



1985

Landlord and Tenant—Landlord Has Duty to Employ Reasonable Security Measures to Avoid Foreseeable Criminal Attacks on Tenants

Mildred Havard Hansen

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Property Law and Real Estate Commons](#), and the [Torts Commons](#)

Recommended Citation

Mildred Havard Hansen, *Landlord and Tenant—Landlord Has Duty to Employ Reasonable Security Measures to Avoid Foreseeable Criminal Attacks on Tenants*, 8 U. ARK. LITTLE ROCK L. REV. 735 (1986). Available at: <https://lawrepository.ualr.edu/lawreview/vol8/iss4/7>

This Note is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

LANDLORD AND TENANT—LANDLORD HAS DUTY TO EMPLOY REASONABLE SECURITY MEASURES TO AVOID FORESEEABLE CRIMINAL ATTACKS ON TENANTS. *Jackson v. Warner Holdings, Ltd.*, 617 F. Supp. 646 (W.D. Ark. 1985).

An intruder raped a tenant in an apartment complex owned by the defendants. The rape occurred after the assailant unlawfully entered the tenant's apartment. The tenant filed a complaint in federal court based upon diversity jurisdiction alleging that the apartment owners negligently failed to provide security against unauthorized entries, security devices such as dead bolt or tamperproof locks, and adequate curtains or other privacy devices. The complaint also alleged that the defendants did not inspect and correct security devices, warn tenants to obtain security devices, or exercise ordinary care to insure safety from criminal attacks.

The defendants filed a motion to dismiss which the court denied, holding that if the Arkansas Supreme Court were presented with the issue, it would recognize a duty owed by a landlord to employ reasonable security measures to avoid foreseeable criminal attacks on tenants by third persons. *Jackson v. Warner Holdings, Ltd.*, 617 F. Supp. 646 (W.D. Ark. 1985).

The history of landlord-tenant relationships has evolved slowly to reflect changes in social and economic conditions.¹ At early common law, leases had both property and contract characteristics.² In the thirteenth century, leases were used as security devices for loans and thus resembled a conveyance of property rights in form only.³ The term for years was classified as a nonfreehold estate and as personal property.⁴ In the fourteenth and fifteenth centuries, farming leases changed the purpose of the lease to subsistence and shelter. By the end of the fifteenth century tenants could bring an action of ejectment to recover the possession of the leased land. The term for years came to be defined as an estate in real property, but less than a freehold interest.⁵ The main purpose of a lease was to give a possessory interest in land, rather than

1. 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 269-75 (1923).

2. 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 221[1] at 178-79 (P. Rohan ed. 1985).

3. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 36, 111, 113-16 (2d ed. 1923).

4. *Id.* The term for years was referred to as a chattel real, in reference to its special connection with land. *Id.* at 116.

5. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *140.

to provide a right to use a structure as a dwelling.⁶

As the economy changed from agricultural to industrial and the population shifted into the cities in the nineteenth century, the concept of the periodic tenancy emerged to govern residential rentals, especially multi-unit apartments.⁷ The structures, therefore, became at least as important as the land itself.⁸ Written leases came into common use and began to appear less like conveyances and more like contracts based on mutual promises.⁹ At the same time, periodic tenancies set by oral agreement became common in urban residential rentals, especially among lower-income groups. However, because of transience and poverty, few landlord and tenant cases in this category are reported.¹⁰ Relationships between landlords and tenants were governed by the covenants contained in written leases, where leases existed, with the common law filling in omissions and ruling on unwritten agreements.¹¹

Traditional rules of landlord-tenant law prevailed in the United States until the decades of the 1960's and 1970's, when the law underwent major changes.¹² The landlord's main obligation was to deliver possession, while the tenant's primary obligation was to pay rent.¹³ The implied covenant of quiet enjoyment developed out of the landlord's duty to deliver possession, extending the concept of possession to include a promise that neither the landlord, his agents nor anyone with title superior to the landlord would disturb the tenant's possession.¹⁴ However, the landlord had no obligation regarding the condition of the premises at delivery or repairs during the term of the lease.¹⁵ Any risk of loss due to destruction or deterioration fell on the tenant,¹⁶ and the obligation to pay rent continued despite the loss.¹⁷ This rule of independent covenants¹⁸ meant that if the tenant defaulted in his payments the

6. 2 R. POWELL, *supra* note 2, ¶ 221[1] at 178.

