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I. INTRODUCTION

The Massachusetts Supreme Judicial Court's decision in Great Atlantic & Pacific Tea Co. v. Yanofsky1 effected three significant changes in landlord-tenant law. The decision abolished two traditional rules concerning landlord-tenant tort law and established a new, progressive rule. The "failure to repair" rule2 had directed that a landlord who entered into an agreement to repair leased premises and who knowingly refused to make necessary repairs could not be held liable in tort. Instead, the landlord could be found liable only on a contract theory for the cost of making the repairs. Yanofsky abolished this rule.3 The landlord in this case was held liable in tort for the foreseeable consequences of his failure to make repairs.

Yanofsky overruled a prior supreme judicial court decision, Chelefou v. Springfield Institution for Savings,4 which held that a lessor's failure to repair a screen in accordance with the parties' oral agreement was an omission and did not give rise to an action in tort. The Chelefou decision rested on the distinction between the landlord's nonfeasance and his misfeasance.5 Nonfeasance would result if a landlord agreed to make repairs and failed to do so. Under this theory, he could be held liable only for the cost of making the repairs.6 If, on the other hand, a landlord agreed to make repairs but did so in a negligent manner, he would have been held liable for misfeasance. Parties injured by the landlord's misfeasance were allowed to recover against him in tort.7 Another facet of this rule governed the consequences when a landlord made

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5. Id. at 240, 8 N.E.2d at 772.
7. Id.
repairs gratuitously in the absence of an express agreement to repair. He was held liable for injuries caused by the faulty repairs only if the plaintiff could prove gross negligence.\(^8\)

By implicitly overruling *Chelefou*, *Yanofsky* laid to rest the distinction between misfeasance and nonfeasance that commonly had been relied on to determine liability in earlier decisions.\(^9\) Neither the distinction between misfeasance and nonfeasance nor the failure to repair rule itself was considered by the *Yanofsky* court to be responsive to contemporary views of the landlord-tenant relationship. A Massachusetts landlord who simply refuses to repair unsafe conditions on rental premises no longer can avoid tort liability while a landlord who in good faith attempts to make such repairs is held liable in tort for repairing in a negligent manner.

The most significant aspect of *Yanofsky*, however, is its holding concerning a landlord's liability to his tenant for injuries suffered by third parties. The court found that a lessor's express agreement to make repairs "should be construed as an agreement to indemnify the lessee against any loss or damage sustained by him"\(^10\) as a result of injury incurred by third parties due to the landlord's failure to make repairs.\(^11\) By implying an agreement to indemnify, the court significantly expanded its protection of innocent tenants: tenants are now insulated from liability incurred as a result of unsafe premises.

This note discusses both the evolution of the rules governing the landlord-tenant relationship and the immediate effects of *Yanofsky* on landlord-tenant tort issues in light of their historical origins. The probable impact of the *Yanofsky* decision on four additional aspects of landlord-tenant law then will be explored: Whether an agreement to indemnify will be implied in a residential lease from an express agreement to repair;\(^12\) whether an agreement to indemnify will be implied in a residential lease in the absence of an express agreement to repair;\(^13\) whether an agreement to repair will be implied in a commercial lease;\(^14\) and whether an

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10. Id. (emphasis added).
11. Id.
12. See text accompanying notes 172-79 infra.
13. See text accompanying notes 180-91 infra.
agreement to indemnify will be implied in a commercial lease which does not include an express agreement to repair.\textsuperscript{15}

II. BACKGROUND

In 1950 a lease agreement was executed between plaintiff, The Great Atlantic \& Pacific Tea Co. (A\&P), and the owner of the property which was later acquired by defendant, Robert Yanofsky.\textsuperscript{16} The lease was for a term of five years with options to renew.\textsuperscript{17} A \& P renewed the lease six times, the last renewal to expire in 1980.\textsuperscript{18} The lease agreement provided for the lessee, A \& P, to make all necessary incidental interior repairs and for the lessor to make all outside repairs.\textsuperscript{19} The lease also included a provision granting the lessor a right of access at reasonable hours to inspect and make repairs.\textsuperscript{20} All provisions in the lease dealing with responsibility for repairs were "continued in force with each renewal, and were in effect at the time [of the accident which gave rise to this lawsuit]."\textsuperscript{21}

A \& P's store manager first discovered a leak in the roof in December of 1974.\textsuperscript{22} On December 17, 1974, the store manager wrote a letter informing the lessor, Yanofsky, of the leak.\textsuperscript{23} Upon receiving the letter Yanofsky took steps to insure that the roof would be repaired.\textsuperscript{24} While awaiting repair of the roof, A \& P employees attempted to reduce the potential danger caused by the wet floor. Buckets were strategically placed to catch the water dripping from the leaky roof.\textsuperscript{25} The water on the floor was mopped up on various occasions.\textsuperscript{26} In addition, shopping carts were used to

\begin{itemize}
\item \textsuperscript{15} See text accompanying notes 194-213 infra.
\item \textsuperscript{17} \textit{Id}. at 898, 403 N.E.2d at 372.
\item \textsuperscript{18} \textit{Id}.
\item \textsuperscript{19} \textit{Id}.
\item \textsuperscript{20} \textit{Id}. Nothing in the record indicates that the lessor was prevented from making such repairs.
\item \textsuperscript{21} \textit{Id}.
\item \textsuperscript{22} \textit{Id}.
\item \textsuperscript{23} \textit{Id}.
\item \textsuperscript{24} Several years prior to the date in question, a roofing contractor had been hired to build a new roof on the store in order to remedy similar leakage problems. The testimony of Yanofsky at trial showed that he unsuccessfully tried to contact the roofer by telephone. Yanofsky then sent him a letter, dated December 19, 1974, requesting that necessary repairs be made. \textit{Id}.
\item \textsuperscript{25} \textit{Id}. at 898-99, 403 N.E.2d at 372.
\item \textsuperscript{26} \textit{Id}.
\end{itemize}
detour customers away from the hazardous area.\textsuperscript{27} No repairs were made, however. On December 23, 1974 a customer, Mrs. Marie Vahey, slipped and fell, fracturing her hip.\textsuperscript{28} No precautions were taken by A \& P on the day of the accident.\textsuperscript{29}

Counsel for Mrs. Vahey negotiated a settlement with A \& P for $20,000.\textsuperscript{30} Mrs. Vahey agreed to settle for this amount and on September 25, 1975 executed a release of all claims against A \& P.\textsuperscript{31} She expressly reserved her right to file suit against all other parties.\textsuperscript{32} Mrs. Vahey then filed suit in the Massachusetts Superior Court against Yanofsky. That action, after joinder with the instant suit by A \& P against Yanofsky for indemnification, was settled in midtrial.\textsuperscript{33} In the action for indemnification, defendant, Yanofsky, moved for a directed verdict after plaintiff had presented its case and again after all the evidence had been presented.\textsuperscript{34} In his motions Yanofsky challenged plaintiff's evidence as insufficient to support a jury finding of an express or implied agreement for indemnification. He further contended "that the evidence was insufficient to warrant the jury in finding that A \& P incurred damages as a result of Yanofsky's breach of any terms of the lease."\textsuperscript{35} Both motions were denied.\textsuperscript{36}

The jury found that A \& P had acted reasonably in settling Mrs. Vahey's claim,\textsuperscript{37} that the injury to Mrs. Vahey was a reasonably foreseeable result of Yanofsky's failure to make repairs,\textsuperscript{38} that A \& P was not contributorily negligent,\textsuperscript{39} and that an implied

\begin{footnotes}
27. \textit{Id.}\n28. \textit{Id.} at 899, 403 N.E.2d at 372.\n29. \textit{Id.} at 905, 403 N.E.2d at 376.\n30. \textit{Id.} at 899, 403 N.E.2d at 372.\n31. \textit{Id.}\n32. \textit{Id.}\n33. \textit{Id.} at 899 n.3, 403 N.E.2d at 372 n.3.\n34. \textit{Id.} at 899, 403 N.E.2d at 372.\n35. \textit{Id.} at 897-98, 403 N.E.2d at 371.\n36. \textit{Id.} at 899, 403 N.E.2d at 372.\n37. \textit{Id.} at 906, 403 N.E.2d at 376.\n38. \textit{Id.} at 904, 403 N.E.2d at 375.\n39. \textit{Id.} Contributor negligence on the part of the Great Atlantic \& Pacific Tea Co. [hereinafter referred to as A \& P] had been asserted due to the condition of floor tiles at the time the leak was discovered. The tiles were alleged to be uneven and in need of repair. The supreme judicial court found the judge's instructions to the jury to be sufficient regarding contributory negligence. "The judge clearly and repeatedly instructed the jury that if they found negligence on the part of A \& P, the latter could not recover in indemnification." \textit{Id.} at 905-06, 403 N.E.2d at 376.
\end{footnotes}
agreement to indemnify arose from Yanofsky's express agreement to make repairs.\textsuperscript{40}

