LANDOWNER PROTECTION OR *CAVEAT EMPTOR*? MISSISSIPPI'S LANDOWNERS PROTECTION ACT APPLIED TO RESIDENTIAL TENANTS

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INTRODUCTION

Traditionally, landlord tort liability could be summarized by one word: immunity. Upon surrender of possession to the tenant, a landlord had no duty to protect, repair, or maintain any conditions on the leased premises.[1] As time progressed, however, landlord-tenant law began to evolve in the tenant's favor. During the latter half of the twentieth century, changes in socio-economic values regarding the relationship between landlord and tenant prompted courts and legislatures to draw exceptions to the general notion of landlord immunity.[2] Regardless of whether the exceptions were grounded in principles of contract, or tort, one guiding premise behind the movement remained constant: the realities of modern-day urban living necessitate careful inquiry when applying certain rules of law to residential tenants.

Although these exceptions are deeply embedded in modern-day landlord-tenant law,[3] the Landowners Protection Act ("LPA") seemingly disregards the majority movement away from *caveat emptor* standards and revamps traditional notions of landlord immunity. The LPA is a premises-liability statute that changes a landowner's duty to invitees to guard against the risk of third-party tortious conduct. In stark contrast to the guiding principle at play during the latter half of the twentieth century, the LPA makes no distinction between business invitees and residential tenants.

This Comment focuses on the LPA's application to multi-dwelling residential apartment complexes and demonstrates the inherent injustice in allowing multi-dwelling tenants to be among the class of individuals covered by the LPA. In light of the LPA, Mississippi courts should preserve the modern values advanced towards residential tenants and recognize an exception to the LPA using the implied warranty of habitability.

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[1] *See generally* GLEN WEISSENBERGER ET AL., THE LAW OF PREMISES LIABILITY § 9.1, at 232 (3d ed. 2001).

[2] *Id. at* § 9.2, at 233-34.

[3] *See* RESTATEMENT (SECOND) OF PROP. (LANDLORD AND TENANT) §§ 17.1-17.7 (1977).

Part I illustrates how residential tenants are among the class of individuals covered by the statute. Part II examines the three primary approaches advanced for governing landlord liability for third-party criminal acts. Part III examines Mississippi's implied-warranty precedent and proposes that the warranty of habitability serve as the standard of care for premises-liability actions against multi-dwelling residential landlords in lieu of the LPA. Part IV provides a brief conclusion that discusses some positive aspects of the LPA and recaps the justification for this Comment's proposed solution.

I. THE LANDOWNERS PROTECTION ACT

A. Overview

Premises liability actions are predicated upon the duty owed by owners or occupiers of land to persons who are injured as a result of conditions or activities on the land.[4] The majority of jurisdictions still adhere to the common-law classification system, which groups entrants into three categories: (1) trespassers; (2) licensees; and (3) invitees.[5] Each category of entrant commands a different duty from the landowner.[6] Thus, the first step in a premises-liability action is to determine the particular class of the entrant because the class dictates the standard of care.[7] Under Mississippi law, an invitee is defined generally as "a person who enters the premises of the owner with the express or implied invitation of the owner, for their mutual economic or material benefit."[8] Traditionally, invitees have been owed the highest duty of care with respect to the three classes of

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[4] *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 57, at 386 (5th ed. 1984).

[5] *Id.* at 393.

[6] *Id.*

[7] *See* Double Quick, Inc. v. Moore, 73 So. 3d 1162, 1166 (Miss. 2011); Davis v. Christian Bhd. Homes of Jackson, Miss., Inc., 957 So. 2d 390, 399 (Miss. Ct. App. 2007) ("The first step in determining the duty owed to an individual injured on the premises of another is to determine whether that individual, at the time of injury, was an invitee, licensee, or a trespasser.").

[8] WEEMS & WEEMS, MISSISSIPPI LAW OF TORTS, § 5:9 (2d ed.).

entrants due to the business purpose behind their presence on the landowners property.[9]

To demonstrate the LPA's impact on future cases, a brief overview of prior premises-liability standards is in order. Previously, landowners owed invitees the duty "to keep the premises reasonably safe, and when not reasonably safe, to warn only where there is hidden danger that is not in plain or open view."[10] That duty extended to protecting invitees from foreseeable criminal acts.[11] To show that the criminal act was foreseeable, invitees were required to prove that the landowner had cause to anticipate such acts, which could be accomplished by proving either: (1) that the landowner had actual or *constructive* knowledge of the assailant's violent nature; or (2) that the landowner had actual or *constructive* knowledge that an atmosphere of violence existed on the premises, which could be established by demonstrating a substantial pattern of criminal activity in the *general vicinity* of the premises.[12]

