

---

## Landlord-Tenant - Breach of Covenant to Repair - Recovery of Consequential Damages: the Restatement Rule as the Tenant's Weapon

Robert Karr

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Robert Karr, *Landlord-Tenant - Breach of Covenant to Repair - Recovery of Consequential Damages: the Restatement Rule as the Tenant's Weapon*, 18 DePaul L. Rev. 822 (1969)

Available at: <https://via.library.depaul.edu/law-review/vol18/iss2/32>

This Case Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

*obiter dicta*. Read in conjunction with the opinions in *Powell v. Texas*, such comments may indicate the advent of new developments in the area of criminal law. Nonetheless, conceding the existence of the insanity defense, the decision of the *Washington* court ranks as a needed reform measure.<sup>45</sup>

*Matthias Lydon*

<sup>45</sup> The Fourth Circuit Court of Appeals has adopted the *Washington* court's reasoning insofar as the governing of psychiatric expert opinion testimony is concerned in *United States v. Wilson*, 399 F.2d 459 (4th Cir. 1968) and *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968).

LANDLORD-TENANT—BREACH OF COVENANT TO  
REPAIR—RECOVERY OF CONSEQUENTIAL  
DAMAGES: THE RESTATEMENT RULE  
AS THE TENANT'S WEAPON

Prior to signing a lease for a house, Meda and Joe Reitmeyer obtained from Harold Sprecher, their prospective landlord, an oral promise that he would either repair or provide materials for the repair of a certain obvious defect. The defect was in the rear porch of the demised dwelling and consisted of loose or missing wood in the porch floor. The Reitmeyers occupied the premises under the lease on August 3, 1965, with knowledge that the defect had not been repaired. They subsequently gave occasional reminders to Sprecher concerning his covenant to repair the defect. These reminders were not heeded. On October 7, 1965, Meda Reitmeyer fell at the point of, and as a result of, the defective flooring and sustained personal injuries. The Reitmeyers brought an action against Sprecher in tort for his negligent failure to repair the defect and sought to recover for the personal injuries suffered by Mrs. Reitmeyer. Although the cause of action arose from defendant's breach of his covenant to repair, plaintiffs alleged a tortious failure to perform such contract. Hence, the plaintiffs claimed as the basis of their cause of action the existence of a contract, yet the damages were not for the landlord's breach of contract but for his negligence in failing to perform his contractual duties. Nor did the complaint contain any allegations that the defective portion of the dwelling was under the control or in the possession of the landlord. The house occupied by the Reitmeyers, as entire premises, was under the complete control and in the possession of the tenant. Since the basis of the alleged tort liability was the contract, the Reitmeyers contended that the oral promise was supported by consideration, the consideration being their having entered into the lease in reasonable reliance upon the promise to

repair. The trial court entered judgment for defendant-landlord on the basis of the weight of precedent in Pennsylvania to the effect that an action in tort for negligence will not lie for the breach of a covenant to repair in the absence of misfeasance on the part of the promisor-landlord, or in the absence of a duty imposed upon the landlord by law.<sup>1</sup> The Supreme Court of Pennsylvania reversed the trial court and adopted the rule of liability as set forth in the *Restatement of Torts*.<sup>2</sup> *Reitmeyer v. Sprecher*, 431 Pa. 284, 243 A.2d 395 (1968).

According to section 357 of the *Restatement* and the rule in this case, the negligent nonperformance of a landlord's covenant to repair will result in the imposition of tort liability upon the landlord over and above his liability for breach of contract. This is also an extension of tort liability for nonfeasance: the landlord entered into a covenant, performed no acts in pursuance thereof, and is thereby held liable for negligence. Thus, *Reitmeyer* represents a hybrid theory of liability based upon the peculiar nature of the landlord-tenant relationship. Such liability is based upon a failure to perform an express contract or covenant to repair premises which, in the absence of such contract or covenant, the landlord would otherwise have no duty to repair.<sup>3</sup> This theory of liability, rendering a landlord responsible for consequential damages flowing from his breach of the covenant to repair, has been gradually adopted by eighteen of the thirty six states which have considered it.<sup>4</sup> Thus

