his agent received written or oral notice of the defects;
\item[(d)] the possibility that the residence could be made habitable within a reasonable time; and
\item[(e)] whether the defects resulted from abnormal conduct or use by the tenant.
\end{itemize}

\textit{Id.} at 200, 293 N.E.2d at 843-44 (footnotes omitted).

\textsuperscript{32} Id. at 510, 306 N.E.2d 432 (1974).

\textsuperscript{33} Id. at 514, 306 N.E.2d at 434. The court noted that the justification for the change in landlord-tenant contract rules was the uncertain validity of the common law stance that a lease was a conveyance of real estate. \textit{Id.} (citing \textit{Boston Hous. Auth. v. Hemingway}, 363 Mass. 184, 293 N.E.2d 831 (1973)). The court also stated that "[w]hatever the contractual liability, there could be no tort liability for non-feasance in the absence of an agreement, for consideration, that the landlord would keep the premises in a condition of safety, and make all repairs without notice." 364 Mass. at 513, 306 N.E.2d at 434.

\textsuperscript{34} 377 Mass. 443, 386 N.E.2d 1256 (1979).

\textsuperscript{35} 377 Mass. at 451, 386 N.E.2d at 1261; \textit{see also} \textit{Restatement (Second) of Property} \S 17 Reporter's note to Introductory note to ch. 17 (1977).
B. Emotional Distress and Tort Law in Massachusetts

In 1897, it was stated, in *Spade v. Lynn & Boston Railway Co.*,\(^\text{36}\) that "in an action to recover damages for an injury sustained through the negligence of another there can be no recovery for bodily injury caused by . . . fright and mental disturbance."\(^\text{37}\) The court, however, left open the question of whether mental suffering that was caused intentionally or recklessly with "utter indifference" was actionable.\(^\text{38}\) This question was left unanswered for seventy-four years.\(^\text{39}\)

The element of speculative damages has been a great concern of courts and the denial of infliction of emotional distress as an independent tort has been based upon a fear of fraudulent or frivolous claims,\(^\text{40}\) a concern over the difficulty in proof of causation,\(^\text{41}\) and a possible flood of litigation.\(^\text{42}\) But, recovery was granted as courts began to recognize the severe injury incurred by plaintiffs. Instead of basing the recovery on emotional distress, however, relief was based upon theories of false imprisonment, trespass, nuisance, invasion of privacy, and technical assault.\(^\text{43}\)

\(^{36}\) 368 Mass. 285, 47 N.E. 88 (1897).

\(^{37}\) Id. at 285, 47 N.E. at 88. Justice Allen further stated:
we remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person . . . without.


\(^{39}\) See infra notes 44-45 and accompanying text.


\(^{42}\) See W. Prosser, * supra* note 36, at § 50. [E]ven at the expense of a 'flood of litigation' . . . it is a pitiful confession of incompetence on the part of any court of a jurisdiction to deny relief on such grounds." Id.

Finally, in *George v. Jordon Marsh Co.*[^44] the court recognized emotional distress as an independent tort and held that "one, who, without privilege to do so, by extreme and outrageous conduct, intentionally causes severe emotional distress and bodily harm even though he has committed no heretofore recognized common law tort" may be held liable.[^45] The court noted that the element of speculation was not any greater than in the usual tort claim where evidence was offered and the issue of causation was required to be weighed with great care.[^46] The *George* court, however, declined to rule as to whether conduct that was negligent, grossly negligent, or wanton and reckless, that caused severe emotional distress and also resulted in bodily injury, was legally sufficient to state a cause of action. The court left open the question of the legal sufficiencies of such distress unaccompanied by bodily harm.[^47]

The question of whether a claim for emotional distress could be supported without accompanying physical injury arose in the leading case of *Agis v. Howard Johnson Co.*[^48] The court in *Agis* held that a plaintiff could recover for emotional distress inflicted intentionally or recklessly even though there might not be accompanying bodily injury.[^49] The court listed the specific factors that a plaintiff would be

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[^45]: Id. at 255, 268 N.E.2d at 921. In justifying its position the court stated: The right to recover... damages should not be denied just because they do not fit in any of the existing niches in the ancient walls surrounding the law of torts. If the current needs of society require and justify so doing, the walls may be extended and additional niches built to accomplish justice.
[^46]: Id. at 250, 268 N.E.2d at 918.
[^47]: 359 Mass. at 255, 268 N.E.2d at 921.
[^49]: Id. at 141, 355 N.E.2d at 317. In this case the plaintiff, a waitress, was summoned to a meeting along with all the other waitresses. At the meeting the defendant manager of the corporation informed the waitresses that stealing was occurring and that they did not know who was responsible. The manager continued by stating that until the
required to prove,50 and stated that if each of these factors were
proved, the chances of frivolous or fraudulent claims would be
minimized.51

The tort claim of emotional distress has changed significantly
since the restrictive stance of Spade. George and Agis demonstrate
the court's willingness to consider the expansion of this claim. The
evolution has been laborious, however, indicating that future expan­
sion promises to be similar.