In contrast, the LPA provides that landlords will only face liability for third-party criminal acts committed against invitees if they actively participate in causing harm to the invitee.[13] Even if the risk of a third-party assault is reasonably foreseeable, landowners will face no tort liability unless the invitee proves that the landowner "impelled" the third party's conduct, which removes

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[9] *See* WEISSENBERGER ET AL., *supra* note 1, at § 4.2, 76 ("This view came to be known as the 'economic-benefit' or 'mutual-benefit' test for invitees. The entrant would be considered an invitee only if he entered land for a purpose directly or indirectly connected with business dealings between himself and the possessor . . . [i]t was the business-dealing aspect which gave rise to an implied assurance of safety, imposing upon the landowner the duty to exercise reasonable care to keep the premises in a reasonably safe condition for the invitee.") (citations omitted).

[10] *Davis*, 957 So. 2d at 399.

[11] *Id. See also* Gatewood v. Sampson, 812 So. 2d 212, 219 (Miss. 2002) ("The duty imposed upon a business proprietor to protect a patron from assaults by other patrons is that the business owner, though not an insurer of the invitee's safety, has a duty to exercise reasonable care to protect the invitee from reasonably foreseeable injury at the hands of the other patrons.") (citations omitted).

[12] *Davis*, 957 So. 2d at 401. It should be noted that, while proof of the pattern of criminal activity in the general vicinity of the subject premises could be used as a factor in demonstrating foreseeability, it was not the only factor that was pertinent to the analysis. *Id.*

[13] *See* MISS. CODE ANN. § 11-1-66.1 (2019).

the incentive for landlords to furnish reasonable security measures on the premises.[14] Specifically, the LPA provides the following:

> (2) For any premises-liability actions brought under the laws of the State of Mississippi, no person who owns, leases, operates, maintains, or manages commercial or other real property in the state of Mississippi and no director, officer, employee, agent, or independent contractor acting on behalf of any such person shall be civilly liable to any invitee who is injured on said property as the result of the willful, wanton or intentional tortious conduct of any third party who is not a director, officer, employee or agent of the person who owns, leases, operates, maintains or manages such commercial or other real property unless the injured party can prove by a preponderance of the evidence that: (a) [t]he conduct of said third party occurred on the property; (b) [t]he conduct of the person who owns, leases, operates, maintains or manages the property actively and affirmatively, with a degree of conscious decision-making, impelled the conduct of said third party; and (c) [t]he third party's conduct proximately caused the economic and noneconomic damages suffered by the injured party.
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> (3) For any civil actions brought under the laws of the State of Mississippi for the purpose of alleging liability for the injury of an invitee as described in subsection (2) of this section, an atmosphere of violence shall only be established by similar violent conduct: (a) [w]hich occurred three (3) or more times within three (3) years before the third party act at issue; (b) [w]hich took place only on the commercial or other real property where the acts of the third party occurred; and (c) [w]hich are based upon three (3) or more separate events or incidents that resulted in three (3) or more arraignments of an individual for a felony involving an act of violence.
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> (4) For any civil actions brought under the laws of the State of Mississippi for the purpose of alleging liability for the injury of an invitee as described in subsection (2) of this section, civil liability may not be based on the prior violent nature of the third party whose acts or omissions proximately caused the claimed injury or damage unless the person who owns, leases, operates, maintains or manages the property has actual, not

[14] *Id.*

> constructive, knowledge of the prior violent nature of said third party.
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> . . . .
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> (7) For purposes of this section, "premises-liability action" means a civil action based upon the duty owed to someone injured on a landowner's premises as a result of conditions or activities on the land.[15]

B. Application to Residential Tenants: The Problem

Statutory language and existing law create the problem that is the focal point of this Comment. The plain language of the statute indicates that it applies to all property owners, including residential landlords,[16] and it covers "civil action[s] based upon the duty owed to someone injured on a landowner's premises as a result of conditions or activities on the land."[17] Under Mississippi law, tenants are regarded as invitees for premises-liability purposes,[18] and under prior standards, landlords had an *affirmative* duty to protect tenants from foreseeable criminal acts.[19]

In contrast, the LPA imposes a *negative* duty upon landlords with respect to protecting tenants from third-party criminal acts.[20] Whereas prior standards deterred nonfeasance (the failure to act), the LPA only deters misfeasance (active misconduct).[21]

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[15] *Id.*

[16] *Id.* "[N]o person who owns, leases, operates, maintains, or manages commercial *or other real property* in the state of Mississippi . . . ." (emphasis added).