The supreme judicial court affirmed the superior court's denial of defendant's motion for a directed verdict.\textsuperscript{41} The court held that Yanofsky's duty to make all outside repairs obligated him to remedy the hazard created by the leaky roof within a reasonable time of notification.\textsuperscript{42} The court reasoned that because the lease's terms were unambiguous regarding the agreement to repair, there was no factual dispute concerning the existence of an implied agreement to indemnify.\textsuperscript{43} Thus, the agreement to indemnify was implied as a matter of law.\textsuperscript{44} The court mentioned, but did not rely upon, the legislative intent of chapter 186, section 19 of the Massachusetts General Laws which states that a lessor must exercise reasonable care to correct, within a reasonable time, any unsafe condition which he knows or ought to know exists.\textsuperscript{45} The statute provides any victim injured while lawfully on the premises with a right of action against the lessor.\textsuperscript{46} The Yanofsky court reasoned:

\begin{quote}
[T]hat a lessee . . . that is "injured" by virtue of being reasonably obliged to settle a claim for personal injuries which were caused by the lessor's failure to repair an unsafe condition within a rea-
\end{quote}

\begin{footnotes}
\item[40] Id. at 905, 403 N.E.2d at 375.
\item[41] Id. at 906, 403 N.E.2d at 376.
\item[42] Id. at 901-02, 403 N.E.2d at 373.
\item[43] Id. at 905, 403 N.E.2d at 373-74.
\item[44] Id.
\item[45] Id. Mass. Gen. Laws Ann. ch. 186, § 19 (West 1977) states that:
A landlord or lessor of any real estate except an owner-occupied two- or three-family dwelling shall, within a reasonable time following receipt of a written notice from a tenant forwarded by registered or certified mail of an unsafe condition, not caused by the tenant, his invitee, or any one occupying through or under the tenant, exercise reasonable care to correct the unsafe condition described in said notice except that such notice need not be given for unsafe conditions in that portion of the premises not under control of the tenant. The tenant or any person rightfully on said premises injured as a result of the failure to correct said unsafe condition within a reasonable time shall have a right of action in tort against the landlord or lessor for damages. Any waiver of this provision in any lease or other rental agreement shall be void and unenforceable. The notice requirement of this section shall be satisfied by a notice from a board of health or other code enforcement agency to a landlord or lessor of residential premises not exempted by the provisions of this section of a violation of the state sanitary code or other applicable by-laws, ordinances, rules or regulations.
\end{footnotes}
reasonable time, would have a cause of action against the lessor under the statute to recover such amounts reasonably paid.\textsuperscript{47}

Because Yanofsky breached his duty to repair, the lessee, A & P, incurred an economic loss. The court held that the lessor's "express agreement to make repairs should be construed as an agreement to indemnify the lessee."\textsuperscript{48}

The court also held that the landlord's failure to make repairs in accordance with the agreement gave rise to a tort action.\textsuperscript{49} Under the common-law failure to repair rule, the appropriate remedy would have been an action for breach of contract by A & P against Yanofsky for the cost of repairing the roof. In holding as it did, the court abolished the common-law rule that a lessor's failure to repair, a nonfeasance, obligates him to pay only the cost of repairs.\textsuperscript{50} This decision was the logical culmination of a trend, which began in Massachusetts in 1973, to hold landlords to a higher standard of care than had previously been imposed upon them.\textsuperscript{51}

Since 1973, the Massachusetts courts have come to accept the modern view that a lease is not a conveyance of an interest in land\textsuperscript{52} but rather is an exchange of covenants more akin to a contract. When a lease was perceived as a conveyance of property, it was assumed that the tenant took complete control of the premises when he took possession. The landlord, therefore, had no right to enter or inspect and consequently could not be expected to make repairs.\textsuperscript{53} Thus, the tenant, being in total control of the premises, was believed to be in the best position to make the necessary repairs.\textsuperscript{54} The contemporary view of a lease as a contractual exchange of promises, however, recognizes that the lessor, as well as the lessee, has obligations with regard to the maintenance of the prem-

\begin{itemize}
\item \textsuperscript{47} 1980 Mass. Adv. Sh. at 902, 403 N.E.2d at 374.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id. at 901-02, 403 N.E.2d at 373-74.
\item \textsuperscript{50} The rule was first espoused in Massachusetts in 1887. The supreme judicial court held that a lessor was not liable in tort for injuries to a farmer and his cow when both fell through the floor of a rented barn. The lessor had agreed to repair the rotted floor and had failed to do so. Tuttle v. George H. Gilbert Mig. Co., 145 Mass. 169, 13 N.E. 465 (1887).
\item \textsuperscript{51} See text accompanying notes 150-71 infra.
\item \textsuperscript{54} Id. at 231-32. For a comparison of modern and agrarian tenants, see Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078-79 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).
\end{itemize}
Landlord-Tenant Law

The law eventually began to recognize the fact that the modern tenant is less able to make repairs than the landlord.\(^55\) This has resulted in the imposition of increased responsibility on landlords to maintain the premises in a safe condition. The outcome of the accompanying change in judicial thinking is greater protection for those who are injured as a result of unsafe conditions on rented property. The duty imposed on a landlord to use reasonable care in maintaining his property has expanded accordingly.\(^56\) To fully understand Yanofsky’s place in this scheme and its present and future implications, it is necessary to trace the history of the landlord-tenant relationship.

III. History of the Landlord-Tenant Relationship in the United States

The landlord-tenant relationship in the United States was originally governed by the principle that a lease was the equivalent of a conveyance of property from a landlord to a tenant.\(^57\) This idea was consistent with both parties’ expectations in a rural agrarian society.\(^58\) Tenants were concerned with the land itself for they made their living and paid their rent through farming.\(^59\) Thus, it was of great importance to tenants that they have exclusive possession of the property, free from the lessor’s interference. The landlord’s duty was merely to deliver possession and refrain from interfering with the tenant’s possessory rights.\(^60\) The tenant’s duty to pay rent was independent of his right to use and possess the premises.\(^61\) No guarantees or warranties attached to the leased property because

\(^{55}\) Quinn & Phillips, supra note 53, at 239.

\(^{56}\) See text accompanying notes 150-70 infra.


\(^{59}\) “[T]he governing idea is that the land is bound to pay the rent... [W]e may almost go to the length of saying that the land pays it through [the tenant’s] hand.” 2 F. Pollock & F. Maitland, The History of English Law § 6, at 131 (2d ed. 1898).

\(^{60}\) “In other words, for the term of the lease, the lands were subject to the tenant’s, not the landlord’s care and concern.” Quinn & Phillips, supra note 53, at 228.

\(^{61}\) “Thus, originally at common law, the tenant could not even escape his rental obligations when the demised premises were destroyed because of the law’s view that the land and not the premises was the essential part of the transaction.” Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 189, 293 N.E.2d 831, 837 (1973).
the buildings were considered to be of minimal importance. In fact, the tenants considered the structures built on the leased land to be incidental to the lease. Thus, the property was leased "as is." Absent fraud, the landlord had no duty to repair buildings, to assure that the premises would be maintained in a safe condition, or to compensate those who might be injured on the rented premises. This doctrine was known as "caveat emptor" or "buyer beware."

The landlord implicitly warranted that the tenant's quiet enjoyment would be undisturbed for the term of the lease. The landlord had no right to enter or inspect the premises without the tenant's permission. Since the landlord never had an opportunity to discover defective conditions, the common-law perception that a landlord could not be expected to keep rented premises in repair was justified.

This system worked well for both parties. In fact, the view of a lease as a conveyance of property in some circumstances was an advantage to a tenant. Although the lessee could not rely on the lessor for assistance in making repairs, he had what he really wanted: Land to farm; privacy; and quiet. The typical lessee was capable of making the repairs necessary to keep his dwelling in a safe, habitable condition. The tenant did not need, and probably did not desire, to have the landlord regularly on the premises. Furthermore, early agrarian tenants often would rent property for

66. "The landlord was not expected to assist in the operation of the land. Quite the reverse, he was expected to stay as far away as possible." Quinn & Phillips, supra note 53, at 228 (emphasis in original).
67. The early common law, in accepting the notion of a lease as a conveyance, developed the principle that "a real action of ejectment, rather than a contractual action of debt," could be used to enforce the tenant's legal rights. The action of ejectment was the preferred method of enforcement. Love, Landlord's Liability for Defective Premises: Caveat Lessee, Negligence or Strict Liability?, 1975 WIS. L. REV. 19, 26.
long terms or for an entire lifetime. 70 The tenant’s long-term interest operated as an incentive for him to make repairs since he could enjoy the fruits of his labor for many years.