C. The Statute

Section 1452 is part of a statutory scheme that supplies remedies
for tenants as against landlords who fail to provide safe and sanitary
housing.53 The purpose of the section is "to facilitate enforcement of
State housing regulations and to provide relief for tenants deprived
of decent homes."54 Specifically, a landlord who is required by any
implied or express provision of the lease or contract to supply certain
services,55 may not willfully or intentionally interfere with the fur­
nishing of that service either by direct or indirect means.56 Land­
lords are also proscribed from interfering in any way with the
tenant's quiet enjoyment.57 While section 14 provides for criminal

person was caught, he would begin to fire all the waitresses in alphabetical order. The
plaintiff was promptly fired. Id.

50. The Agis court established four elements that a plaintiff must show before re­
covery may be had:

(1) that the actor [defendant] intended to inflict emotional distress or that he
knew or should have known that emotional distress was the likely result of his
conduct; ... (2) that the conduct was "extreme and outrageous" . ... ; (3) that
the actions of the defendant were the cause of the plaintiff's distress ... ; and
(4) that the emotional distress sustained by the plaintiff was "severe" . . . .

Id. at 144-45, 355 N.E.2d at 318-19 (citations omitted).

51. Id. at 145, 355 N.E.2d at 319. The court stated "'it is for the jury, subject to
the control of the Court,' to determine whether there should be liability. . . ." Id. (quoting
RESTATEMENT (SECOND) OF TORTS, § 46 comment h (1965)). The standards of Agis
were applied in the Simon case. See supra note 50 and infra note 68 and accompanying

52. MASS. GEN. LAWS ANN. ch. 186, § 14 (West 1977 & Supp. 1983); see supra note 3.

53. 385 Mass. at 100, 431 N.E.2d at 564.

54. Id. at 101, 431 N.E.2d at 564 (citing Boston Hous. Auth. v. Hemingway, 363
Mass. 184, 293 N.E.2d 831 (1973)).

enumerated are water, hot water, heat, light, power, gas, elevator service, telephone serv­
ice, janitor service and refrigeration service. Id.

56. Id.

57. Id.
It also creates an independent civil action. Therefore, if found guilty of a violation, the landlord is liable for actual and consequential damages, or three months rent, whichever is greater.

When section 14 was first enacted, portions of the statute, "failure to provide services" and "interference with quiet enjoyment" required intentional or willful conduct. When it was re-written, however, the words intentional and willful were deleted from the quiet enjoyment phrase. In interpreting this act of the legislature, the supreme judicial court has stated that specific intent was no longer required when a landlord had interfered with a tenant's quiet enjoyment, and that unsanitary conditions could cause harm regardless of whether or not the landlord had acted intentionally. Courts in Massachusetts have imposed liability upon the landlord "whenver the 'natural and probable consequence' of the landlord's action was [an] interruption of the tenant's rights."

There have only been three cases involving section 14 on appeal, as most decisions of the housing courts have been left undisturbed. Those cases, which include Simon, are highly significant due to the interpretation given to section 14 by the supreme judicial court.

58. Id. The criminal penalties are imprisonment up to six months or a fine not to exceed $300 but not less than $25. Id.

59. Id. The statute provides for civil liability to be imposed on those who violate its provisions. Id. The Simon court stated that a landlord need not be convicted for a criminal violation before a tenant could state a civil cause of action against the landlord because that would defeat the utility of the statute to the tenant who was attempting to enforce the provisions. 385 Mass. at 100, 431 N.E.2d at 564.

60. MASS. GEN. LAWS ANN. ch. 186, § 14 (West 1977 & Supp. 1983). This provision guarantees a minimum amount of damages to a successful tenant in the event that the actual damages suffered were minimal. If a tenant were to be only compensated for actual damages, and those damages were slight, the tenant might not litigate. The triple rent damage provision encourages landlords to comply with the statute. Simon, 385 Mass. at 111, 431 N.E.2d at 569; see infra notes 158-172 and accompanying text.

61. Simon, 385 Mass. at 101, 431 N.E.2d at 564 (citations omitted).

62. Id.

63. Id. at 101-102, 431 N.E.2d at 564.

64. Simon, 385 Mass. at 101, 431 N.E.2d at 564.


67. See infra notes 158-172 and accompanying text.
D. Simon

1. Emotional Distress

The *Simon* court was confronted with several issues, the first of which concerned whether Gem recklessly inflicted emotional distress upon Ms. Solomon. In applying the standard set forth in *Agis*, the court rejected Gem's argument that it was not the proximate cause of Ms. Solomon's injuries. Gem's argument that causation had not been established was based upon several facts. First, a plumber had examined the building's two waste stacks and plumbing system, and had found them to be in good repair and in compliance with the state plumbing regulations. Second, the source of the flooding was unclear, and although some back-ups did occur, uncontroverted testimony indicated that the condition was caused by objects discarded by other tenants through the plumbing system or roof vents. Gem, therefore, asserted that it acted reasonably in its maintenance of the plumbing and was not responsible for the flooding that caused Ms. Solomon's injuries.