<sup>1</sup> *Harris v. Lewistown Trust Co.*, 326 Pa. 145, 191 A. 34 (1937); *Lopez v. Gukenback*, 391 Pa. 359, 137 A.2d 771 (1958); *Strothman v. Houggy*, 186 Pa. Super. 638, 142 A.2d 769 (1958); *Keiper v. Marquart*, 192 Pa. Super. 88, 159 A.2d 33 (1960); *Green v. Independent Oil Co.*, 414 Pa. 477, 201 A.2d 207 (1964); *Pratt v. Scott Enterprises*, 421 Pa. 46, 218 A.2d 795 (1966).

<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 357 (1965): "A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession, if (a) the lessor, as such, has contracted by a covenant in the lease or otherwise, to keep the land in repair, and (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and (c) the lessor fails to exercise reasonable care to perform his contract."

<sup>3</sup> *Moss v. Hicks*, 240 N.C. 788, 83 S.E.2d 890 (1954); *Daulton v. Williams*, 81 Cal. App. 2d 70, 183 P.2d 325 (1947); *Sanderson v. Berkshire-Hathaway, Inc.*, 245 F.2d 931 (2d Cir. 1957). See generally PROSSER, TORTS § 63 (3d ed. 1964).

<sup>4</sup> *Collison v. Curtner*, 141 Ark. 122, 216 S.W. 1059 (1919); *Scholey v. Steele*, 59 Cal. App. 2d 402, 138 P.2d 733 (1943); *Dean v. Hershowitz*, 119 Conn. 398, 177 A. 262 (1935); *Propper v. Kesner*, 104 So. 2d 1 (Fla. 1958); *Waterbury v. Riss & Co.*, 169 Kan. 271, 219 P.2d 673 (1950); *2310 Madison Avenue, Inc. v. Allied Bedding Mfg. Co.*, 209 Md. 399, 121 A.2d 203 (1956); *Barron v. Liedloff*, 95 Minn. 474, 104 N.W. 289 (1905); *Fried v. Buhmann*, 128 Neb. 590, 259 N.W. 512 (1935); *Rosenberg v. Krinick*, 116 N.J.L. 597, 186 A. 446 (1936); *Lommori v. Milner Hotels*, 63 N.M. 342, 319 P.2d 949 (1957); *Ashmun v. Nichols*, 92 Or. 223, 178 P. 234 (1919); *Rampone v. Wanskuck Buildings Inc.*, 227 A.2d 586 (R.I. 1967); *Merchants' Cotton Press & Storage Co. v. Miller*, 135 Tenn. 187, 186 S.W. 87 (1916); *Ross v. Haner*, 244 S.W. 231 (Tex. Civ. App. 1924), *aff'd*, 258 S.W. 1036 (Tex. Comm. App. 1924); *Mesher v. Osborne*, 75 Wash. 439,

the general rule that no liability in tort will be imposed upon a landlord who merely fails to keep his word by not repairing the defect is slowly disappearing. The minority rule of the landlord's liability becomes the majority rule with *Reitmeyer*.<sup>5</sup> Moreover, *Reitmeyer* expressly overrules a long series of Pennsylvania cases which have refrained from imposing tort liability upon a landlord who has otherwise committed no tortious act.<sup>6</sup>

The object of this note is to examine *Reitmeyer* in light of the other cases which have adopted the *Restatement* rule imposing tort liability for breach of contract, and to question the principles of law and the public policy upon which the rule is based. Also to be considered is the rationale of the courts which have rejected this view and the protective devices of the tenant which have apparently been rejected or ignored by *Reitmeyer*.