The agrarian framework of American society changed as the nation became industrialized. Urban areas began to emerge, drawing people from all parts of the nation as well as from Europe. Urban growth was accompanied by a corresponding decrease in the rural population. 71 Consequently, commercial and residential leases in urban areas increased in importance. 72 The people who relocated to these urban centers needed apartments rather than the quiet enjoyment of a piece of fertile farmland. In return for his rent the tenant expected a safe, comfortable place to live. The urban tenant hardly could be called self-sufficient, and “the last thing he wanted was to be left alone.” 73 Apartment and commercial buildings were equipped with complex heating, electrical, and plumbing systems. 74 Surely the vast majority of modern apartment dwellers could not be expected to have the resources or knowledge necessary to make repairs on such systems. 75 “Agrarian self reliance in this context . . . [was] simply not possible.” 76

As these economic and social changes altered the landlord-tenant relationship, the courts remained stagnant, adhering to archaic common-law rules and ideas. 77 Various jurisdictions within the United States began to seek remedies for the resulting injustices. Not until the twentieth century did most jurisdictions recognize that landlord-tenant law had to be reevaluated in light of the radical changes which had taken place since colonial times. 78 The

70. Id. at 1078-79.
72. 2 R. Powell, supra note 62, at 180.
73. Quinn & Phillips, supra note 53, at 231.
76. Id. at 231.
77. “Since the courts demonstrated no willingness to modify the common law, it became necessary for the legislatures to take corrective action.” Love, supra note 67, at 38.
78. In 1970, Judge Skelly Wright, in his oft-quoted historical analysis of the obligations of landlords, concluded that the time for change had at last arrived. It is overdue for courts to admit that these assumptions are no longer true with regard to all urban housing. Today’s urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in ‘a house suitable for occupation.’ Furthermore, today’s city dweller usually has a single, specialized skill unrelated to maintenance
Massachusetts courts and legislature were slow to respond to the
cry for reform in many areas of landlord-tenant law.\textsuperscript{79} Massachusetts’ strict adherence to the common-law principle that a lease
was a conveyance of an interest in land continued until 1973, when
the principle was invalidated by the supreme judicial court in
\textit{Boston Housing Authority v. Hemingway}.\textsuperscript{80} Only after \textit{Hemingway}
rejected the archaic conveyance principle did Massachusetts courts
begin to formulate progressive rules and thus embark upon the com-
mandable, new trend of decisions in which \textit{Yanofsky} plays such an
important role.\textsuperscript{81}

\section*{IV. \textit{Yanofsky} and the Demise of the Failure 
To Repair Rule}

In Massachusetts, the old common-law rules of landlord-tenant

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\textsuperscript{79} Regarding the landlord’s duty to repair common passageways one com-
mentator noted, “The Massachusetts court has been more lenient toward the landlord
and has held the tenant more strictly to the maxim \textit{caveat emptor}.” Harkrider, \textit{Tort Liability of a Land-

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\item Javins v. First Nat’l Realty Corp., 428 F.2d 1071, 1078-79 (D.C. Cir.), cert. denied,
400 U.S. 925 (1970) (footnotes omitted). \textit{See also} Harkrider, \textit{Tort Liability of a Land-
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tator noted, “The Massachusetts court has been more lenient toward the landlord
and has held the tenant more strictly to the maxim \textit{caveat emptor}.” Harkrider, \textit{supra}
78, at 403 n.172.
\item Regarding situations such as those occurring in \textit{Yanofsky}, where “land is leased
for a purpose which involves the admission of the public,” most states agree that a
landlord must use reasonable care in inspecting and repairing before possession is
1971). “Massachusetts appears to be quite alone to the contrary.” \textit{Id.} at n.40.
\item Regarding the landlord’s liability for nonperformance of his agreement to repair,
a “slowly increasing number of the courts, which . . . [had] reached a slight majority
[had] worked out a liability in tort for such injuries to person or property. . . .” \textit{Id.}
at 409.
\item For a more complete review of the state of the law in other jurisdictions, \textit{see id.}
at 399-412.
\item 363 Mass. 184, 197, 293 N.E.2d 831, 841 (1973).
\item \textsuperscript{81} \textit{See} text accompanying notes 150-71 \textit{infra}.
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eth centuries. These challenges were not successful, however, until 1973.

One of the early rules that insulated lessors from tort liability was stated in 1887 in Tuttle v. George H. Gilbert Manufacturing Co. Tuttle held that no cause of action in tort existed against a lessor who breached his agreement to make repairs. In 1919 the rule was reaffirmed in Fiorntino v. Mason. Plaintiff in Fiorntino was injured when she fell down a flight of stairs. The landlord had been notified that the stairs were defective and had made an oral agreement to repair them when he was notified of the defects. According to the court, failure to comply with such an agreement gave rise merely to a right of action for breach of contract, where the damages commonly are only the cost of repairs. The court adhered to this rule and found no evidence to support an award of tort damages under any other theory. The rule followed by the court was based "upon the concept that a lease was to be considered as purely a conveyance of property." The lease was construed as a conveyance so that the tenant had an exclusive right to possession and a duty to pay rent, independent of the landlord's


83. See Mounsey v. Ellard, 363 Mass. 693, 297 N.E.2d 43 (1973); Boston Hous. Auth. v. Hemingway, 363 Mass. at 184, 293 N.E.2d at 831. For a detailed discussion of Mounsey and Hemingway, see text accompanying notes 150-71 infra. See also Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892), in which the Massachusetts Supreme Judicial Court reached a decision recognizing an implied warranty of habitability in leases of furnished rooms or furnished houses. The court held that one who rented a furnished house or room need not tolerate uninhabitable conditions. Instead, tenants under such circumstances could expect, and rely on the fact, that the premises would be fit to live in when delivered. The court reasoned that tenants were contracting for premises fit for immediate use more than for a lease of real estate. Caveat emptor, if applied in such a case, would be unjust. Id. at 350, 31 N.E. at 286.

84. 145 Mass. 169, 13 N.E. 465 (1887).
85. Id. at 175, 13 N.E. at 467.
87. At trial the plaintiff was asked: "Q. And then he [landlord] said he would repair those stairs? A. Yes, 'I [landlord] would repair the stairs, and fix the lower stairs way up.'" Id. at 454, 124 N.E. at 284.
88. Id. at 453, 124 N.E. at 283.
89. Id. at 454, 124 N.E. at 284.
90. Id. at 456, 124 N.E. at 285.
obligation to make repairs. The lessor's duty was to deliver possession to the tenant; he had no right to interfere with the tenant's exclusive possessory interest. The landlord could not enter, inspect, or repair the premises in the tenant's possession without the tenant's permission. Thus, because the tenant had a better opportunity to repair, the burden for making repairs was placed on him.92 This reasoning demonstrates how the law favored the landlord's interest in the condition of his property over the tenant's right to live in a safe dwelling. The Fiorniino court held that the landlord had no duty to keep the premises safe at all times for the tenant.93 A duty would exist only if the lessor expressly agreed to keep the premises not only in repair but also in a safe condition throughout the term. Such an agreement would place on the landlord the additional duty to inspect and discover defects.94 The court termed such an arrangement "a most onerous undertaking" for the landlord.95

Judicial reluctance to impose burdens on the suppliers of housing continued as the nation grew and modernized and the need for adequate housing became more acute. In dealing with the failure to repair rule, which had insulated landlords from tort liability for damages caused by their failure to repair, Massachusetts drew a distinction between misfeasance and nonfeasance. If the tenant could prove that the landlord committed a misfeasance by, for example, making repairs in fulfillment of an agreement and doing so in a negligent manner, tort redress was permitted under ordinary negligence principles.96 The prevailing judicial attitude effectively discouraged landlords from honoring their repair agreements since refusal to make repairs constituted nonfeasance and resulted in liability only for the cost of repairs. The reason behind this distinction was that the lessor, by making repairs, though he did so negligently, led the lessee to believe that the condition had

92. Harkrider, supra note 78, at 383.
94. Id. at 454, 124 N.E. at 284.
95. Id. at 453, 124 N.E. at 284.
96. Conahan v. Fisher, 233 Mass. 234, 238, 124 N.E. 13, 14 (1919). The court found that the landlord was not liable. The decision, however, in dicta, did reaffirm the rule that negligent repair of the balcony railing by the landlord constituted misfeasance and therefore entitled plaintiffs to recover under a tort theory of liability. See also Markarian v. Simonian, 373 Mass. 669, 369 N.E.2d 718 (1977) (reaffirming the misfeasance rule); DiMarzo v. S. & P. Realty Corp., 364 Mass. 510, 306 N.E.2d 432 (1974) (landlord found liable in tort when negligent repairs to defective floor caused floor to collapse and injured plaintiff).
been corrected. Because the lessee was induced to believe that the premises were safe, he did not attempt to make repairs himself. Dangerous conditions, therefore, remained unrepaired. 97 Massachusetts courts also attached heavier liability to misfeasance because in many cases the negligent repairs not only failed to correct the defect but made the condition worse. 98 For these reasons the courts felt that lessors who negligently made repairs were less deserving of protection from tort liability than lessors who simply did nothing. In addition, less overt reasons, such as the limited availability of liability insurance, explain the courts' reluctance in early tort decisions to impose liability on landlords and other business entrepreneurs. 99

The 1974 decision of DiMarzo v. S. & P. Realty Corp. 100 opened the door to abolition of the common-law failure to repair rule. The DiMarzo court stated that the common-law rules would be reconsidered when the facts of a case warranted it. 101 Such an opportu-

98. W. Prosser, supra note 79, at 411.
99. In many early cases, the courts chose not to render decisions adverse to landlords in order to avoid decreasing landlords' capital investments. See Lossee v. Buchanan, 51 N.Y. 476 (1873), which stated:
[T]he general rules that I may have the exclusive and undisturbed use and possession of my real estate . . . are much modified by the exigencies of the social state . . . . We must have factories, machinery, dams, canals, and railroads . . . . I take the risk of being accidentally injured in my person without fault on their part. Most of the rights of property, as well as person, in the social state, are not absolute but relative and they must be so arranged . . . to promote the general welfare.
Id. at 484. Another explanation for the attitude was that “American judges of the Nineteenth Century were of a different breed. Many were politicians; all were living in a new land crying for exploitation; industrialists were often dominant figures in society; country gentlemen were rarely judges in industrial states.” Morris, Hazardous Enterprises and Risk Bearing Capacity, 61 Yale L.J. 1172, 1175-76 (1952). See also James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549 (1948).