7. C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 79-83 (1962).

8. 2 R. POWELL, *supra* note 2, ¶ 221[1] at 180-81.

9. *Id.*

10. *Id.* ¶ 253 at 374.

11. Glendon, *The Transformation of American Landlord-Tenant law*, 23 B.C.L. REV. 503, 508 (1982).

12. *Id.* at 503.

13. 1 H. TIFFANY, *TREATISE ON THE LAW OF LANDLORD AND TENANT* § 182 (1912).

14. *Id.* § 79 at 552-53.

15. *Id.* § 86(a) at 556, § 87(a) at 574.

16. *Id.* § 87(g) at 617.

17. C. MOYNIHAN, *supra* note 7, at 70.

18. An independent covenant is "where either party may recover damages from the other for the injuries he may have received by a breach of the covenants in his favor; and it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff." BLACK'S LAW DICTIONARY 436 (rev. 4th ed. 1968).

landlord could not retake possession but could only seize the tenant's chattels.¹⁹ In a minority of jurisdictions, including Arkansas, the landlord had a duty to mitigate the tenant's damages by reletting the premises if possible.²⁰

Exceptions to these common law rules began to arise in the nineteenth century.²¹ Lease terms gave the landlord the right to end possession when the tenant defaulted in rent payments.²² Summary process statutes allowed the landlord to enforce his rights against defaulting or holdover tenants.²³ If the landlord wrongfully ousted the tenant during the term of the lease, he was liable for breach of the covenant of quiet enjoyment, and his right to rents was suspended or ended.²⁴ The legal fiction of constructive eviction, which made the landlord's failure to repair equivalent to actual eviction, allowed the tenant to move out and treat the lease as terminated with no further obligation to pay rent.²⁵

Still, the tenant had little recourse for unfit or dangerous conditions in the rented dwelling.²⁶ The landlord generally had no duty to deliver the premises in fit condition.²⁷ When unfit conditions arose during the lease term, the burden of repair fell on the tenant.²⁸ Because the landlord had no responsibility to make repairs, he was not liable for injuries caused by defective conditions.²⁹

Several exceptions developed to ameliorate the harshness of this rule. If the landlord knew of hidden defects but did not disclose them to the tenant, he could be held liable for resulting injuries.³⁰ If the landlord negligently failed to keep common areas in good repair,³¹ or

19. C. MOYNIHAN, *supra* note 7, at 70-71.

20. *See, e.g.*, *La Vasque v. Beeson*, 164 Ark. 95, 261 S.W. 49 (1924). A later Arkansas case, *Browne v. Dugan*, 189 Ark. 551, 74 S.W.2d 640 (1934), refused to impose a duty to mitigate on the landlord because of the tenant's wrongdoing. In *Baston v. Davis*, 229 Ark. 666, 318 S.W.2d 837 (1958), the court held that a *tenant* has a duty to mitigate when his assignee abandons. *See generally* Annot., 21 A.L.R. 3d 534, 541 (1968).

21. Glendon, *supra* note 11, at 512.

22. 2 H. TIFFANY, *supra* note 13, § 274(d) & (e) at 1764-65.

23. *Id.* § 274(d) at 1764.

24. *Id.* § 184 at 1258, § 185(a) at 1258-59.

25. C. MOYNIHAN, *supra* note 7, at 72-73.

26. *See generally* 1 H. TIFFANY, *supra* note 13, § 87.

27. 1 AMERICAN LAW OF PROPERTY § 3.78 (1952); R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 203 (3d ed. 1981). Exceptions existed when the landlord fraudulently misrepresented the condition of the premises and for short-term leases of furnished premises. 1 H. TIFFANY, *supra* note 13, § 86 at 561-62, 570-74.

28. *See generally* Glendon, *supra* note 11, at 515-16.

29. 1 H. TIFFANY, *supra* note 13, § 87 at 575, 649; 52 C.J.S. *Landlord and Tenant* § 435 (1968).

30. 1 H. TIFFANY, *supra* note 13, § 86 at 562-70.