The court found, however, that Gem's arguments regarding the plumbing did not correctly state the scope of duty owed by Gem to its tenants. The court stated that it had firmly established that landlords renting residential dwellings guaranteed that the premises would be habitable, and that at the very least, this was a duty to keep the premises in compliance with state sanitary codes. Moreover, the court noted that there was evidence at trial which indicated that the wall between Ms. Solomon's apartment and the adjoining basement area was porous. Because Gem contemplated cementing the wall but did not do so, the court determined that a jury could reasonably find Gem's failure to cement was the proximate cause of

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68. See supra note 50.
69. 385 Mass. at 95-96, 431 N.E.2d at 561.
70. Id. at 95, 431 N.E.2d at 561.
71. Id.
72. Id. at 96, 431 N.E.2d at 561.
73. Id. One court has stated that the primary issue in emotional distress litigation is that of duty. "[D]uty . . . is a legal conclusion which depends upon 'the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" Rodrigues v. State, 52 Hawaii, 156, 170, 472 P.2d 509, 518 (1970) (citing W. PROSSER, THE HANDBOOK OF THE LAW OF TORTS, § 53, at 332 (3d ed. 1964)).
75. 385 Mass. at 96, 431 N.E.2d at 561 (citations omitted).
76. Id.
Ms. Solomon's injuries.\textsuperscript{77} In addition, because the state sanitary code requires apartments to be water tight,\textsuperscript{78} the court stated that Gem incorrectly focused its causation argument on the relationship between its conduct and the flooding rather than on the relationship between the flooding and the injuries sustained.\textsuperscript{79}

Having found that Gem had violated its duty by failing to prevent the flooding of Ms. Solomon's apartment, the court then stated that there was ample evidence to support the requisite elements\textsuperscript{80} in a cause of action for reckless or intentional infliction of emotional distress.\textsuperscript{81} Because testimony given at trial revealed that Ms. Solomon continually complained of the flooding and that Gem sent a clean up crew each time, the court determined that a jury could find that Gem had notice.\textsuperscript{82} As a result, Gem knew, or should have known, that floods of sewage water would cause emotional distress.\textsuperscript{83} The court stated further that because the flooding occurred numerous times over an extended period, the jury was also justified in its finding of reckless conduct\textsuperscript{84} because the indifference displayed by Gem amounted to outrageous behavior.\textsuperscript{85}

\begin{itemize}
\item \textsuperscript{77} Id. at 96-97, 431 N.E.2d at 562 (citations omitted).
\item \textsuperscript{78} Id. at 97, 431 N.E.2d at 562 (citing MASS. ADMIN. CODE tit. 105, § 410.000 (1978)).
\item \textsuperscript{79} 385 Mass. at 97 n.3, 431 N.E.2d at 562 n.3.
\item \textsuperscript{80} See supra note 50.
\item \textsuperscript{81} 385 Mass. at 97, 431 N.E.2d at 562.
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Id. at 97, 431 N.E.2d at 562.
\item \textsuperscript{84} The elements required in an intentional or reckless infliction of emotional distress as set forth in Agis, see supra note 50, is an adoption of the RESTATEMENT (SECOND) OF TORTS § 46 (1977). Recklessness, as applied to Section 46, is defined as follows:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id. § 500. Section 500 states that there must be present a "conscious disregard or indifference" to that risk. Id. at comment a. This definition of reckless applies to Section 46 when the acts are in deliberate disregard of a high probability that emotional distress will occur. Id. § 46, at 77.

\item \textsuperscript{85} 385 Mass. at 97, 431 N.E.2d at 562. Section 46 of the Restatement states that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. RESTATEMENT (SECOND) OF TORTS § 46 (1977). Section 46 was adopted by Massachusetts courts in Agis. 371 Mass. at 145, 355 N.E.2d at 319. Section 46 further states:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress or
Although the claim for intentional infliction of emotional distress against Gem was affirmed, Ms. Solomon appealed the summary judgment granted against her on her claim of negligent maintenance. 86 The court stated that it did not recognize a cause of action for negligent infliction of emotional distress without physical injury. 87 It concluded that it need not decide that issue in Simon nor whether the legislature intended to authorize a claim for negligent infliction of emotional distress under section 14. 88 Further, while the court also refused to decide whether the tenant could recover for emotional distress under a theory of strict liability, 89 it noted that Ms. Solomon had not shown that she was entitled to additional recovery even if recovery under a lesser standard of culpability was available. 90

2. Section 14 and Damages

Ms. Solomon invoked section 14 as a counterclaim to Gem’s summary eviction proceeding. 91 In interpreting section 14, the court rejected Gem’s argument that a criminal conviction was necessary before a civil action was instituted, 92 and that in a claim of interference of quiet enjoyment, specific or malicious intent was unnecessary. 93 Gem argued further that it had been found liable for the actions of third parties and that these actions were beyond its control. 94 This argument, similar to Gem’s causation argument regard-