The grounds of tort liability of a landlord to his tenant with respect to defective conditions in the premises are set forth in the *Restatement of Torts*,<sup>7</sup> and, but for the controversial section 357, are generally accepted.<sup>8</sup> This general rule, imposing no liability absent misfeasance, contains several exceptions: a landlord will be liable for the injuries sustained by a tenant as the result of undisclosed dangerous conditions existing on the premises which are known, or should be known to the landlord;<sup>9</sup> such liability in

---

134 P. 1092 (1913); *Flood v. Pabst Brewing Co.*, 158 Wis. 626, 149 N.W. 489 (1914). Illinois and Mississippi accept the rule subject to limitations: *Alaimo v. DuPont*, 4 Ill. App. 2d 85, 123 N.E.2d 583 (1954); *Hodges v. Hilton*, 173 Miss. 343, 161 So. 686 (1935); *Ford v. Pythian Bondholders Protective Committee*, 223 Miss. 630, 78 So. 2d 743 (1955).

<sup>5</sup> PROSSER, *supra* note 3, at 422: "An increasing minority of the courts, by now only slightly less in number, have worked out a liability in tort for such injuries to person or property, finding a duty arising out of the contract relation." Since that writing Rhode Island and now Pennsylvania have worked out such liability; thus, the minority becomes the majority.

<sup>6</sup> For example, in *Harris v. Lewistown Trust Co.*, 326 Pa. 145, 147, 191 A. 34, 36 (1937), the court stated: "Where the cause arises merely from failure to keep a promise to repair, the remedy is in assumpsit. To found an action in trespass (tort), there must be some breach of duty apart from nonperformance of the promise."

<sup>7</sup> *Supra* note 3; RESTATEMENT (SECOND) OF TORTS §§ 355-56 (1965).

<sup>8</sup> See, e.g., *Earle v. Kuklo*, 26 N.J. Super. 471, 98 A.2d 107 (1953); *Faber v. Creswick*, 31 N.J. 234, 156 A.2d 252 (1959); *Johnson v. O'Brien*, 258 Minn. 502, 105 N.W.2d 244; RESTATEMENT (SECOND) OF TORTS § 358 (1965). *But cf.* *Zinn v. Hill Lumber & Inv. Co.*, 176 Kan. 669, 272 P.2d 1106 (1954); *Warner v. Fry*, 360 Mo. 496, 228 S.W.2d 729 (1950). See also RESTATEMENT (SECOND) OF TORTS § 359 (1965); *Nunan v. Dudley Properties*, 325 Mass. 551, 91 N.E.2d 840 (1950); *Socket v. Gottlieb*, 187 Cal. App. 2d 760, 9 Cal. Rptr. 831 (1960); *Snyder v. I. Jay Realty Co.*, 30 N.J. 303, 153 A.2d 1 (1959); *Sezzin v. Stark*, 187 Md. 241, 49 A.2d 742 (1946); RESTATEMENT (SECOND) OF TORTS §§ 360-61 (1965); *Myrick v. Herrmann*, 17 Ill. App. 2d 301, 149 N.E.2d 792 (1958); *Southern Apartments, Inc. v. Emmett*, 269 Ala. 584, 114 So. 2d 453 (1959); *Smith v. Kravitz*, 173 Pa. Super. 11, 93 A.2d 889 (1953); *Roesler v. Liberty Nat'l Bank*, 2 Ill. App. 2d 54, 118 N.E.2d 621 (1954); RESTATEMENT (SECOND) OF TORTS § 362 (1965).

<sup>9</sup> See, e.g., *Earle v. Kuklo*, 26 N.J. Super. 471, 98 A.2d 107 (1953); *Faber v. Creswick*, 31 N.J. 234, 156 A.2d 252 (1959); *Johnson v. O'Brien*, 258 Minn. 502, 105 N.W.2d 244 (1960); RESTATEMENT (SECOND) OF TORTS § 358 (1965).

tort will be imposed where injuries result from defects in land leased for the purpose of admitting the public;<sup>10</sup> liability will lie where the premises under the control of the landlord are defective and injuries result from such defective conditions;<sup>11</sup> finally, where the landlord undertakes to make repairs and performs such repairs negligently, liability will be imposed where injuries result.<sup>12</sup> There is one element common to these exceptions which does not exist in the *Reitmeyer* case: the person whose welfare is endangered by the defects stated above lacks either knowledge of the defect or the ability to correct it. In *Reitmeyer* the injured party had both knowledge of and the ability to correct the defect or avail herself of an appropriate alternative course of action.