31. *Id.* § 87 at 628-40 and § 91 at 641-44.

made repairs negligently,³² he also risked liability. A landlord could also be held liable for injuries resulting from a dangerous condition of which he was aware on premises leased for use by the public.³³

A series of landmark cases set precedents for sweeping changes in landlord-tenant law in many jurisdictions beginning in 1970. In that year, the United States Court of Appeals for the District of Columbia held in *Javins v. First National Realty Corp.*³⁴ that an implied warranty of habitability applied to landlords, and that the landlord's and tenant's lease covenants are mutually dependent. As a result, tenants could receive rent abatements without vacating the premises when the landlord failed to remedy defects.³⁵ The court used standards set out in the District of Columbia housing regulations as the foundation for the warranty.³⁶ The court alternately justified its position by contrasting modern urban conditions with the feudal agrarian economy in which the traditional rules arose.³⁷ The court reasoned that a lease is like other contracts and represents a "package of goods and services" rather than a conveyance of a mere possessory interest in land.³⁸

The court in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,³⁹ another 1970 decision from the District of Columbia Circuit, used a negligence theory to hold a landlord liable for a criminal attack on a tenant by a third party. The court in *Kline* discussed the reasons courts had previously declined to change the rule that the landlord has no duty to protect tenants from crime.⁴⁰ Among these were the idea that the crime was a superceding cause, the difficulty in determining foreseeability of criminal acts, subjection of the landlord to a vague standard, adverse economic consequences, conflict with the allocation of crime prevention to the government, and judicial reluctance to upset the established common law landlord-tenant relationship.⁴¹ The court

32. *Id.* § 87 at 608.

33. *Id.* § 89 at 655.

34. 428 F.2d 1071 (D.C. Cir. 1970); see Note, *Property—Implied Warranty of Habitability in Leases*, 26 ARK. L. REV. 94, 97-98 (1972) for a discussion of the Arkansas position at that time regarding the application of warranties to leases.

35. 428 F.2d at 1082-83.

36. *Id.* at 1072-73.

37. *Id.* at 1077-79.

38. *Id.* at 1074.

39. 439 F.2d 477 (D.C. Cir. 1970). An intruder assaulted a tenant in an apartment hallway after a series of prior criminal incidents and a reduction in building security measures. *Id.* at 478-80.

40. *Id.* at 481.

41. *Id.*

based its ruling on the landlord's control over common areas,⁴² the analogy of the landlord-tenant relationship to innkeepers and guests,⁴³ and the contractual nature of the modern lease, which the court said includes an implied protective service.⁴⁴

In 1973, in *Sargent v. Ross*,⁴⁵ the New Hampshire Supreme Court abandoned the general rule of landlord tort immunity, and in its place adopted the same reasonable care standard of general tort law that applies to other personal injury cases. The court said that the traditional exceptions are only relevant as evidence of reasonableness.⁴⁶ Thus, the landlord was liable in tort for the death of a tenant's child who fell from a steep outside stairway that the landlord built without adequate railings.⁴⁷ The landlord's control over the area and the question of hidden danger became relevant only as evidence of foreseeability and reasonable care.⁴⁸

In another major case, *Trentacost v. Brussel*,⁴⁹ the New Jersey Supreme Court held that a landlord must provide reasonable security measures to prevent third party criminal attacks on tenants in common areas of apartments when he is aware of a potentially dangerous situation. The landlord had failed to provide a lock for the front door of his apartment building which was located in a high crime area. As a result, a mugger assaulted and robbed a tenant on a common stairway inside the lobby.⁵⁰ The court extended the implied warranty of habitability to impose a duty on the landlord to provide reasonable safeguards to protect tenants from foreseeable crime on the leased premises.⁵¹ The court based the duty solely on the landlord-tenant relationship,⁵² noting the high incidence of crime in urban society and the normal expectations of modern urban tenants for a safe living environment.⁵³

The theories set out in these cases formed the bases for numerous decisions in other jurisdictions.⁵⁴ Courts have justified the tort rationale

42. *Id.* at 480-81, 484.

43. *Id.* at 482-83.

44. *Id.* at 481-82.

45. 113 N.H. 388, 308 A.2d 528 (1973).

46. *Id.* at 398-99, 308 A.2d at 534-35.