[17] *Id.*

[18] *See, e.g.*, Galanis v. CMA Mgmt. Co., 175 So. 3d 1213, 1216 (Miss. 2015); Price v. Park Mgmt., Inc., 831 So. 2d 550, 551 (Miss. Ct. App. 2002) (citing O'Cain v. Harvey Freeman & Sons, Inc., 603 So. 2d 824, 830 (Miss. 1991)).

[19] *See Price*, 831 So. 2d at 551 ("It is well settled that a landlord owes his tenants a duty to keep the premises in a reasonably safe condition, and that this duty extends to protecting tenants from the foreseeable criminal acts of others."). *See also Affirmative Duty*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("affirmative duty" means "A duty to take a positive step to do something").

[20] *See generally*, Olin L. Browder, *The Taming of a Duty - The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 101-102 (1982) (citing Francis H. Bohlen, *Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908)). *See also Negative Duty*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("negative duty" means "A duty that requires someone to abstain from something").

[21] *See* Bohlen, *supra* note 20, at 219 "There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-

Accordingly, landlords are now immune from liability for third-party criminal assaults committed against tenants unless the tenant proves that the landlord orchestrated the assault.[22] Facing potentially zero tort liability, the incentive for landlords to decrease security measures in order to save costs needs no elaboration and bodes ill for residential tenants.

Of course, one can theorize all day about the LPA's potential impact on landlord conduct when, in reality, such speculation may be purely conjectural. However, this problem is not strictly theoretical. The substantive change to a landlord's duty conflicts with an ancient principle of tort law that is directly applicable to multi-unit apartment complexes: the landlord's duty to maintain the common areas of the apartment in a reasonably safe condition.[23] In *Turnipseed v. McGee*, the Mississippi Supreme Court stated the rule as follows: "[i]t is the landlord's duty to exercise reasonable care to keep safe such parts over which he reserves control, and, if he is negligent in this respect, and personal injury results to a tenant or to a person there in the right of the tenant, he is liable in tort."[24] Perhaps originally recognized to prevent personal injuries arising from artificial conditions on the premises, the duty applies with equal force to ensure tenant security from third-party criminal acts.[25]

Thus, the simple problem is that the LPA only exposes landlords to tort liability for active misconduct, thereby alleviating a residential landlord's duty to protect tenants from foreseeable criminal acts. The simple solution is that courts should re-impose

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feasance, between active misconduct working positive injury to others and passive in action, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant."

[22] MISS. CODE ANN. § 11-1-66.1 (2019). Of course, if a landlord's constant neglect to maintain the common areas in a reasonably safe condition leads to enough felony arraignments, then tenants could pursue an action alleging that an atmosphere of violence exists on the premises. However, this disregards the tenants that are completely barred from any legal recourse after suffering a criminal assault in the common areas because the landlord did not impel the third party's conduct, and the statutory requisites to allege liability based on atmosphere of violence were not satisfied.

[23] Browder, *supra* note 20, at 102.

[24] Turnipseed v. McGee, 109 So. 2d 551, 554 (Miss. 1959) (citations omitted).

[25] *See* Thomas v. Columbia Grp., LLC, 969 So. 2d 849, 853 (Miss. 2007). *See also* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 481 (D.C. Cir. 1970) (stating that duty to maintain common areas includes providing reasonable security measures to ward off predictable criminal acts).

that duty based on sound considerations of public policy.[26] The following section discusses the potential avenues to do so.

II. HISTORICAL DEVELOPMENT: LANDLORD LIABILITY FOR THIRD-PARTY CRIMINAL ACTS

A. Standards for Imposing Landlord Liability

Various principles of property, tort, and contract law combine to create the melting pot that accurately describes modern-day landlord-tenant law.[27] With regards to landlord liability for third-party acts, this interaction of law has generated confusion regarding what duty is owed, and from which source of law that duty is derived.[28] Yet, despite jurisdictional variants of minute details, three general approaches have been advanced for measuring landlord tort liability for third-party criminal acts.[29]

1. Immunity with exceptions: the common law approach

Agrarian principles of property law governed landlord tort liability until well into the turn of the twentieth century.[30] A lease was regarded as a conveyance of real property that vested control over the premises in the tenant upon transfer of possession and terminated the landlord's right to enter the property.[31] The absence of the right to control the premises was the basis for the doctrine of

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[26] *See* 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 16B.08 (Michael Allan Wolf ed. 2005), LEXIS ("In the modern context of residential leasing . . . the landlord retains significant control over common areas and other portions of the leased premises, and because, as between the landlord and the tenant, the landlord has the physical access and the economic resources to take the necessary precautions against criminal intrusions. In recognition of these modern realities, the traditional rule of landlord immunity for criminal conduct has increasingly come under attack.").