Of the similar decisions preceding *Reitmeyer*,<sup>13</sup> few have relied as heavily upon the contract and public policy aspects of the issue as has this court.<sup>14</sup> Pre-*Reitmeyer* cases imposing tort liability upon the landlord on the basis of his covenant to repair have imposed such liability in reliance upon one of two theories. One theory embodies the fiction that the landlord retains "control" over the premises by virtue of his right to enter the premises and effectuate the repairs.<sup>15</sup> This would result in imposition upon the landlord of the same liability as that which is imposed upon an occupier of land—to maintain the land in such a way as to avoid causing injury to those rightfully upon it. The use of the "control" fiction thus appears to admit the lack of any liability upon the lessor as such. In discussing the "control" fiction, the Pennsylvania Supreme Court in *Harris v. Lewistown Trust Company* stated that "this view is based upon the conclusion that liability in tort should follow as a legal incident of occupation and control. . . . By the great weight of authority, occupation and control are not reserved through an agreement by the owner to repair."<sup>16</sup> Other states have held that a covenant to repair

<sup>10</sup> No cases in point have been decided. *Cf.* *Zinn v. Hill Lumber & Inv. Co.*, 176 Kan. 669, 272 P.2d 1106 (1954); *Warner v. Fry*, 360 Mo. 496, 228 S.W.2d 729 (1950). *See generally* PROSSER, *supra* note 3, at 418. RESTATEMENT (SECOND) OF TORTS § 359 (1965).

<sup>11</sup> *See, e.g.*, *Nunan v. Dudley Properties*, 325 Mass. 551, 91 N.E.2d 840 (1950); *Socket v. Gottlieb*, 187 Cal. App. 2d 760, 9 Cal. Rptr. 831 (1960); *Snyder v. I. Jay Realty Co.*, 30 N.J. 303, 153 A.2d 1 (1959); *Sezzin v. Stark*, 187 Md. 241, 49 A.2d 742 (1946). *See generally* PROSSER, *supra* note 3. RESTATEMENT (SECOND) OF TORTS §§ 360-61 (1965).

<sup>12</sup> *See, e.g.*, *Myrick v. Herrmann*, 17 Ill. App. 2d 301, 149 N.E.2d 792 (1958); *Southern Apartments, Inc. v. Emmett*, 269 Ala. 584, 114 So. 2d 453 (1959); *Smith v. Kravitz*, 173 Pa. Super. 11, 93 A.2d 889 (1953); RESTATEMENT (SECOND) OF TORTS § 362 (1965).

<sup>13</sup> *Supra* note 4.

<sup>14</sup> *But see* *Rampone v. Wanskuck Buildings Inc.*, 227 A.2d 586 (R.I. 1967).

<sup>15</sup> *De Clara v. Barber S.S. Lines, Inc.*, 309 N.Y. 620, 132 N.E.2d 871 (1956); *Noble v. Marx*, 298 N.Y. 106, 81 N.E.2d 40 (1948). *But see* *Michaels v. Brookchester, Inc.*, 26 N.J. 379, 140 A.2d 199 (1958); *Taylor v. Geroff*, 347 Ill. App. 55, 106 N.E.2d 210 (1952); *Cooper v. Roose*, 151 Ohio St. 316, 85 N.E.2d 545 (1949). *See* Comment, 48 MICH. L. REV. 689 (1950).

<sup>16</sup> *Supra* note 6; *Cavalier v. Pope*, [1906] A.C. 428. The following statement of the

has given the landlord such control,<sup>17</sup> but *Reitmeyer* has not purported to so hold.