47. *Id.*

48. *Id.*

49. 82 N.J. 214, 412 A.2d 436 (1980).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. See R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 4:15 (1980); Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 109-19, 144-

first applied in *Sargent and Trentacost* by the landlord's ability to maintain common areas⁵⁶ and control access to apartments through common areas.⁵⁶ Some courts have characterized the landlord-tenant relationship as a special one imposing a duty on the landlord to provide security.⁵⁷ The urban settings of modern apartments, in which tenants have no realistic means to improve security, have been an important factor for some courts.⁵⁸ Foreseeability of criminal activity because of locations in high crime areas or a past history of crime on the premises has been the primary focus for many others.⁵⁹

Legislative reforms in landlord and tenant law beginning in the late 1960's also reflect the trend toward expanding landlords' duties.⁶⁰ Thirty-six states passed legislation between 1969 and 1982 creating new duties for landlords similar to the warranty of habitability created by the courts.⁶¹ These statutes have provided the basis for liability in a number of court decisions.⁶² Violations of the statutory provisions are viewed by the courts as negligence per se or as evidence of negligence.⁶³

In contrast to the legislative and judicial activity in the majority of states, Arkansas landlord-tenant statutes still reflect the traditional common law rules.⁶⁴ The last action by the legislature in the area of residential landlord-tenant law was a provision regulating security deposits.⁶⁵ A modified version of the Uniform Landlord-Tenant Act was

50; Glendon, *supra* note 11, at 524-26, 535-36.

55. See, e.g., *Graham v. M&J Corp.*, 424 A.2d 103 (D.C. Ct. App. 1980) (landlord's failure to provide front door lock and rear exit in duplex in high crime area raised jury question of foreseeability).

56. *Holley v. Mt. Zion Terrace Apartments*, 382 So. 2d 98 (Fla. Dist. Ct. App. 1980).

57. *Kwaitkowski v. Superior Trading Co.*, 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981).

58. *Duarte v. State*, 84 Cal. App. 3d 729, 148 Cal. Rptr. 804 (1978).

59. See *O'Hara v. Western Seven Trees Corp. Intercoast Management*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977) and cases cited *supra* notes 55, 56 & 58.

60. *Browder*, *supra* note 54, at 112-15; Glendon, *supra* note 11, at 523-24. Glendon counted 38 states which had given tenants new rights and remedies by statute.

61. *Browder*, *supra* note 54, at 112-13 n. 55; see also Glendon, *supra* note 11, at 523-24 nn. 135-36.

62. See, e.g., *Gula v. Garvel*, 71 Ill. App. 2d 174, 218 N.E.2d 42 (1966); *Williams v. Fontes*, 383 Mass. 95, 417 N.E.2d 963 (1981). Compare the formulations for liability based on statutory violations contained in the Restatement (Second) of Property § 17.6(2) (1977) (reasonable care standard) and the Restatement (Second) of Torts §§ 288A and 288B(1) (1965) ("per se" negligence rule with certain exceptions).

63. See generally *Browder*, *supra* note 54, at 105-08, 123-33.

64. See *infra* text accompanying notes 65-70. The majority of the Arkansas landlord-tenant statutes date from the 1838 codification of the common law. See ARK. STAT. ANN. §§ 50-501 to -524 (1971). The last prior revision is represented by 1937 Ark. Acts 129 (codified at ARK. STAT. ANN. § 50-523 (1971)). Act 129 broadened the misdemeanor provisions for holdover tenants to include land as well as buildings.

65. 1979 Ark. Acts 531 (codified at ARK. STAT. ANN. §§ 50-525 to -530 (1971)). The Act set

proposed, but failed, in 1979.⁶⁶

Arkansas cases show adherence to the traditional common law principles as well. The Arkansas Supreme Court held in 1926 that the tenant has the duty to inspect the rented premises and provide his own repairs, rejecting an implied warranty of suitability unless the landlord has been guilty of fraud or concealment of defects.⁶⁷ Later cases reiterated the same position.⁶⁸ As late as 1970, the court held that a landlord could not be forced to make repairs unless he had expressly agreed to do so.⁶⁹ Independence of covenants is still the law in Arkansas; the state supreme court held in 1967 that the obligation to pay rent is not affected by destruction of a leased building by fire.⁷⁰

Consistent with its prior decisions, the court continues to regard the landlord's tort liability as governed by the well-known traditional rules and exceptions. For example, if the landlord undertakes repairs and does them negligently, he can be held liable.⁷¹ In a decision taking an even more restricted view of landlord liability, the court has held that the landlord is not required to light common passageways.⁷² Thirty years later, the court adhered to its statement of the no-liability rule in holding that a landlord has no duty to remove temporary hazards from a common stairway.⁷³

Some Arkansas cases show a very slow trend toward using ordi-

maximum deposit limits and standards for returning deposits.