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86. 385 Mass. at 98, 431 N.E.2d at 562.
88. Id. at 103, 431 N.E.2d at 565.
89. See supra notes 138-154 and accompanying text.
90. Id. at 94, 431 N.E.2d at 560. See supra notes 58-59 and accompanying text.
91. See supra notes 59-60 and accompanying text.
92. Id. at 102, 431 N.E.2d at 564-65.
93. Id. The actions of third parties claimed were related to Gem’s reliance on the testimony that tenants had introduced foreign materials into waste stacks and had used washing machines in apartments. Id. at 103, 431 N.E.2d at 565.
ing the issue of reckless infliction of emotional distress,95 was rejected on the basis of duty:96 the flooding could have been prevented, and Gem had a duty to prevent it.97

The court granted limited review on the issue of damages98 and affirmed all of the damages99 except the $10,000 award for breach of Ms. Solomon's quiet enjoyment, which was held to be redundant.100 The court stated that the primary cause of confusion leading to the redundancy arose from the jury instruction.101 The trial judge below had instructed that for interference of quiet enjoyment, the jury was to consider the statutory awards provided under section 14. Additionally, for breach of warranty of habitability, the jury was instructed that damages may be awarded for the difference between the rent paid and the value of the premises in its inhabitable condition.102 The jury was further instructed that lost income, medical expenses and pain and suffering were to be considered in assessing damages for reckless infliction of emotional distress. As a result of these instructions, the Simon court believed that, because the jury awarded damages under all three provisions, duplication of damages necessarily followed.103 The court noted that if the jury had based the award for interference with quiet enjoyment upon actual damage suffered, then that award duplicated the damages granted for the lost rental value in the warranty of habitability as well as for the infliction of emotional distress.104 The court, therefore, determined that the $10,000 award for breach of quiet enjoyment was not justified under section 14 because triple rent damages were to be awarded

95. See supra text accompanying notes 70-77.
96. See supra note 73; infra text accompanying note 114.
97. 385 Mass. at 103, 431 N.E.2d at 565 (citations omitted); see infra note 142 and accompanying text.
98. 385 Mass. at 108, 431 N.E.2d at 568. The court limited its review of the damages awarded by the trial court to the issue of whether the award was supported by the evidence because Gem did not object at the time of the jury instruction. Since Gem filed timely motions for a directed verdict and for a judgment notwithstanding the verdict, however, limited review was granted. Id. at 107-08, 431 N.E.2d at 568.
99. See supra text accompanying notes 14-16.
100. 385 Mass. at 108, 431 N.E.2d at 568.
101. Id. These damages were to be actual and consequential damages, or three months rent, whichever was greater. The judge instructed that actual and consequential damages should include rent that was paid over the value of the apartment, as well as lost income due to the injury sustained and damages for emotional distress. Id. at 109, 431 N.E.2d at 568.
102. Id.
103. Id.
104. Id.
only when actual damages were less than the tripled rent.  

Additionally, the court affirmed the attorney fees awarded to Ms. Solomon in the amount of $40,000. Gem argued that legal fees were granted to Ms. Solomon regarding her count of emotional distress, which was not part of her statutory claim. The court, however, dismissed this argument by stating that the delineation of claims did not affect the rights of the plaintiff and that the provision for actual and consequential damages suggested an intent by the legislature to include all reasonable foreseeable damages. Because it was found at trial that Gem knew or should have known that the floods would cause emotional harm and that Ms. Solomon's injuries were foreseeable, the emotional distress award was within the range of section 14 and was properly included in the consideration of attorney fees. The fees were found to be reasonable and the court added that because judges are given broad discretion in such awards, their findings are not to be disturbed unless they are completely erroneous.

III. Analysis

A. Emotional Distress

There is no question that Ms. Solomon suffered severe emotional distress as a result of Gem's actions. The straight-forward application of the standard set forth in Agis's was proper, and the only serious contention raised was that of causation. The court's application of a duty owed by a landlord to a tenant, which emphasized that causation was found between the flooding and Ms. Solomon's injuries rather than between the conduct of the landlord and the flooding, was proper in light of the theory of warranty of habitability and its purpose. If the court had allowed Gem's causation argument to prevail, it would have absolved Gem of all liability for the
extensive suffering and injury of Ms. Solomon. Because duty is a legal conclusion, the Simon court essentially decided that, based upon policy considerations, Ms. Solomon was entitled to protection from Gem. Without such a duty imposed on landlords by the Simon ruling, recalcitrant landlords might be encouraged to ignore problems in apartments if they are unable to ascertain the location of the problem. This would put tenants in the untenable position of knowing that, although wrongful conduct had been committed, there was no one at whom they could point a finger. In such a case, a tenant would be at his landlord's mercy, thereby defeating the purpose of section 14.