The *Reitmeyer* court predicates the tort liability of the landlord upon a more proximate theory: that the negligence of the landlord is based solely upon the lease contract, and not upon any fiction of control.

[N]egligence, not simply the breach of the agreement to repair, is the gist of the action in tort and the agreement to repair does not render the landlord liable unless he has knowledge of the defect when the lease is executed and the agreement to repair made and then only when consideration can be found to support the agreement to repair.<sup>18</sup>

Thus, the court looks to the lease contract as the foundation for the landlord's duty owed to the tenant to perform the contract with reasonable prudence. A breach of such duty is therefore tortious. Moreover, a condition precedent to the existence of such a duty is the validity of the contract, thus accounting for the requirement that the covenant to repair be supported by sufficient consideration. The court finds that since the covenant to repair was one of the terms of the agreement upon which the tenant is presumed to reasonably rely, the covenant is therefore supported by the tenant's undertakings in the lease, no further consideration being necessary. There are at least two avenues of attack that could be pursued to indict the court's rationale: how can an oral covenant to repair, if disputed by the landlord, be conclusively considered part of the lease agreement when the lease is in writing? Further, the rationale is tenuous, not in the court's finding that a duty exists, but rather, in the conclusion of the court that a failure to perform the contract constituted an actionable breach of that duty.

The Pennsylvania court admittedly bases its opinion upon a public policy which must compensate the tenant for his supposedly inferior bargaining position:

[W]e must realize further that most frequently today the average prospective tenant vis-à-vis the prospective landlord occupies a disadvantageous position. Stark necessity very often forces a tenant into occupancy of premises far from desirable and in a defective state of repair.<sup>19</sup>

Hence this court, in advancing its version of public policy, maintains that the landlord is in a position of strength when dealing with a prospective

---

English court was quoted by Chief Justice Cardozo in *Cullings v. Goetz*, 256 N.Y. 287, 290, 176 N.E. 397, 398 (1931): "The power of control necessary to raise the duty . . . implies something more than the right or liability to repair the premises. It implies the power and the right to admit people to the premises and to exclude people from them."

<sup>17</sup> *Supra* note 15.

<sup>18</sup> *Accord*, Page v. Ginsberg, 345 Ill. App. 68, 102 N.E.2d 165 (1951); Merchants' Cotton Press & Storage Co. v. Miller, 135 Tenn. 187, 186 S.W. 87 (1916).

<sup>19</sup> *Reitmeyer v. Sprecher*, 243 A.2d 395, 398 (Pa. 1968).

tenant. Yet, by positing a requirement that consideration support the landlord's promise to repair, the court appears to imply the contrary—that the landlord and the tenant are of equal bargaining power. It can be inferred from the court's discussion of consideration that the tenants in *Reitmeyer* would have looked elsewhere for a residence had the landlord not made this promise. If the tenants were in fact acting out of "stark necessity," they would hardly be in a position to demand a promise to repair from the prospective landlord. Such a public policy decision as *Reitmeyer* will do little to aid those impecunious persons for whose benefit it was rendered. What of those who are forced to move into "premises far from desirable" where no such covenant to repair is made by the landlord; will a landlord be deterred by this decision? A promise to repair made to a tenant in a disadvantageous position would likely be de facto gratuitous, rather than supported by consideration. The good intentions of the instant decision are thus marred.