Furthermore, liability insurance was not as common as it is today. See Tinker, Comprehensive General Liability Insurance—Perspective and Overview, 25 Fed'N Ins. Counsel 217, 220 (1975). Thus, the courts were reluctant to saddle those who provided rental housing with financial burdens that were often far in excess of what the typical landlord at that time could afford to pay.

100. 364 Mass. 510, 306 N.E.2d 432 (1974). Because the landlord negligently made repairs, liability was found on the basis of ordinary negligence principles. The tenant's employee was injured when he fell through a floor weakened by water damage. The landlord, in an effort to repair, merely put in a few nails “here and there.” Id. at 512, 306 N.E.2d at 433.
101. Id. at 514, 306 N.E.2d at 434.
nity arose in *Markarian v. Simonian*\(^\text{102}\) when a lessor was found liable for the negligent installation of window screens. In that case, a child was injured when he fell through a screen and out a window.\(^\text{103}\) The supreme judicial court, however, refused to overrule a 1937 case, *Chelefou v. Springfield Institution for Savings*,\(^\text{104}\) which found no liability when a child fell through a screen and out a third-floor window. The *Markarian* decision distinguished *Chelefou* on the ground of foreseeability. The screens in *Markarian* were installed for the purpose of preventing a child from falling out\(^\text{105}\) while the screens in *Chelefou* were installed to allow a breeze to cool the apartment while keeping insects out.\(^\text{106}\) Because of this distinction the court allowed the plaintiff in *Markarian* to recover while avoiding the need to overrule *Chelefou*. Thus, the *Chelefou* barrier to tort recovery, omission or nonfeasance, survived the *Markarian* decision. The court would go only so far as to cast doubt on the validity of *Chelefou*.\(^\text{107}\) The timidity of the *Markarian* decision illustrates the way in which the Massachusetts judiciary sidestepped opportunities to aggressively attack the obsolete common-law rules.\(^\text{108}\) Until 1973, when the modern trend began in Massachusetts,\(^\text{109}\) cases commonly were handled like *Markarian*: the court, in order to reach fair decisions while leaving antiquated rules intact, was continuously expending “considerable energy and [exercising] great ingenuity in attempting to fit various factual settings into recognized exceptions.”\(^\text{110}\) *Markarian* thus left a degree of uncertainty in its wake regarding the future existence of the common-law failure to repair rule in Massachusetts.

*Poirier v. Town of Plymouth*\(^\text{111}\) hinted at an answer by abolishing the “hidden defect” barrier to recovery.\(^\text{112}\) This barrier,
commonly referred to as the hidden defect rule, had placed a heavy burden of proof on plaintiffs to show that their injuries were caused by a hidden defect on a landowner's property which the landlord knew about or should have discovered. If the lessor failed to rebut the plaintiff's allegations by proving that the hidden defect was not readily discoverable, the lessee could recover. Proof that the defect was not discoverable served as an affirmative defense for the landlord. The Poirier court abolished the hidden defect rule and substituted a "standard of ordinary care under all circumstances." The Poirier court abolished the hidden defect rule and substituted a "standard of ordinary care under all circumstances." The Poirier court abolished the hidden defect rule and substituted a "standard of ordinary care under all circumstances." The Poirier court abolished the hidden defect rule and substituted a "standard of ordinary care under all circumstances."

Although Poirier dealt with the relation between a landowner-employer and his employee, one Massachusetts jurist has opined that the Poirier holding is readily applicable to landlord-tenant law. Massachusetts Court of Appeals Justice John M. Greaney stated that the now obsolete distinction between patent and latent defects inherent in the hidden defects rule could be eliminated as a discredited "status" distinction, just as the status distinction between licensees and invitees has been abolished. In 1978, Mounsey v. Ellard held that the status distinction between invitees and licensees, which resulted in imposition of different standards of care on landlords, prevented juries from "ever determining the fundamental question whether the defendant has acted reasonably." Because of this, the court found that such a status distinction was no longer valid. Justice Greaney reasoned from the Mounsey case that a standard of reasonable care should apply to a landlord as well as to a landowner-employer. He also predicted that the next appropriate case would be decided under the reasonable care standard.

In 1980 the uncertainty created by Markarian and partially resolved by Poirier, as to how far the pro-tenant trend of Massachusetts decisions would extend, was conclusively eliminated. The

113. Id. at 540.
114. Id.
115. Id.
116. Id. at 539.
118. 363 Mass. 693, 297 N.E.2d 43 (1973). For a full explanation of the Mounsey rationale and the visitor status distinctions, see notes 156-67 infra and accompanying text.
119. 363 Mass. at 707, 297 N.E.2d at 44.
120. Greaney, supra note 117, at 66.
Massachusetts Supreme Judicial Court, in the unprecedented case of *Young v. Garwacki*, held a landlord liable in tort for failing to repair a defective balcony railing. The landlord was held liable for injuries sustained by Young, a third party visiting the building, as a result of her fall through a defective balcony railing. The landlord, La Freniere, had been on notice that the defect existed. No express agreement, however, bound the landlord to make repairs. The *Young* court held that the landlord had not used reasonable care in maintaining the premises in a safe condition even though the landlord had not agreed to make repairs. Thus, an implied agreement to repair the premises existed. By finding such an implied agreement and by holding the landlord liable in tort for failing to make repairs, the misfeasance-nonfeasance element of the failure to repair rule was all but abolished. Prior to *Young*, a finding of nonfeasance made a lessor liable only for the cost of repairs; the *Young* court, however, found the lessor liable in tort. Thus, common tort damages encompassing such things as medical expenses, lost wages, and pain and suffering were available. The decision went on to abolish the “control” distinction which previously had barred recovery. The control distinction provided that a landlord had no duty to repair those parts of the premises under the tenant’s control. The areas of rental property not demised exclusively to a tenant were considered the only areas that the lessor was responsible for repairing, if in fact a duty to repair existed at all. In *Young* the defective railing was part of the premises demised to the tenant and therefore was under the tenant’s control. Finding the landlord liable for failing to repair this railing effectively abolished the control distinction as a potential bar to tort redress.

A weak argument could be made that *Young* did not abolish the misfeasance-nonfeasance distinction within the failure to repair rule in light of the fact that the rule’s requirement of an express

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122. Id.
123. The landlord, however, testified that he considered it his obligation to repair the railing. Id. at 730, 402 N.E.2d at 1046. The tenant, Garwacki, had been found liable for the plaintiff Young’s injuries in a previous suit. The tenant, however, had not appealed the decision nor had he sought indemnification from his landlord.
124. For a full discussion of *Young*, see notes 134-41 infra and accompanying text.
126. Id. at 730, 402 N.E.2d at 1046.
agreement to repair had not been met. No express agreement to repair existed in Young. Although past decisions, such as Markarian,\(^{127}\) had relied on questionable distinctions in order to avoid overruling prior cases, the distinction between express and implied agreements cannot be used to limit a tenant's tort recovery. The Young court held that a duty to repair exists regardless of the presence of an express agreement to repair. Therefore, no distinction can be drawn between express and implied agreements. The legal consequences of a landlord's breach of his duty should not depend on the presence or absence of an express agreement to repair. In Yanofsky, however, an express agreement to repair the roof did exist. The landlord, after receiving notice and reasonable time to repair, failed to make such repairs and was held liable in tort. The Yanofsky and Young decisions thus put an end to the continuing validity, however eroded, of decisions such as Chelefou and Fiorntino which supported the validity of the nonfeasance bar to tort recovery inherent in the failure to repair rule. The supreme judicial court, in imposing increased responsibility on the party best able to prevent the injury, continued the trend toward recognition and enforcement of tenants' rights. The court accomplished this by allowing an action in tort against the landlord when he was alleged to be guilty of nonfeasance, contrary to the old common-law rule.