66. S.B. 607, sponsored by Sen. Mike Wilson in the 72nd General Assembly, Regular Session of 1979, was passed by the Senate, but H.B. 1106, sponsored by Rep. Gloria Cabe, died in the House Committee on Public Health. H.B. 1106, 72nd General Assembly, Regular Session (1979). Telephone interview with Larry Holifield, Arkansas Legislative Council (March 10, 1986). The proposed Act contained 48 sections and would have been a comprehensive revision of the existing law.

67. *Oliver v. Hartzell*, 170 Ark. 512, 280 S.W. 979 (1926).

68. *Tipps v. Mullis*, 257 Ark. 622, 519 S.W.2d 67 (1975) (tenant's contention that premises were unfit was no defense to action for rent under lease obligating landlord to make repairs after notice; tenant had failed to give notice); *see also* *Davis v. Seay*, 247 Ark. 396, 445 S.W.2d 885 (1969) (absent agreement, a tenant is presumed to repair and improve rented premises for his own benefit); *Ferrill v. Collins*, 225 Ark. 247, 281 S.W.2d 939 (1955) (lease providing that a tenant is responsible for repairs in areas under his control is enforceable).

69. *Sparkman v. Etter*, 249 Ark. 93, 458 S.W.2d 129 (1970).

70. *Lawson v. Taylor Hotels*, 242 Ark. 6, 411 S.W. 2d 669 (1967).

71. *Sparks v. Murray*, 120 Ark. 17, 178 S.W. 909 (1915) (faulty roof repair resulting in damage to tenant's goods).

72. *Joseph v. Riffel*, 186 Ark. 418, 53 S.W. 2d 987 (1932). Compare the traditional rule that the landlord is usually responsible for areas under his exclusive control; *see supra* text accompanying notes 30-33.

73. *Kilbury v. McConnell*, 246 Ark. 528, 438 S.W.2d 692 (1969) (day-old accumulation of ice and snow).

nary tort principles to hold landlords liable.⁷⁴ The supreme court announced that it would apply a negligence standard to determine whether a tenant's guest could recover for injuries caused by repairs to a porch.⁷⁵ The court said that either the repair itself must be negligently made or the landlord should have known that the boards needed repair.⁷⁶ In *Hudson Chevrolet Co. v. Sparrow*,⁷⁷ the court held a landlord liable on the theory of *res ipsa loquitur* for injuries suffered by a tenant when sewer gas exploded in a shower without a trap.⁷⁸

By contrast, in sales of houses (as opposed to leases), the court has gradually expanded the scope of the implied warranty of habitability. In *Wawak v. Stewart*,⁷⁹ the court applied the theory to sales of new housing,⁸⁰ and at the same time abolished the rule of *caveat emptor* as a matter of public policy.⁸¹ Eleven years later, the court extended the warranty to second buyers for latent defects in construction.⁸² A year later, the court stated in dictum in a landlord and tenant case involving an apartment fire, that the jury had ample evidence to find a breach of the warranty of habitability,⁸³ thereby indicating that the same rules might apply to landlords.

In *Jackson v. Warner Holdings, Ltd.*,⁸⁴ the District Court for the Western District of Arkansas held that the Arkansas Supreme Court would recognize a duty owed by a landlord to his tenants to employ reasonable security measures to avoid foreseeable criminal attacks by

74. See cases cited *infra* notes 75-78 & 83.

75. *Alston v. Kahn*, 242 Ark. 47, 411 S.W.2d 659 (1967).

76. *Id.* at 49, 411 S.W.2d at 661.

77. 250 Ark. 849, 467 S.W.2d 751 (1971).