While the court affirmed Ms. Solomon's claim for reckless infliction of emotional distress, it refused to recognize a cause of action for negligent infliction of emotional distress without attendant physical injury. Several reasons for this denial were enunciated in Payton v. Abbott Laboratories. First, in a claim for negligent infliction of emotional distress, the emotional disturbance that is not so severe as to have physical impact is likely to be "so temporary, so evanescent and so relatively harmless" that allowing recovery would overburden both defendants and courts. Second, such claims are too easily imagined or faked when the guarantee of genuineness represented by physical injury is missing. Third, if the degree of culpability is mere negligence, the defendant should not be burdened by liability for emotional distress. These reasons are very similar to justifications espoused as support for disallowing any type of damages for any emotional distress unaccompanied by physical injury.

Other courts have disagreed that the claim of negligent infliction of emotional distress should be disallowed simply because there is no physical injury. The California Supreme Court, in Molien v. Kaiser Foundation Hospitals, stated that while courts wanted to

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114. See supra note 73.
115. See W. Prosser, supra note 40, § 53 at 325-26.
116. See supra text accompanying note 54.
119. Id.
120. Id. at 553, 437 N.E.2d at 179.
121. See supra notes 40-42 and accompanying text.
122. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). In Molien, the plaintiff and his wife belonged to the Kaiser Health plan. When Mrs. Molien went in for a routine physical, the doctor informed her that she had syphilis. Mr. Molien was brought in for blood tests and Mrs. Molien was required to undergo treatment. Subsequently, it
avoid fictitious and fraudulent claims, drawing a line at negligence was not necessarily a justifiable rationale. The Molien court believed that there were two major problems in allowing intentional and reckless infliction of emotional distress while disallowing a negligence claim. First, such a distinction was overinclusive because it permitted recovery for emotional distress when there was physical injury regardless of whether that injury was minimal. Further, it was underinclusive because such a distinction systematically denied recovery to valid and genuine claims. Second, the requirement of physical injury itself resulted in encouraging "extravagant pleading and distorted testimony." Similarly, the Supreme Court of Utah stated

[that] if the right to recover for injury resulting from the wrongful conduct could be defeated whenever such dangers [of fraud] exist, many of the grievances the law deals with would be eliminated. That some claims may be spurious should not compel those who administer justice to shut their eyes to serious wrongs and let them go without being brought to account. It is the function of Courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the task may be difficult to perform.

Hawaii in Rodrigues v. State, also abrogated the physical injury requirement. There, the Supreme Court of Hawaii stated that a general standard was needed for testing the validity of such claims. Factors to be considered in determining the genuineness of claims included the sophistication of medical testimony as well as

was discovered that the doctor's diagnosis was in error. The plaintiff alleged as a result of the negligent diagnosis, his wife became upset, suspicious and the marriage broke down. Id. at 921, 616 P.2d at 815, 167 Cal. Rptr. at 833.

123. Id. at 927, 616 P.2d at 819, 167 Cal. Rptr. at 837.
124. Id. at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.
125. Id. at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838.
127. 52 Hawaii, 156, 472 P.2d 509 (1970). In Rodrigues, the plaintiffs were home owners who resided on a lot separated from the highway by an unimproved parcel of land. A culvert ran under the highway emptying onto the parcel. The plaintiff informed the state that the culvert often clogged and during heavy rains water would build up on his land. The state highway department assured the plaintiff that everything would be fine and told the plaintiff to call if flooding looked imminent. One night, during a storm, the plaintiff called the state and warned that flooding looked certain. The state workers arrived five hours later by which time the home was flooded with six inches of water causing extensive damage to the plaintiff's house and furnishings. Id. at 159, 472 P.2d at 513.
128. Id. at 172, 472 P.2d at 519.
the quality and genuineness of the proof presented to the court. Additionally, the ability of the court and the jury to see through dishonest claims, according to the Rodrigues court should be a consideration. The court further reasoned, "[i]t can no longer be said that the advantages gained by the courts in administering claims of mental distress by reference to narrow categories outweigh the burden thereby imposed on the plaintiff." Rodrigues then adopted the standard that serious mental suffering would be recognized when a "reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."

The foregoing reasoning should have been applied to the facts of Simon. It is unreasonable to presume that Ms. Solomon's injuries were lessened by the culpability of the defendant's conduct and there is no doubt that she had a valid claim. Additionally, Gem breached its duty whether it acted negligently or recklessly. The emotional distress suffered by Ms. Solomon was not increased by reckless conduct any more than it was decreased by negligent conduct. On the other hand, if there had been accompanying physical injury, such as a cut which had become infected, the court would have most likely allowed the cause of action. In a case such as Ms. Solomon's, where there is a valid claim, a plaintiff must pray for a physical injury in order to recover for her genuine and valid negligently inflicted emotional harm. Moreover, requiring physical injury encourages extravagant pleading and distorted testimony. In the hypothetical of the infected cut, much time and evidence would be lent in support of the physical injury in an attempt to justify the emotional distress. Most courts have deleted foreseeability as the sole criteria in emotional distress cases, although some courts are still citing foreseeability and defendant's lesser degree of culpability as sufficient reasons for denying negligent infliction of emotional distress. The real reason is fear of fraudulent and frivolous claims rather than the articulated justifications advanced.