V. **Young and Abolition of the Rule That No Agreement to Repair Will Be Implied by a Mere Leasing of Premises**

Another rule strictly adhered to at common law was that no agreement to repair would be implied by a mere leasing of premises.\(^{128}\) The absence of an agreement to repair was a bar to recovery in all but one situation. When a landlord gratuitously made repairs, the Massachusetts courts allowed an injured plaintiff to recover in tort if gross negligence could be proven.\(^{129}\) The rule was reaffirmed in 1972 by the Massachusetts Supreme Judicial Court in Popowych v. Poorvu.\(^{130}\) The decision reiterated the principle that, in the absence of an agreement to repair, the lessors were under

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127. 373 Mass. at 669, 369 N.E.2d at 718. See notes 102-10 supra and accompanying text.
129. Id. at 398, 124 N.E. at 84.
no affirmative duty to make repairs to a window. If they chose to do so gratuitously, they would be liable for injury only if the plaintiff could prove gross negligence on the part of the repairmen hired by the lessor. During trial it was revealed that the lessor’s repairmen had left debris on the floor after they began to fix the window. Plaintiff, Popowych, a third party, fell on a round, hard object. Since the repairmen’s actions did not constitute gross negligence, plaintiff was foreclosed from recovering.

In Young v. Garwacki plaintiff, who was injured by falling through a defective balcony railing, alleged two counts of negligence. The trial court judge, while noting that the accident occurred on a part of the premises demised to the tenant and supposedly under his control, rejected the control distinction. The jury was instructed “to assume that there was an implied duty imposed on the landlord to exercise reasonable care to maintain the rental premises in a reasonably safe condition.” In affirming the lower court’s decision, the supreme judicial court commended the trial judge for his foresight in giving such an instruction in view of the fact that prior to Young redress was not allowed for injuries incurred as a result of defects in parts of the premises under the tenant’s control.

Young found that a duty to repair was implicit in the leasing of the premises even without an express agreement to repair. By finding the landlord liable for injuries resulting from his failure to repair when no express agreement to repair existed, the Massachusetts judiciary, for the first time, found such an agreement to be implied from the leasing arrangement. The court went even further by including within the lessor’s duty to repair the requirement that he use reasonable care to insure that the parts of the premises demised to the tenant, and under the tenant’s control, be maintained in a safe condition. Distinctions such as control, based on outdated rules, were said to do nothing more than discourage repairs on rented premises since landlords under that principle had no incentive to repair and tenants with short-term leases often lacked the desire, knowledge, and resources to do so.

131. Id. at 849, 279 N.E.2d at 706. See also text accompanying note 8 supra.
132. 361 Mass. at 848, 279 N.E.2d at 706.
133. Id. at 848-49, 279 N.E.2d at 706.
135. Id. at 731 n.1, 402 N.E.2d at 1046 n.1 (emphasis added).
136. Id.
137. Id. at 735, 402 N.E.2d at 1049.
Young court hoped to encourage necessary repairs and thus to eliminate potential traps to unwary third parties such as Ms. Young. The Young decision signifies a new standard for lessors: their conduct is to be measured under all circumstances by a standard of reasonableness rather than by archaic common-law rules and doctrines.

The extent to which landlords are chargeable with knowledge was not determined in Young. Massachusetts Supreme Judicial Court Justice Liacos, however, made it clear that a landlord "should not be liable in negligence unless he knew or reasonably should have known of the defect and had a reasonable opportunity to repair it." Young, which focused on residential leases, left the following questions open with regard to commercial leases:

Whether an agreement to repair will be implied in a commercial, as opposed to a residential, lease arrangement; whether the control distinction will maintain its validity in a commercial setting; and, taking the possibilities to the extreme, whether a landlord may be held liable to a commercial tenant for injuries sustained as a result of defects on parts of the rental premises within the tenant's control in the absence of an express agreement to repair. These issues will be discussed in the context of the Yanofsky decision.

The facts of the Yanofsky case did not permit the court to decide these questions since Yanofsky involved a defect in an area which the landlord had expressly agreed to repair. Yanofsky, in implying an agreement to indemnify from an express agreement to repair, extended complete financial protection to tenants who otherwise would be liable to third persons injured as a result of unsafe...

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138. Id. at 735-36, 402 N.E.2d at 1049.
139. Seven years ago, in Sargent v. Ross, 113 N.H. 388, 397-398, 308 A.2d 528, 534 (1973), Chief Justice Kenison wrote: "Henceforth, landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm. A landlord must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk. We think this basic principle of responsibility for landlords as for others 'best expresses the principles of justice and reasonableness upon which our law of torts is founded' (citations omitted). Henceforth, this basic principle of responsibility applies to Massachusetts landlords as well.

140. Id. at 736, 402 N.E.2d at 1049.
141. Id. at 737 n.8, 402 N.E.2d at 1050 n.8.
142. "We do not decide whether our rule today should extend to nonresidential properties." Id. at 738 n.12, 402 N.E.2d at 1051 n.12.
143. See text accompanying note 48 supra.
conditions on premises which the landlord expressly agreed to re­

144 This note will examine several issues raised when Yanofsky's implications are considered: Whether an agreement to indemnify will be implied from an express agreement to make re­

pairs in a residential leasehold situation;145 whether an indemnification agreement will be implied in a residential context in the absence of an express agreement to repair;146 whether an agreement to repair will be implied in a commercial lease;147 and whether an agreement to indemnify will be implied in a commercial leasehold setting where no express agreement to repair exists.148 Only by ex­

amining the current trend in Massachusetts regarding landlord-­

tenant tort law can one attempt to forecast the answers to these questions.

VI. OTHER DEVELOPMENTS IN MASSACHUSETTS LANDLORD-TENANT LAW PRIOR TO YANOFSKY

The year 1973 was critical in Massachusetts landlord-­

tenant law. By implying a warranty of habitability149 in all residential

leases, the Massachusetts Supreme Judicial Court, in Boston Hous­

ing Authority v. Hemingway,150 recognized that modern residential

tenants are entitled to safe and humane living conditions. The Hemingway court extended the Ingalls v. Hobbs151 holding, which implied the warranty only to furnished dwellings, by making the warranty applicable to all premises used primarily as dwell­

ings.152 In addition, Hemingway abolished the rule that a tenant's covenant to pay rent was independent of the landlord's obligation to provide the premises.153 The independent covenants rule was deemed obsolete since it was premised on the outdated idea that a lease was a conveyance of property.154 In so holding, another of

145. See text accompanying notes 172-79 infra.
146. See text accompanying notes 180-91 infra.
147. See text accompanying notes 194-209 infra.
148. See text accompanying notes 194-213 infra.
149. Formerly, a warranty of habitability was implied only when a building was rented for the purpose of serving as a dwelling to the lessee. The warranty of habitability serves as a guarantee that the premises are in a habitable condition and fit for use and occupation. Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).
150. 363 Mass. at 184, 293 N.E.2d at 831.
151. 156 Mass. 348, 31 N.E. 286 (1892). See the discussion of Ingalls in note 83 supra.
152. 363 Mass. at 196-97, 293 N.E.2d at 841.
153. Id. at 198, 293 N.E.2d 842.
154. Id. See also note 61 supra and accompanying text.
the tenant’s common-law burdens fell. Caveat emptor\textsuperscript{155} was again seen as inconsistent with contemporary societal needs.

\textit{Mounsey v. Ellard}\textsuperscript{156} was also decided in 1973. In that case a police officer who slipped and was injured on defendant landowner’s property was allowed to recover on a negligence theory.\textsuperscript{157} Prior to \textit{Mounsey}, firemen and police officers were considered to be licensees, a subcategory of the common-law visitor class.\textsuperscript{158} A licensee is someone who enters upon another’s land with the occupier’s consent for his own purposes and not for the owner’s benefit.\textsuperscript{159} An invitee, on the other hand, is one who enters the occupier’s premises at the occupier’s invitation to conduct business which concerns the occupier.\textsuperscript{160} The invitee is “placed on a higher footing than a licensee.”\textsuperscript{161} To be included in this more protected category, a visitor had to confer a benefit upon the occupier in the performance of something in which the latter had an interest, provided the benefit was other than “‘those intangible advantages arising from mere social intercourse.’”\textsuperscript{162} Before \textit{Mounsey}, a licensee had to prove reckless or willful and wanton conduct in order to recover.\textsuperscript{163} The court, in refusing to further honor the licensee versus invitee status distinction and in adopting one duty of reasonable care for all landowners and occupiers, removed another burden from the shoulders of injured plaintiffs. The Massachusetts Supreme Judicial Court, in the words of Chief Justice Tauro, refused to follow the “ancient and largely discredited common law distinction” between invitees and licensees because the “status question often prevents the jury from ever determining the fundamental question whether the defendant has acted reasonably in light of all the circumstances in the particular case.”\textsuperscript{164} Although \textit{Mounsey} dealt with a landowner-defendant, the court expressly applied its holding to land occupiers as well.\textsuperscript{165} The \textit{Mounsey} decision ex-