78. *Id.*

79. 247 Ark. 1093, 449 S.W.2d 922 (1970). For a discussion of the case see Young and Harper, *Quaere: Caveat Emptor or Caveat Venditor?*, 24 ARK. L. REV. 245 (1970). See also *Wingfield v. Page*, 278 Ark. 276, 644 S.W.2d 940 (1983) (implied warranty of habitability arises by implication of law, not agreement in fact, and is intended to hold builder-vendor to a "path of fairness." *Id.* at 279, 644 S.W.2d at 942); *Bull v. Brantner*, 10 Ark. App. 229, 662 S.W.2d 476 (1984); *Pickler v. Fisher*, 7 Ark. App. 125, 644 S.W.2d 644 (1983) (a reading of *Wawak* makes it apparent that the judicially declared implied warranties created by it were motivated by a desire to equalize the "indefensible contrast" between the rules applied to the sale of real property and the rules applied to sales of personal property. *Id.* at 128, 644 S.W.2d 645-46). Cf. *Bankston v. McKenzie*, 287 Ark. 350, 698 S.W.2d 799 (1985).

80. 247 Ark. at 1100, 449 S.W.2d at 926.

81. *Id.* at 1099, 449 S.W.2d at 925.

82. *Blagg v. Fred Hunt Co.*, 272 Ark. 185, 612 S.W.2d 321 (1981).

83. *Dalrymple v. Fields*, 276 Ark. 185, 190, 633 S.W.2d 362, 364-65 (1982) (the issue was whether the introduction of evidence of a former owner's financial status may have improperly influenced the jury's award of damages).

84. 617 F. Supp. 646 (W.D. Ark. 1985).

third persons. The court applied Arkansas law under *Erie*⁸⁵ principles,⁸⁶ in the absence of an Arkansas decision on the issue.⁸⁷ Judge H. Franklin Waters first stated that, under the law of Arkansas, the issue of duty is a question of law and never a question of fact for the jury.⁸⁸ In order to determine what position the Arkansas courts would take regarding the landlord's duty to prevent criminal attacks on tenants, the court found it necessary to examine cases addressing analogous issues.⁸⁹

The district court found support for such a duty in a series of three Arkansas cases decided between 1932 and 1983.⁹⁰ Judge Waters noted that in *Joseph v. Riffel*,⁹¹ the Arkansas Supreme Court had held that the landlord has no legal obligation to light common passageways for the benefit of tenants in the absence of statute or agreement. But in a 1969 case, *Kilbury v. McConnell*,⁹² the court followed *Joseph* only reluctantly, since it recognized that other jurisdictions favored a rule imposing a duty of reasonable care on landlords to keep their premises free from such hazards.⁹³

Judge Waters then turned to *Keck v. American Employment Agency, Inc.*⁹⁴ for an indication of the current Arkansas position on liability for third-party crimes.⁹⁵ In *Keck*, the Arkansas Supreme Court reversed a directed verdict for the employment agency,⁹⁶ holding that it had a duty to exercise ordinary care in its relationship with Mrs. Keck,⁹⁷ a jobseeker who was raped by a man posing as an employer.⁹⁸ The court held that the agency created the contractual relationship by offering its services, and the relationship carried with it the duty to exercise ordinary care.⁹⁹ Judge Waters stated that the court's progression away from the more conservative cases is shown by the analogies

85. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

86. 617 F. Supp. at 647.

87. See *supra* text accompanying notes 64-86, and see *infra* text accompanying note 112.

88. 617 F. Supp. at 647 (citing *Missouri Pac. R.R. v. Harelson*, 238 Ark. 452, 382 S.W.2d 900 (1964); *Keller v. White*, 173 Ark. 885, 293 S.W. 1017 (1927)).

89. 617 F. Supp. at 647.

90. *Id.*

91. 186 Ark. 418, 53 S.W.2d 987 (1932).

92. 246 Ark. 528, 438 S.W.2d 692 (1969).

93. *Id.* at 532-33, 438 S.W.2d at 694.

94. 279 Ark. 294, 652 S.W.2d 2 (1983).

95. 617 F. Supp. at 648.

96. 279 Ark. at 296, 652 S.W.2d at 3-4.

97. *Id.* at 298, 652 S.W.2d at 6.

98. *Id.* at 296, 652 S.W.2d at 4.