[27] *See generally* Browder, *supra* note 20, at 99.

[28] *See generally* POWELL, *supra* note 26.

[29] *Id.*

[30] *See* Corey Mostafa, *The Implied Warranty of Habitability, Foreseeability and Landlord Liability for Third-Party Criminal Acts Against Tenants*, 54 UCLA L. REV. 971, 975 (2007) (citing Caroline Hudson, *Expanding the Scope of the Implied Warranty of Habitability: A Landlord's Duty to Protect Tenants from Foreseeable Criminal Activity*, 33 VAND. L. REV. 1493, 1495 (1980)). *See also* WEISSENBERGER ET AL., *supra* note 1, § 9.1, at 232 ("The landowner was a man of great wealth and consequent power and influence. The tenant was commonly a menial servant with a very limited power of choice in selecting his humble home.").

[31] *See* WEISSENBERGER ET AL., *supra* note 1, § 9.1, at 233.

caveat emptor ("let the buyer beware"), which characterized landlord-tenant law for hundreds of years and immunized landlords from liability arising from defects on the leased premises.[32] Simply stated, because the landlord surrendered his right to control the property, he owed no legal duty to the tenant whatsoever, and tenants took the premises as they found it.[33]

As time progressed, the landlord-tenant relationship began to draw exceptions to the common law "no-duty" rule, which were largely based upon changing socio-economic values during the twentieth century.[34] Specifically, courts began to recognize that modern tenants possessed neither the expertise nor the wherewithal to make necessary repairs to the leased premises.[35] As a result, the following major exceptions were carved into the general "no-duty" rule for landlord tort liability at common law: (1) a landlord could be liable under a covenant to repair;[36] (2) liability could be imposed for injuries caused by latent defects that were in existence at the inception of the lease and known to the landlord;[37] and (3) liability could be imposed for injuries sustained in, or caused

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[32] *Id.*

[33] *See* Michael J. Davis & Phillip E. Delatorre, *A Fresh Look at Premises Liability as Affected by the Warranty of Habitability*, 59 WASH. L. REV. 141, 143 (1984) ("While landlord immunity was thus born from the conceptual notion of lease as conveyance and nurtured by the economic and social conditions of Tudor England, it grew strong and hardy through the addition of a fairness argument peculiar to the premises liability sector of landlord-tenant law. The landlord should not be responsible, the courts held, because he had no control over the premises.").

[34] WEISSENBERGER ET AL., *supra* note 1, § 9.1, at 233 ("This trend [was] due in large part to the increasing recognition of the fact that tenants who lease defective premises are likely to be impecunious and unable to make the necessary repairs which their own safety and that of others may demand . . . .").

[35] Hudson, *supra* note 30, at 1496 (citing Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077-78 (D.C. Cir. 1970)).

[36] WEISSENBERGER ET AL., *supra* note 1, § 9.7, at 243. One major limitation to this rule was that the landlord's duty stemmed from a contractual obligation; therefore, courts refused to allow tenants to recover damages for personal injuries under this theory for decades. However, the majority of jurisdictions now take the position that a landlord assumes a tort duty if a covenant to repair exists at the commencement of the lease. *Id.* at 244.

[37] *See* Hudson, *supra* note 30, at 1497 (characterizing the exception as fraudulent concealment of dangerous conditions).

by, areas or instrumentalities of which the landlord maintained control.[38]

Yet, despite these judicial measures taken to reduce landlord immunity from tort liability, landlords had no duty to take affirmative action to protect their tenants from third-party criminal acts.[39] There had to be a special relationship between the parties to prompt such a duty, and the landlord-tenant relationship did not suffice.[40] Accordingly, it was not until the implied warranty of habitability gained recognition as a dominant principle of landlord-tenant law that courts began to recognize tort-liability arising from a duty to protect tenants from third-party criminal acts.[41]

a. Origin of revolution: the implied warranty of habitability

While there is debate as to its official origin,[42] the most frequently-cited opinion regarding the implied warranty of habitability's inception is *Javins v. First National Realty Corp.*, which jumpstarted the "tenants-rights" movement that created most of the principles that are seen in modern-day landlord-tenant law.[43] In *Javins*, a multi-dwelling landlord brought a summary

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[38] *See* WEISSENBERGER ET AL., *supra* note 1, at 250-51 ("[A] more liberal rule has been applied in cases involving injuries sustained in areas of the premises or from instrumentalities which are not part of the specific lease arrangement, or over which the landlord retains some measure of control. Such areas included portions of the leased premises used in common by all tenants on multi-unit premises, such as common passageways, stairways, porches, lobbies, fire ways and yards . . . [w]hen a tenant enters a common area or uses a common instrumentality, he is deemed to be an invitee of the landlord, and hence may recover on the same basis as any other invitee."). *See also* RESTATEMENT (SECOND) OF PROP: (LANDLORD AND TENANT) §§ 17.3-17.4 (1977).