\begin{itemize}
  \item \textsuperscript{155} For a discussion of caveat emptor, see text accompanying notes 63 & 64 \textit{supra}.
  \item \textsuperscript{156} 363 Mass. at 693, 297 N.E.2d at 43.
  \item \textsuperscript{157} \textit{Id.}
  \item \textsuperscript{158} \textit{Id.} at 694-95, 297 N.E.2d at 44.
  \item \textsuperscript{159} W. Prosser, \textit{supra} note 79, at 376.
  \item \textsuperscript{160} \textit{Id.} at 385.
  \item \textsuperscript{161} \textit{Id.}
  \item \textsuperscript{162} \textit{Mounsey v. Ellard}, 363 Mass. at 705, 297 N.E.2d at 50 (quoting Taylor v. Goldstein, 329 Mass. 161, 165, 107 N.E.2d 14, 16 (1952)).
  \item \textsuperscript{163} \textit{Id.} at 694, 297 N.E.2d at 44.
  \item \textsuperscript{164} \textit{Id.} at 706-07, 297 N.E.2d at 51 (footnote omitted).
  \item \textsuperscript{165} \textit{Id.}
\end{itemize}
pressly abolished the distinction between licensees and invitees and imposed a single duty of reasonable care on all landowners and occupiers with regard to anyone legally on their premises. This rule parallels the intent of chapter 186, section 19 of the Massachusetts General Laws: a lessor must exercise reasonable care to correct unsafe conditions on rental property.

The reasonableness standard, espoused in *Mounsey*, carried through much of the subsequent Massachusetts case law dealing with the landlord’s duty to maintain leased premises in a safe condition. Prior to *Mounsey*, *Hemingway* effectively extinguished the validity of the common-law view of a lease as a conveyance of an interest in land by holding that landlords have a duty to provide tenants with habitable dwellings. By accepting the modern view, that a lease is essentially a contractual exchange of covenants, *Hemingway* lent support to the *Mounsey* rationale that the crucial question when tort issues arise in the landlord-tenant context is the reasonableness of the landlord’s conduct. These two decisions were the first in a line of cases that radically changed the obligations of landlords.

Four years later the supreme judicial court extended the reasonableness standard of *Mounsey*. Two decisions eliminated yet another common-law bar to recovery. In *King v. G & M Realty Corp.*, a tenant’s guest was allowed tort redress upon proving that the stairway where her accident occurred had been negligently maintained. In a similar case, *Lindsey v. Massios*, the court allowed a tenant who was injured on an unlit stairway to recover. These decisions imposed a reasonableness standard on the landlord regardless of who was injured as long as it was foreseeable that the victim would be on the premises. The landlord’s defense in relying on the status distinction between a tenant and a tenant’s guest was readily defeated by application of the *Mounsey* rationale. Extension of the *Mounsey* reasonableness standard to abolish the distinction between tenant and guest, a development which allowed both the

166. *Id.* at 707, 297 N.E.2d at 51. The court did, however, assert that a lesser duty existed with regard to trespassers. *Id.* at 707 n.7, 297 N.E.2d at 51 n.7. See also *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (citing *Mounsey v. Ellard*, 363 Mass. at 703-04, 708, 297 N.E.2d at 49, 52). The Court in *Kermarec* refused to recognize the licensee-invitee distinction in maritime law.


King and Lindsey plaintiffs to recover, signifies the court's growing acceptance of the policies which demand the imposition of a greater standard of care on landlords. With Hemingway's attack on caveat emptor, Mounsey's abolition of the common-law licensee-invitee status distinction, and the extension of Mounsey in King and Lindsey to abolish the tenant-guest distinction, the Massachusetts Supreme Judicial Court clearly sounded the warning: caveat lessor, or lessor beware. The Commonwealth had begun to align itself with the trend of decisions in other jurisdictions. The Yanofsky ruling, allowing indemnification of a lessee by a lessor in a commercial lease, exemplifies the modern Massachusetts view of the landlord-tenant relationship. It is characteristic of the trend which began in 1973.

VII. AGREEMENT TO INDEMNIFY IMPLIED IN RESIDENTIAL LEASES CONTAINING EXPRESS AGREEMENT TO REPAIR

The initial question left open by Yanofsky is whether an agreement to indemnify will be implied from an express agreement to repair in a residential leasehold relationship. This question must be answered affirmatively. In Yanofsky, the supreme judicial court adopted the reasoning of the Restatement (Second) of Property. The court's decision to hold the landlord liable was based on a number of persuasive factors set forth in the Restatement: The landlord contractually undertook to make repairs; the tenant justifiably relied on the landlord to make the repairs, thereby foregoing such efforts himself; and the landlord had a reversionary interest in the premises, providing him with incentive to keep his property in repair. The Restatement sections relied on in Yanofsky, however, do not mention indemnification.

170. See text accompanying notes 150-69 supra; text accompanying note 171 infra.
171. See note 79 supra. See also Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972), an Illinois case abolishing the independent covenants rule, in which the court used Justice Cardozo's definition of the judiciary's obligations regarding obsolete common law rules: "A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience." Id. at 367, 280 N.E.2d at 217 (quoting B. CARDOZO, THE GROWTH OF THE LAW 136-37 (1924)) (emphasis in original).
173. Id. § 17.5, comment b (1)-(3).
Forcing a landlord to pay for his breach of an express agreement to repair also is supported by recent case law. It is widely accepted that, although modern residential tenants justifiably expect their apartments to be safe and habitable, most lack the knowledge, financial resources, incentive, and ability to make repairs themselves.\(^{174}\) In addition, the residential landlord is usually in the best position to distribute the cost of compensating injured plaintiffs.\(^{175}\) The Yanofsky court felt that the justifications for holding a landlord liable for physical harm caused by a breach of his express agreement to repair also should protect innocent tenants from having to bear the cost of such compensation. Imposing an agreement to indemnify is firmly supported by notions of fairness as well as by the Restatement's rationale for holding the landlord liable when he has breached his express agreement to repair. The Restatement's reasoning is equally, if not more, applicable to situations involving residential leases.

Residential tenants have even less opportunity and incentive to make repairs than commercial tenants.\(^{176}\) A tenant who leases defective premises is often in possession for a short term, usually has little money, and probably does not know how to make repairs.\(^{177}\) Neither the Restatement nor tort principles draw a distinction between commercial and residential leases. The Young decision, by implying an agreement to repair from a residential lease, placed increased responsibility on landlords who lease residential property.\(^{178}\) The Mounsey decision and chapter 186, section 19 of the Massachusetts General Laws impose a duty of reasonable care on landlords to ensure the safety of their property.\(^{179}\) These holdings, in conjunction with the social policies which inspired the post-1973 movement to make tort recovery more available to ten-


\(^{175}\) W. PROSSER, supra note 79, at 494. See also Pound, The End of Law as Developed in Legal Rules and Doctrines, 27 HARV. L. REV. 195, 233 (1914); note 189 infra.

\(^{176}\) See generally Quinn & Phillips, supra note 53, at 225. See also RESTATEMENT (SECOND) OF TORTS § 356, Comment a (1965); text accompanying notes 73-76 supra.

\(^{177}\) See RESTATEMENT (SECOND) OF TORTS § 356, Comment a (1965); text accompanying notes 73-76 supra.

\(^{178}\) See text accompanying notes 121-25 supra.

\(^{179}\) MASS. GEN. LAWS ANN. ch. 186, § 19 (West 1977). For the text of this statute, see note 45 supra.
ants, appear to encourage extension of *Yanofsky* to residential leaseholds involving express agreements to repair.

In *Yanofsky* the supreme judicial court found that the landlord breached his duty to repair. This breach was found to be the foreseeable cause of a victim’s injury. Inherent in the decision to imply an agreement to indemnify is the notion that when a landlord causes an injury, he alone should be responsible for compensating the victim. This reasoning should be equally applicable to residential tenants in order to protect them from financial loss.

VIII. AGREEMENT TO INDEMNIFY IMPLIED IN A RESIDENTIAL LEASE WITH AN IMPLIED AGREEMENT TO REPAIR

A somewhat more difficult question is presented when the agreement to repair is implied rather than expressed in a residential lease. The *Young* decision, in applying a reasonableness standard, held that a landlord’s duty to repair is implicit in the mere leasing of residential property.\(^{180}\) The court also abolished the control distinction as a bar to recovery.\(^{181}\) Thus, in a residential context, it does not matter whether the defect was located in a leased or common area as long as the landlord had notice of the defect and had time to repair it. It appears, therefore, that the supreme judicial court will find a duty to repair whether expressed or implied in all residential leases. Whether an implied agreement to indemnify a tenant for money paid to third parties in settlement of injury claims can be derived from an implied agreement to repair is another question.