*Reitmeyer* by no means represents the tenant's sole recourse; there are a number of soundly reasoned alternatives available to the tenant, formulated by courts which reject the blanket imposition of tort law concepts on the landlord's liability, as such. Especially applicable to the facts in *Reitmeyer* are the options available to the tenant to repair the premises at his own expense and deduct such expense from future rental payments,<sup>20</sup> to sue for the cost of repairs without waiting an indefinite period of time for the fulfillment of the promise,<sup>21</sup> to sue the landlord for the difference in values between the premises as defective and as in a state of repair,<sup>22</sup> or to abandon the premises by virtue of constructive eviction.<sup>23</sup> Also, state legislatures have adopted statutes, civil and penal, in aid of the tenant.<sup>24</sup> There is authority that actions in tort will lie based upon such statutes.<sup>25</sup>

<sup>20</sup> *Wallace v. Williams*, 313 P.2d 784 (Okla. 1957); *Kurland v. Massachusetts Amusement Corp.*, 307 Mass. 131 (1940); *John Meckes & Sons Co. v. American Meat Co.*, 96 Ohio App. 17, 117 N.E.2d 191 (1954).

<sup>21</sup> *Mills v. Ruppert*, 167 Cal. App. 2d 58, 333 P.2d 818 (1959); *Sun Ray Drug Co. v. Lawler*, 366 Pa. 571, 79 A.2d 262 (1951); *Hadcock v. Soslow*, 257 App. Div. 906, 12 N.Y.S.2d 138 (1939).

<sup>22</sup> *Pappas v. Zerwoodis*, 21 Wash. 2d 725, 153 P.2d 170 (1944); *Coleman Holding Corp. v. Altman*, 150 Misc. 724, 270 N.Y.S. 81 (1934); *Noble v. Tweedy*, 90 Cal. App. 2d 738, 203 P.2d 778 (1949).

<sup>23</sup> *Groh v. Kover's Bull Pen, Inc.*, 34 Cal. Rptr. 637, 221 Cal. App. 2d 611 (1963); *Masser v. London Operating Co.*, 106 Fla. 474, 145 So. 79 (1932); *Automobile Supply Co. v. Scene-in-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930); *Lynder v. S. S. Kresge Co.*, 329 Mich. 359, 45 N.W.2d 319 (1951).

<sup>24</sup> CAL. CIV. CODE §§ 1941, 1942 (West 1954); MONT. REV. CODES ANN §§ 42.201, 42.203 (1947); N.D. CENT. CODE §§ 47-16-12, 47-16-13 (1943); OKLA. STAT. tit. 41, §§ 31, 32 (1951); S.D. CODE §§ 38.0409, 38.0410 (1939). See Feuerstein and Shestack, *Landlord and Tenant—The Statutory Duty to Repair*, 45 ILL. L. REV. 205 (1950).

<sup>25</sup> *Finley v. Williams*, 45 Ga. App. 863, 166 S.E. 265 (1932); *Gray v. Capital Construc-*

*Reitmeyer* has, in purporting to adhere closely to the words of the *Restatement*, deviated from subsection (a) of section 357 which prescribes the imposition of tort liability, provided that "the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair." The words of the *Restatement* apply where there has been a general covenant to keep the land in a condition of repair. The covenant in *Reitmeyer* was not "to keep the land in repair," but was a promise to repair or provide the materials to repair a specific defect and nothing more. Thus, such covenant would have no application to any other defect arising or existing on the premises. It cannot be inferred from the landlord's promise that the landlord was to accept responsibility for any injuries which might result from the specific defect in question. The alternative stated in the covenant that the landlord may provide materials for repair rather than actually repair would imply that the landlord was giving assurance that the condition would be rectified and nothing more. In the leading Illinois case of *Alaimo v. DuPont*,<sup>26</sup> the court held, in a fact situation similar to that of *Reitmeyer*, that the landlord was liable for injuries sustained by the tenant where, at the time of contracting, it was contemplated by both parties that the landlord would be liable for such damages as might result if the defect were not cured. The *Restatement* uses the term "contracted" in reference to the covenant of the landlord and *Alaimo* stands in support of the necessity that there be a mutual manifestation of assent in the terms of the contract.<sup>27</sup> In the comment to section 357 of the *Restatement* it is noted that, "[s]ince the duty arises out of the existence of the contract to repair, the contract defines the extent of the duty." Of all the courts which have sought to impose tort liability upon the landlord because of his failure to perform his contractual duty to repair and which have distinguished between the general covenant to repair and a covenant to make specific repairs only, only one court has held in favor of tort liability in the latter but not in the former.<sup>28</sup> A fair interpretation of *Reitmeyer* is that the landlord assures the tenant that the tenant will not sustain injuries from a defect which is obvious to both the landlord and the tenant.