129. Id. at 172, 472 P.2d at 519-20 (quoting Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 966 (1958)).
130. 52 Hawaii at 172, 472 P.2d at 520.
131. Id. at 174, 472 P.2d at 520.
132. Id. at 173, 472 P.2d at 520.
134. See Mollen, 27 Cal. 3d at 929, 616 P.2d at 820, 167 Cal. Rptr. at 838.
135. W. Prosser, supra note 40, § 12, at 51.
137. W. Prosser, supra note 40, § 12, at 50.
B. **Strict Liability—Warranty of Habitability**

The question of whether a landlord could be held strictly liable for a breach of warranty of habitability was also addressed by the *Simon* court. Ms. Solomon argued that proof of negligence should not be necessary in the landlord-tenant relationship. The court stated initially that the warranty of habitability contemplated a minimum requirement that the landlord keep the dwelling in conformity with the state sanitary code. The court did not hold that a landlord could be held strictly liable, but rather, it noted that a landlord could be held liable for the tenant’s injuries at least when the landlord had not exercised reasonable care. It is uncertain whether the court made the narrower statement because Gem’s conduct had already been held to be reckless, or if it was because negligence was an element required to be proven.

The rationale for adopting strict liability in the landlord-tenant context is based on several factors. The landlord has superior

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138. 385 Mass. at 98, 431 N.E.2d at 563; see *supra* note 90 and accompanying text.
139. *See supra* notes 29-31 and accompanying text.
140. 385 Mass. at 96, 431 N.E.2d at 561.
141. *Id.* at 96, 431 N.E.2d at 562 (citing Crowell v. McCaffery, 377 Mass. 443, 450-51, 386 N.E.2d 1256, 1260 (1979)» (emphasis added); *see supra* text accompanying notes 74-75.
142. 385 Mass. at 98, 431 N.E.2d at 562. In Berman & Sons, Inc. v. Jefferson, 379 Mass. 196, 200-01, 396 N.E.2d 981, 984-85 (1979), the court declined to decide the question of whether a finding of negligence was a necessary prerequisite for imposing liability upon a landlord for failure to maintain compliance with minimum housing standards. *Id.* (citing Crowell v. McCaffery, 377 Mass. 443, 386 N.E.2d 1256 (1979)). In *Berman*, the landlord argued that to impose strict liability would penalize a landlord who acted reasonably and would create a hopeless duty especially since neither the landlord nor the tenant expected perfect upkeep when there were system breakdowns and time needed for repairs. Therefore, the landlord argued that the law should correspond to reality. 379 Mass. at 199-200, 396 N.E.2d at 984. The court responded by stating that “[a] tenant has a right to expect that the landlord will comply with the law. It is this right we protect.” *Id.* at 199-200 n.6, 396 N.E.2d at 984 n.6. The court further stated that “[c]onsiderations of fault do not belong in an analysis of warranty.” *Id.* at 200, 396 N.E.2d at 984.

*Berman*, therefore, indicates that the court is willing to view a strict liability imposition favorably. Commentators have suggested that there are a number of reasons why an imposition of strict liability in the landlord-tenant context is valid.

The adoption of the implied warranty of habitability was premised in large part on product liability and analogies. If a lease is a contract to provide goods and services, these same products liability precedents suggest that a landlord (like a builder-vendor of real property, seller of used property, provider of commercial services, or lessor of personal property) should be held strictly liable for personal injury or property damage caused by a defect in the premises.

143. *Id.* at 155.
knowledge and is in a better position to prevent defects. Also, the landlord is in a better position to bear and distribute losses through liability insurance, thus spreading the ultimate cost on to all tenants. Finally, a strict liability standard eliminates the need for proving negligence, an important factor since it may be impossible for the tenant to prove that the landlord knew or should have known about the defect.¹⁴⁴

There are also those who strenuously advance reasons for denying the imposition of strict liability on landlords.¹⁴⁵ First, it has been asserted that an apartment has several rooms with many facilities, thus making it difficult to ascertain who is responsible for the defect or its source.¹⁴⁶ Many jurisdictions, however, imply a warranty in new homes on the builder-vendor of real property despite the complexity of the product.¹⁴⁷ In fact, it is “this very complexity that has justified the imposition of strict liability because it is impossible for the average purchaser to detect even dangerous defects in construction.”¹⁴⁸ A second criticism is that an apartment is subject to constant use and deterioration and is therefore “used” property.¹⁴⁹ Still, the landlord is in a better position to inspect for defects and determine a need for repair. An additional consideration is the fact that courts have been willing to hold sellers of used property strictly liable.¹⁵⁰ A third reason for denying the imposition of strict liability upon landlords is that the lease is an agreement to provide services and therefore the theory of strict liability is inapplicable.¹⁵¹ The services of the landlord, however, are more commercial than professional in nature, and therefore, such an immunity to strict liability should not apply.¹⁵² A final rationale is that a lease is not a sale, but most jurisdictions have not made a distinction between sellers and non-sellers of personal property.¹⁵³ Like a retailer or manufacturer, the landlord places his product, the apartment, in “the stream of commerce.” Moreover, because he controls the length of the lease, a landlord can prevent the circulation of a defective product.¹⁵⁴