On its face, language appearing in the *Yanofsky* opinion might discourage extension of indemnification in the context of implied agreements to repair. Justice Quirico stated: “such an agreement to indemnify may be implied as a matter of law from an agreement to repair, contained in the express terms of a lease.”\(^{182}\) Since *Yanofsky* involved a commercial lease containing an express agreement to repair, Justice Quirico dealt specifically with express agreements. Even though the *Yanofsky* decision focused on express agreements, the logical extension of the principles espoused in recent Massachusetts cases indicates that an agreement to indemnify

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181. *Id.* Abolition of the control distinction is discussed in text accompanying notes 125 & 126 supra.
will be implied when a duty to repair has been found in the absence of an express agreement.

Analysis of the Young and Yanofsky decisions' treatment of the Restatement supports indemnification. The comments accompanying section 17.5 of the Restatement state that the rule holding a landlord liable in tort for failing to honor his contractual promise to repair applies only to express agreements to repair.\(^\text{183}\) Young clearly rejected the requirement that an express agreement to repair must exist in order for an injured victim to recover in tort against a landlord. It necessarily follows that the supreme judicial court found the Restatement requirement of an express agreement to be obsolete. The supreme judicial court in Yanofsky, therefore, in relying on the Restatement rationale to imply an agreement to indemnify, could not have been referring to the Restatement's discussion of express agreements in the lease but rather to the Restatement's reasoning that the party causing the plaintiff's injuries should bear the cost of compensation. When the breach of a duty to repair causes the plaintiff's injuries, whether the duty arose from an express or an implied agreement should be irrelevant. If the supreme judicial court is to remain consistent with the policies developed since 1973 in Massachusetts and with its adoption of the Restatement rationale in Yanofsky, as modified by the Young decision, the court will have to allow an agreement to indemnify to be implied in a residential lease regardless of the existence of an express agreement to make repairs. It is clear that the Massachusetts Supreme Judicial Court has extended its protection of tenants and their guests far beyond the Restatement's rules.

Requiring an express agreement to repair as a prerequisite to indemnification may make sense in a commercial relationship,\(^\text{184}\) but a different result is clearly warranted in a residential context. The policies behind protection of innocent tenants and third parties, now widely recognized by the courts, encourage indemnification for both economic and physical harm.\(^\text{185}\) The supreme judicial court has frequently reached decisions consistent with these policies.\(^\text{186}\) The Yanofsky decision focused on the fact that the landlord

\(^{183}\) Restatement (Second) of Property § 17.5, comment b(1) (1977).

\(^{184}\) An analysis of the distinction between commercial and residential leases appears in text accompanying notes 196-208 infra.

\(^{185}\) These policies are discussed in text accompanying notes 150-71 supra.

caused Mrs. Vahey's injuries by breaching his duty to repair. He alone, therefore, was held responsible for bearing the cost of compensating her.\textsuperscript{187} A landlord has no less a duty to make repairs when the agreement to repair is implied rather than expressed. The law is concerned with protecting innocent tenants and guests. The supreme judicial court stated that:

\begin{quote}
it [is] clear, moreover, that a lessee such as A \& P that is "injured" by virtue of being reasonably obliged to settle a claim for personal injuries which were caused by the lessor's failure to repair an unsafe condition within a reasonable time, would have a cause of action against the lessor under the statute to recover such amounts reasonably paid.\textsuperscript{188}
\end{quote}

In insulating the innocent tenant from economic harm by forcing the negligent landlord to indemnify him, financial responsibility for injuries suffered as a result of unsafe rental premises is placed upon the lessor. Liability, as espoused in modern tort theory, should rest on the "party best able to bear [the risk], and most likely to prevent the injuries."\textsuperscript{189} The availability of liability insurance, the landlord's stronger bargaining position, and his greater ability to spread the costs of compensation all indicate that he is in the best position to pay damages incurred as a result of the breach of his duty to repair.

The Young decision's dismissal of the distinction between implied and express agreements to repair, as they impact upon the landlord's liability, should be sufficient to prevent a landlord from

\begin{thebibliography}{9}
\bibitem{297} 297 N.E.2d at 43; Boston Hous. Auth. v. Hemingway, 363 Mass. at 184, 293 N.E.2d at 831.
\bibitem{188} \textit{Id.} (construing MASS. GEN. LAWS ANN. ch. 186, § 19 (West 1977) to insulate tenants from economic harm caused by the landlord's breach of his duty to repair) (emphasis added).
\bibitem{189} W. PROSSER, \textit{supra} note 79, at 410. \textit{See also} Dean v. Hershowitz, 119 Conn. 398, 177 A. 262 (1935); Cooperrider, \textit{A Comment on the Law of Torts}, 56 MICH. L. REV. 1291, 1299 (1958). Professor Cooperrider's reaction to F. HARPER \& F. JAMES, \textit{THE LAW OF TORTS} (1956) was that the basic principles of tort law "can be summarized in two slogans, 'Let All Victims Be Compensated,' and 'Let the Loss Be Spread.'" \textit{See also} Pound, \textit{supra} note 175, at 233.
\bibitem{W. PROSSER, supra} W. PROSSER, \textit{supra} note 79, supports Cooperrider's proposition: There is a strong and growing tendency, where there is blame on neither side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence to shift the loss by creating liability where there has been no fault. An entire field of legislation, illustrated by the workmen's compensation acts, has been based upon the same principle.
\bibitem{Id. at 494} \textit{Id.} at 494.
\end{thebibliography}
using lack of an express agreement to repair as a bar to a tenant's action for indemnification. Failure to remove this potential bar to recovery would be tantamount to finding the landlord at fault and responsible for a third party's injuries while holding the tenant liable for compensating the victim merely because the agreement to repair was implied rather than express. The Young court abolished the distinction in the repair context; to revive it in the indemnification context would be inconsistent and indefensible. If a duty to repair exists, then the reasons for allowing indemnification of the tenant also exist. Whether the landlord's duty was implied or express should not be relevant.

Little resistance to imposing increased responsibility onto landlords remains in Massachusetts. Stricter standards have been applied to landlords' actions as the ancient common-law rules have been rejected.\(^{190}\) The stage has been set for realization of the logical and reasonable consequences of the Yanofsky decision. An agreement to indemnify must be implied from any agreement, express or implied, to make repairs. Such a result would further the important social policy of compensating innocent victims quickly and efficiently by placing the burden of compensation on the party who is responsible for the hazard, who can best prevent such accidents, and who can best distribute the cost.\(^{191}\)

**IX. AGREEMENT TO REPAIR IMPLIED IN A COMMERCIAL LEASE**

Whether an agreement to repair will be implied in a commercial lease will be determined by the Massachusetts Supreme Judicial Court's view as to the validity of the distinctions often drawn between commercial and residential leases. The court in Young, relying on both the legislative intent underlying chapter 186, section 19 of the Massachusetts General Laws\(^{192}\) and the recent trend of decisions in Massachusetts, implied an agreement to repair in a residential lease.\(^{193}\) The court did not decide whether the holding applied to nonresidential property.\(^{194}\) Extension to commercial premises, however, was not expressly precluded.

\(^{190}\) See text accompanying notes 149-71 *supra* for a discussion of the demise of these common-law rules in Massachusetts.

\(^{191}\) See W. Prosser, *supra* note 79, at 494; Cooperrider, *supra* note 189, at 1299.


The two kinds of leases frequently are distinguished on the basis of the compelling needs of residential tenants. The view of a "dwelling as a necessity of life" and the social consequences of poor housing have led courts to provide greater protection to residential tenants. These factors are not present when a building is leased for commercial reasons. The Restatement (Second) of Torts and the Restatement (Second) of Property, however, have been interpreted as making no distinction between residential and commercial leases. As new rules regarding landlord-tenant tort law are adopted, the various policy considerations relevant to commercial and residential leases will continue to be debated.

Before 1959, the Massachusetts judiciary gave little indication about its stance on the distinction to be made between residential and commercial leases. In 1959, however, the supreme judicial court, for the first time, allowed a commercial tenant to recover for damages arising from the landlord's failure to maintain and repair the premises. This decision was reached at a time when damages allowable for such a "nonfeasance" breach were limited to the cost of repairs. The liberal damages award, coupled with the recent trend of decisions in Massachusetts, indicates judicial concern for the protection of commercial tenants.

An analysis of the recent enactments of the Massachusetts legislature lends support to the contention that a distinction between residential and commercial leases is unwarranted. In 1972, the Massachusetts legislature enacted chapter 186, sections 19 and


199. For the text of MASS. GEN. LAWS ANN. ch. 186, § 19 (West 1977), see note 45 supra.
15. 

Section 19 deals with the landlord’s duty to exercise reasonable care in repairing defects. Section 15 prevents the landlord from exculpating himself from liability. The legislature drew no distinction between residential and commercial landlords in either section. In section 19 the legislature specifically carved out an exception for owner-occupied, two- or three-family dwellings yet was silent as to commercial property. Had the legislature intended to limit section 19 to residential leases, it would have done so with clear language to that effect, as it had done regarding lessors of two- or three-family dwellings. The same argument is applicable to the language in chapter 186, section 15, which speaks of leases only as they relate to “real property.” That language does not distinguish between residential and commercial landlords either. The language chosen by the legislature, therefore, can be interpreted to impose a reasonableness standard on commercial as well as residential landlords.