The rule adopted by the Supreme Court of Pennsylvania, being afield of contract and property law, appears to be less practical in light of current developments in the landlord-tenant area rather than being "the sound and sensible approach to the instant problem."<sup>29</sup> Section 357 of the *Restatement*

tion Corp., 131 Misc. 34, 225 N.Y.S. 446 (1927); *Michaels v. Brookchester, Inc.*, 26 N.J. 379, 140 A.2d 199 (1958).

<sup>26</sup> *Alaimo v. DuPont*, 4 Ill. App. 2d 85, 123 N.E.2d 583 (1954). *Accord*, *Cromwell v. Allen*, 151 Ill. App. 404 (1909); *Farmer v. Alton Bldg. & Loan Ass'n*, 294 Ill. App. 206, 13 N.E.2d 652 (1938).

<sup>27</sup> *Alaimo v. DuPont*, *supra* note 4. *See also* *Leitner v. Braen*, 51 N.J. Super. 31, 143 A.2d 256 (1958).

<sup>28</sup> *Hodges v. Hilton*, 173 Miss. 343, 161 So. 686 (1935).

<sup>29</sup> *Supra* note 19, at 398.

is intended to put teeth into the enforcement of a landlord's general covenant to keep the land in repair—a covenant wherein both parties contemplate that the landlord will continually, upon being given notice, strive to make the premises safe for those who would rightfully enter the dwelling or place of business. *Reitmeyer* goes further and seeks to enforce a covenant not necessarily contemplated by section 357—a covenant to make specific repairs. When stripped of its reliance upon the *Restatement*, the liability imposed upon the landlord is based upon nothing but negligent nonfeasance.<sup>30</sup> A criticism of the decision, therefore, is that it amounts to judicial legislation. As Chief Justice Bell observed in his dissenting opinion: "What is the use of talking about *Stare Decisis*, or increased litigation, or the terrible backlog of cases, if a majority of this Court bury *Stare Decisis* at their daily or weekly or monthly wish or whim?"<sup>31</sup>

*Robert Karr*

<sup>30</sup> See generally PROSSER, *supra* note 3, at § 54.

<sup>31</sup> *Supra* note 19, at 399.

PRODUCTS LIABILITY—DRUG MANUFACTURERS—  
AN ABSOLUTE DUTY TO WARN EXISTS NOTWITHSTANDING  
MINISCULE STATISTICAL PROBABILITY OF HARM

In 1963, Glynn Richard Davis, age thirty-nine and in good health, received Sabin oral polio vaccine (type III) at a West Yellowstone, Montana, mass-immunization clinic. The vaccine administered was manufactured by Wyeth Laboratories, Inc., under standards devised by a subdivision of the United States Department of Health, Education and Welfare, the Division of Biologic Standards, which, prior to the drug's dispensation, had tested the drug and authorized its release. Prior to delivery to the clinic, however, several reports—including a Surgeon General's Special Report—had indicated that use of type III vaccine could potentially result in paralytic disease.<sup>1</sup> Such potentiality of paralysis was extremely minimal when the drug was administered to children, but as to the adult population the risks were greater, albeit still statistically slight. Wyeth placed pertinent portions of these findings on each bottle of the vaccine; however, these findings were neither read by Davis, nor was Davis told of the risk involved in use of the drug. Shortly after receiving the vaccine, he evidenced paralysis and other poliomyelitic symptoms which subsequently resulted in permanent paralysis from

<sup>1</sup> See 1962 SURGEON GEN. REP. (March and Dec.), and 1962 ASS'N ST. TERR. HEALTH (Sept.).