99. *Id.* at 300, 652 S.W.2d at 6.

drawn in *Keck*¹⁰⁰ to cases from other jurisdictions involving rapes of tenants¹⁰¹ and an assault of a woman in a supermarket parking lot.¹⁰² Judge Waters quoted the rule from *Keck*:

Specifically, where a victim of a rape can show that a defendant who owed some duty to the victim, breached that duty, and could foresee that the breach might result in injury to the victim, and that breach was a significant factor in a rape, then a jury question of negligence exists. In other words, such cases should not be automatically dismissed.¹⁰³

A final factor in the district court's analysis was the liberal procedural rules favoring the plaintiff in a motion to dismiss.¹⁰⁴

While other states debate the limits and theories of the landlord's liability to tenants for third-party crimes, Arkansas landlord-tenant law remains comparatively inactive.¹⁰⁵ However, the Arkansas Supreme Court implicitly recognized an implied warranty of habitability in the landlord-tenant context in *Dalrymple v. Fields*,¹⁰⁶ and the court also cited with approval in *Keck* decisions from other jurisdictions finding landlords liable for foreseeable criminal attacks.¹⁰⁷ A holding that a landlord has a duty to prevent criminal attacks on tenants would be consistent with the judicial attitude implied in these cases.

Perhaps the lack of up-to-date landlord and tenant statutes¹⁰⁸ is one reason Arkansas lags behind the trend in the United States toward expanding landlord liability.¹⁰⁹ Commentators have noted the important catalytic role that statutes have played in judicial decisions in other states.¹¹⁰ Arkansas is one of only seven states without either revised

100. 617 F. Supp. at 648.

101. *Duarte v. State*, 84 Cal. App. 3d 729, 148 Cal. Rptr. 804 (1978); *O'Hara v. Western Seven Trees Corp. Intercoast Management*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977); *Holley v. Mt. Zion Terrace Apts.*, 382 So. 2d 98 (Fla. Dist. Ct. App. 1980).

102. *Butler v. Acme Markets, Inc.*, 177 N.J. Super. 279, 426 A.2d 521 (1981), *aff'd*, 89 N.J. 270, 445 A.2d 1141 (1982).

103. 617 F. Supp. at 648 (quoting 279 Ark. at 301, 652 S.W.2d at 6).

104. 617 F. Supp. at 649. A rule 12(b)(6) motion should be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle him to relief." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

105. *See supra* notes 89-95 and accompanying text.

106. 276 Ark. 185, 633 S.W.2d 362 (1982); *see supra* text accompanying notes 65-78.

107. *See Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 301-02, 652 S.W.2d 2, 6-7 (1983) (citing *Duarte v. State*, 84 Cal. App. 3d 729, 148 Cal. Rptr. 804 (1978)); *O'Hara v. Western Seven Trees Corp. Intercoast Management*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977); *Holley v. Mt. Zion Terrace Apartments*, 382 So. 2d 98 (Fla. Dist. Ct. App. 1980)).

108. *See supra* notes 64-66 and accompanying text.

109. *See supra* notes 34-63 and accompanying text.

110. *See generally* Glendon, *supra* note 11, at 519-20, 523-24; Browder, *supra* note 54, at

landlord-tenant statutes or a court ruling enlarging or creating duties for landlords.¹¹¹ A statute, of course, is not a prerequisite for a holding enlarging landlord duties.¹¹² Some jurisdictions have not waited for legislation before ruling that landlords are liable for foreseeable criminal attacks on tenants.¹¹³ Arkansas should join the overwhelming majority of states¹¹⁴ in discarding the old law as an "out-worn relic" unsuited to the social conditions of our time.¹¹⁵

Mildred Havard Hansen

123-34.

111. Browder, *supra* note 54, at 113 n. 56. The other six states are Alabama, Colorado, Indiana, Mississippi, South Carolina, and Utah. *Id.*

112. *See generally* R. SCHOSHINSKI, *supra* note 54, § 4:15, at 217-23.

113. *See, e.g.*, Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970); Duarte v. State, 84 Cal. App. 3d 729, 148 Cal. Rptr. 804 (1978); Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972).

114. *See supra* notes 34-63 and accompanying text.

115. Browder, *supra* note 54, at 113.