¹⁴⁴. *Id.*
¹⁴⁵. *Id.* at 156.
¹⁴⁶. *Id.* at 137.
¹⁴⁷. *Id.* at 137 n.674.
¹⁴⁸. *Id.* at 138.
¹⁴⁹. *Id.*
¹⁵⁰. *Id.* at 138-39 n.680.
¹⁵¹. *Id.* at 139 n.683.
¹⁵². *Id.* at 140.
¹⁵³. *Id.*
¹⁵⁴. *Id.* at 142.
As the foregoing discussion indicates, the reasons advanced for
the imposition of strict liability upon landlords are more persuasive
than those advanced for not establishing such a liability. Despite the
logic of imposing strict liability, the Massachusetts courts have de­
clined to do so.

C. Damages

Ms. Solomon’s award of $10,000 for interference with quiet en­
joyment was vacated on the basis of redundancy.\textsuperscript{155} Although this
resulted in part from the confusing instructions issued by the trial
judge to the jury,\textsuperscript{156} it is clear that the court’s interpretation of sec­
tion 14 was also important in this determination.\textsuperscript{157}

In interpreting damages recoverable under section 14, the court
relied heavily upon \textit{Darmetko v. Boston Housing Authority}.\textsuperscript{158} In
\textit{Darmetko}, the lower housing court had applied the triple rent clause
of section 14 in awarding damages for a leaking roof.\textsuperscript{159} The housing
court awarded three times the monthly rent for each month the roof
had remained unrepaired.\textsuperscript{160} In reviewing the interpretation of sec­
tion 14, the \textit{Darmetko} court stated that section 14 provided for actual
and consequential damages or three months rent, and that there was
no indication of legislative intent that each month in which a viola­
tion occurred should be considered separately.\textsuperscript{161} This conclusion
severely limited damages awarded under the statute as well as less­
ened the punitive aspects to the landlord.\textsuperscript{162} The \textit{Simon} court’s read­
ing of section 14, however, further limited the damages recoverable
under that section. In holding that a tenant could receive only one
award of triple rent regardless of the number of violations,\textsuperscript{163} the
court stated that the triple rent damage provision was an incentive to
tenants to seek damages.\textsuperscript{164} Once such an award had been granted,

\begin{itemize}
\item \textsuperscript{155} \textit{See supra} notes 98-105 and accompanying text.
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} 385 Mass. at 110-11, 431 N.E.2d at 569.
\item \textsuperscript{158} 378 Mass. 758, 393 N.E.2d 395 (1979). In \textit{Darmetko}, the tenant claimed that
defects existed in the kitchen and living room floors, in addition to the fact that the roof
leaked, bringing water into the closet and the living room. \textit{Id.} at 759, 393 N.E.2d at 397.
\item \textsuperscript{159} \textit{Id.} at 760, 393 N.E.2d at 397.
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.} at 762, 393 N.E.2d at 398 (emphasis added).
\item \textsuperscript{162} In \textit{Darmetko}, the damage award by the housing court was three times the
monthly rent for each month the roof remained unrepaired for a total of $5,358. Under
the supreme judicial court’s interpretation of section 14, the damages were reduced to
$141. \textit{Id.} at 761-62, 393 N.E.2d at 398.
\item \textsuperscript{163} 385 Mass. at 110, 431 N.E.2d at 569.
\item \textsuperscript{164} \textit{See supra} note 60 and accompanying text.
\end{itemize}
that incentive had been fulfilled. The court too quickly dismissed Ms. Solomon's argument that such a restrictive reading would effectively immunize landlords from future violations. The court reasoned that a tenant could institute another proceeding if a new violation arose after the initial suit. A hypothetical will illustrate the difficult situation the court has created by its rulings in Darmetko and Simon.

A, a tenant, pays $100 per month in rent. At the beginning of month one, the roof begins to leak (violation one). At the end of the same month, the electricity is turned off (violation two). These remain unrebpaired for three months. Prior to the Darmetko holding, the successful litigating tenant could have potentially recovered $1800, but because of Darmetko, the tenant's potential award is reduced to $600. With the further limitation of Simon, which permits only one triple rent damage award per suit, regardless of the number of violations, if the tenant institutes a proceeding at the end of the third month, the potential award is only $300. If the tenant, however, instituted proceedings for the violation of the leaking roof before the electricity shut-off occurred, the tenant could institute a second proceeding against the landlord for the second violation and receive $600.