A reason often given for a legal distinction between residential and commercial landlords is that commercial tenants maintain a stronger bargaining position than residential tenants. The absence of an agreement to repair might imply that the parties, in negotiating the lease, for whatever reason, decided not to include an agreement by the landlord to repair. This freedom of contract argument can be explored only with an understanding of the purposes of liability. The law is concerned with injuries to unsuspecting third parties as well as to tenants. The courts, in order to

200. MASS. GEN. LAWS ANN. ch. 186, § 15 (West 1977) states that:

Any provision of a lease or other rental agreement relating to real property whereby a lessee or tenant enters into a covenant, agreement or contract, by the use of any words whatsoever, the effect of which is to indemnify the lessor or landlord or hold the lessor or landlord harmless, or preclude or exonerate the lessor or landlord from any or all liability to the lessee or tenant, or to any other person, for any injury, loss, damage or liability arising from any omission, fault, negligence or other misconduct of the lessor or landlord on or about the leased or rented premises or on or about any elevators, stairways, hallways or other appurtenance used in connection therewith, shall be deemed to be against public policy and void.

201. MASS. GEN. LAWS ANN. ch. 186, § 19 (West 1977). See note 45 supra for the full text of the statute.

202. The Michigan Supreme Court in Mobil Oil Corp. v. Thorn, 401 Mich. 306, 312, 258 N.W.2d 30, 33 (1977), makes a similar argument, citing the RESTATEMENT (SECOND) OF TORTS § 357 (1965), which also recognizes no distinction between residential and commercial leases with regard to the landlord-tenant relationship.

203. MASS. GEN. LAWS ANN. ch. 186, § 15 (West 1977). For the full text of § 15, see note 200 supra.

204. See note 197 supra.
protect these parties, will continue to attach liability to those who are responsible for the defective conditions causing injury and who are in the best position to make repairs. This principle of deterrence is deeply ingrained in judicial thought. Even when many of the now defunct common-law rules still were followed, an exception to the rule exempting landlords from liability existed when the property was leased for a purpose requiring admission of the public. Basically, the exception was founded on the idea that a landlord’s duty to the public was so great that shifting liability to the tenant in certain situations was forbidden. A second exception prevented landlords from using their property in such a way as to create a public nuisance. This second exception applied only to conditions existing prior to possession by the commercial tenant, yet it embodied the policy of expanding a landlord’s duty to repair leased property when the public was to be admitted.

The freedom of contract argument, often used to support a judicial hands-off policy regarding commercial leases, was dealt a severe blow by Yanofsky. It is clear that the tenant, A & P, was in at least an equal bargaining position with the lessor. The lease, while expressing an agreement to repair, conspicuously omitted an agreement to indemnify. The traditional freedom of contract rationale would suggest that the absence of such an agreement was intended by the parties, who surely must have known of the existence of such a device. Regardless of the existence of equal bargaining positions, the supreme judicial court felt it necessary to extend complete financial protection to the commercial tenant by implying an agreement to indemnify. The Yanofsky decision represents the latest step in the trend of decisions emphasizing tenants’ rights, regardless of the commercial or residential nature of the lease. The demise of the commercial versus residential distinction is even clearer when chapter 186, section 19 is construed to mean that commercial as well as residential landlords should be held to a reasonable standard of care, regardless of the existence of an ex-

206. W. Prosser, supra note 79, at 403-04.
207. Id. at 404.
208. Id. at 405.
press agreement to make repairs. The supreme judicial court, in Young, decided that such an express agreement was unnecessary in a residential lease. Implying an agreement to repair in a commercial lease would be consistent with prior case law, legislative intent, and social policy.

X. AGREEMENT TO INDEMNIFY IMPLIED FROM
AN IMPLIED AGREEMENT TO REPAIR IN A COMMERCIAL LEASE

Assuming that an agreement to repair may be implied in a commercial lease, it is necessary to consider whether an agreement to indemnify may be implied as well. The same policies favoring an implied agreement to repair support implying an agreement to indemnify, even absent an express agreement to repair. Should the court imply a duty to repair, the manner in which the duty arises should be irrelevant. Extension of the duty to repair would be the logical result if the Massachusetts judiciary were to continue applying social policies as it has in its recent decisions. Deciding that the commercial landlord has a duty to repair, regardless of the existence of an express agreement to that effect, would be consistent with the legislature’s intent as well as with the court’s commitment to protecting tenants and unwary third parties. The decision would reaffirm this commitment by placing the responsibility for physical injuries caused by unsafe conditions existing on any rented property upon the landlord who, when given notice and time to repair, unreasonably refused to do so.

The arguments put forth in Yanofsky for implying an agreement to indemnify would be equally applicable even in the absence of an express agreement to repair. The major obstacle for the courts to overcome will be implying an agreement to repair in a commercial setting. If such an agreement is found, the duty to repair should carry with it a duty to indemnify in the event of a landlord’s breach. To hold otherwise would be tantamount to finding the landlord at fault for failing to prevent the injury while placing the burden of compensation on the tenant.

210. This theory is discussed in detail in text accompanying notes 189-91 supra.
211. These decisions are discussed in text accompanying notes 149-71 supra.
213. 1980 Mass. Adv. Sh. at 902-05, 403 N.E.2d at 373-75. These arguments are discussed in text accompanying notes 180-91 supra. The Yanofsky decision made no reference to a distinction between commercial and residential leases.
XI. Conclusion

In the past, disputes between landlords and tenants were resolved by reference to the widely recognized view that a lease was a conveyance of a property interest. The tenant was perceived to have as much control over the property as he would if he owned it. Thus, the tenant bore the responsibility for making all necessary repairs. The failure to repair rule and the accompanying distinction between nonfeasance and misfeasance arose from this view. In almost all situations the law served as a bar to tenants' tort actions against landlords.

The Massachusetts judiciary shared this view for many years. In 1973, however, the Massachusetts Supreme Judicial Court abandoned its adherence to the principle that a lease is the equivalent of a conveyance of property. Since 1973 the court has adopted the position that a lease is a contractual exchange of covenants with accompanying duties. The trend of decisions in Massachusetts since 1973 has been toward elimination of many barriers to tort recovery by tenants. The supreme judicial court has shown an unwavering commitment to holding landlords liable for tortious injuries incurred as a result of unsafe conditions on premises that the landlord had a duty to repair.

This commitment was demonstrated further in Young v. Garwacki. In Young the supreme judicial court held a landlord liable for failing to make repairs to an area of the premises within the tenant's control. The decision is particularly significant because the landlord had never agreed to make repairs. The court's finding of an implied agreement to repair was unprecedented. In Young the Massachusetts judiciary became even further committed to its policy of protecting tenants.

In Yanofsky, the landlord had expressly agreed to make repairs. A customer, Mrs. Vahey, was injured when she slipped on a wet floor in the A & P store. A leak in the roof, which the landlord, Yanofsky, had failed to repair, brought about the dangerous condition. Mrs. Vahey sued both Yanofsky and A & P. Both claims were settled prior to the outcome of the indemnification action by A & P against Yanofsky. The Massachusetts Supreme Judicial Court held that, although no agreement to indemnify existed, such an agreement was implied from the agreement to repair. The entire financial responsibility for compensating the injured victim was placed

on the landlord. The court abolished the failure to repair rule and “nonfeasance” barriers to recovery by holding a landlord liable for failing to repair a defective condition on his premises after he had expressly agreed to make such repairs. The supreme judicial court’s treatment of the indemnification issue is laudable. Yanofsky should serve as notice to all landlords in Massachusetts that, in the future, innocent tenants ultimately will not be responsible for compensating those injured on a landlord’s unsafe property.

Residential tenants usually are considered less knowledgeable than their landlords. Social policy demands that these transient and often impecunious persons be protected. On the other hand, commercial tenants usually are viewed as competent to take care of themselves. There is often no logical basis for this distinction, however, as the court in Yanofsky demonstrated by providing substantial protection to a financially strong commercial tenant. Thus, reliance on the distinction between residential and commercial leases to bar commercial lessors’ potential liability, or to bar recovery against them in the form of indemnification, probably will fail. Furthermore, extension of the Yanofsky and Young rationales indicates that an express agreement to repair will no longer be necessary in order for the courts to imply an agreement to indemnify. In future cases complete tenant indemnification should be the rule in all fact situations where the landlord has notice of dangerous conditions and reasonable time to repair. When this has been accomplished, the Massachusetts judiciary will have completed the task, begun in 1973, of making landlord-tenant tort law responsive to contemporary needs.

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