As indicated by this hypothetical, the court has essentially placed the burden on the plaintiff-tenant to institute proceedings in a timely fashion as well as encouraged litigation rather than settlement. In addition, once there is a violation, a landlord who knows that there are minimal actual damages, is assured of a maximum

165. 385 Mass. at 110, 431 N.E.2d at 569.
166. Id. at 111, 431 N.E.2d at 569.
167. For purposes of the hypothetical, assume both examples are violations and both are resulting from the fault of the landlord.
168. Before Darmetko, the tenant could recover for both violations. For the first violation (the leaking roof), the calculation would be as follows: three times the monthly rent of $100 ($300) multiplied by each month unrepaired (3) equals the appropriate award ($900). The second violation, the electrical shut-off, would be calculated in the same manner for another $900, yielding a total of $1800.
169. The Darmetko court stated that each month the violation occurred or continued should not be treated separately. 378 Mass. at 762, 393 N.E.2d at 398. Therefore, the first violation would be calculated as follows: three times the monthly rent of $100, which equals $300. The second violation would be calculated in the same manner for a total of $600.
170. The Simon court held that the triple rent clause was to be used only in cases where the actual damages were less than three months rent. Additionally, the violations were not to be considered separately. 385 Mass. at 109-11, 431 N.E.2d at 569. As a result, the damages would total $300.
171. See supra text accompanying note 166.
award to the tenant of only three months rent regardless of the number of violations that he commits. This anomalous result also will be difficult for the housing courts, because if a new violation occurs after the initial suit is filed, the tenant may institute a second proceeding. Thus, it is possible that a tenant could have two or more related actions in process at the same time. This will burden the tenant, the landlord and the court. If the two actions are consolidated, the Simon court's ruling appears to limit the tenant to a total possible award of three months rent and immunize the recalcitrant landlord. Thus, the Simon court's interpretation and application of the damage award under section 14 has emasculated the use of that section for tenants claiming minimal damages and permits immunization for irresponsible landlords. Such a result is inconsistent with the purpose of the statute which was to ensure decent housing and to protect tenants.

IV. Conclusion

In Simon v. Solomon, the Massachusetts Supreme Judicial Court was requested to decide questions involving the warranty of habitability, the tort claim of emotional distress and the interpretation of Chapter 186, Section 14 of the Massachusetts General Laws.

The Simon court affirmed damages for breach of warranty of habitability, stating that in Massachusetts it was firmly established that landlords renting residential dwellings guaranteed that the premises would be habitable. Further, at the very least, this was a duty to keep the premises in compliance with state sanitary codes.

The court declined to decide the question of whether strict liability was applicable in a landlord violation of warranty of habitability. Although the court has yet to decide this issue specifically, contemplating a minimum requirement that the dwelling be habitable indicates the court's willingness to do so favorably. The justifications advanced for strict liability are compelling since the landlord has superior knowledge, is in a better position to bear the loss, and is making a profit from the renting venture. Although a strict liability theory is not fully analogous because a lease is not a sale, the land-

172. 385 Mass. at 111, 431 N.E.2d at 569.
173. See supra notes 52-65 and accompanying text.
lord controls his "product", the apartment, and it is he who puts the product into the stream of commerce.

In affirming Ms. Solomon's emotional distress damages, the court found that the landlord acted recklessly with extreme and outrageous behavior, that these actions caused the injuries, and that the injuries were severe. The court, however, affirmed the dismissal of Ms. Solomon's claim for negligent infliction of emotional distress stating that the Massachusetts courts have not recognized such a cause of action unless accompanied by physical injury. In rationalizing this position, the supreme judicial court has stated that in a negligent infliction of emotional distress claim without physical injury, such emotional harm is likely to be so temporary and relatively harmless that allowing recovery would burden defendants and courts. The court has expressed concern that such claims would be too easily imagined, and the lack of physical injury takes away the guarantee of genuineness that the court desired. Finally, the court did not believe that the degree of the defendant's culpability in a negligence case warranted imposing a liability for possible emotional harm. Notwithstanding the policy concerns advanced by the court, Ms. Solomon's injuries were severe whether as a result of negligent or reckless conduct. The fear of fraudulent claims is not a valid reason for denying recovery: the court should take the responsibility of determining the validity of a claim and not merely close its eyes to the problem.

The Simon court also interpreted Chapter 186, Section 14 and stated that its purpose was to ensure decent housing and to protect tenants. In its interpretation, however, the court held that only one recovery of the triple rent clause was available in a proceeding. The court's interpretation of section 14 in both Simon and Darmetko has essentially emasculated the use of the statute to tenants who claim only minimal damages. In addition, this interpretation has effectively immunized irresponsible landlords.

Simon represents part of a growing trend that is holding landlords liable for tenants' injuries—both physical and emotional. Despite this, the limitations placed upon tenant recovery under section 14, indicates the court's concern with maintaining some balance in the landlord-tenant relationship.

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