[39] POWELL, *supra* note 26, at § 16B.08[5].

[40] *Id.* ("Examples of such special relationships are the relationships existing between innkeeper and guest, business proprietor and business invitee, hospital and patient, and common carrier and passenger. In such relationships, a duty of protection exists because of the allocation of control and the power to act as between the parties. The passenger on a common carrier, for example, is undoubtedly under the control of the carrier insofar as the ability to take realistic precautions against crime is concerned. To the extent that criminal activity is foreseeable, the party possessing control of the situation and the power to take reasonable precautions to protect the other party is required to take those precautions.").

[41] *See* Mostafa, *supra* note 30, at 977-78. *See also* Hudson, *supra* note 30, at 1498.

[42] *See* Hudson, *supra* note 30, at 1498-99.

[43] *See generally* POWELL, *supra* note 26, at §16B.04 (regarding landlord-tenant law subsequent to the implied warranty's establishment as the "new common law").

dispossession action against his tenants for withholding rent.[44] The tenants accepted their failure to pay rent but asserted that their actions were justified because the apartment's physical condition violated over 1500 housing codes.[45]

Recognizing, *inter alia*, that the value placed on modern residential leases was no longer on the interest in land, but rather on the suitability of the premises as a dwelling,[46] the court held that a warranty of habitability should be implied in residential lease agreements.[47] Breach of the warranty was measured by compliance with the District's housing codes and entitled tenants to pursue normal contractual remedies.[48]

The policy considerations articulated in *Javins* prompted the majority of states to adopt the implied warranty of habitability.[49] The warranty generally only covers residential leases, although some states extend the warranty, or a variant thereof, to the commercial context.[50] It has historically been limited to physical defects on the leased premises.[51] Jurisdictions are in conflict, however, as to whether compliance with the warranty is exclusively measured by housing codes, or whether the warranty creates a

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[44] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1073 (D.C. Cir. 1970).

[45] *Id.*

[46] *Id.* at 1078-79 ("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 work; he is unable to make repairs like the jack-of-all-trades farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle-income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property.").

[47] *Id.* at 1080.

[48] *Id.* at 1082-83.

[49] *See* Hudson, *supra* note 30, at 1493 & n.1. *See also* Sweatt v. Murphy, 733 So. 2d 207, 210 (Miss. 2002) (recognizing the implied warranty in Mississippi for the first time by majority opinion).

[50] *See* POWELL, *supra* note 26, at § 16B.04. *See also* Mostafa, *supra* note 30, at 993 (examining the implied warranty of suitability governing commercial leases).

[51] *See* Hudson, *supra* note 30, at 1502 ("[M]ost courts consider the term 'defect' to include the landlord's failure to provide 'essential' services, such as hot water . . . ." (citations omitted)).

standard that is independent of any housing code.[52] Mississippi takes the latter approach, characterizing implied-warranty actions as negligence actions to which housing codes are relevant, but not the dispositive factor in determining liability.[53]

Simply stated, the warranty requires landlords to provide their tenants with a home that is safe and suitable for habitation.[54] Yet, states are split on the issue of whether "safe" and "habitable" encompass security from harm.[55] For this reason, it remains appropriately classified under the immunity-with-exceptions approach – it subjects landlords to liability for personal injuries caused by defects on the premises, but it has not been a unanimously-excepted avenue for imposing a duty to protect tenants from third-party criminal acts.[56]

2. Specific duty to protect against foreseeable criminal activity: the *Kline* approach

Subsequent to its decision in *Javins*, the United States Court of Appeals for the District of Columbia once again made a landmark decision in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, where it held that residential landlords have a duty to protect their tenants from the foreseeable criminal acts of third parties.[57] In *Kline*, the appellant, Sarah B. Kline, sued her landlord to recover personal injuries after she was criminally assaulted in a common hallway of her apartment complex.[58] At the inception of the lease, the complex contained a full-time employee in the lobby that could view the activity on the elevators, two attendants standing watch over the garage entrances, and the main entrance to the building

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[52] POWELL, *supra* note 26, at § 16B.04. *See also* Browder, *supra* note 20, at 111 (1982) ("The scope of warranty has usually been measured by the terms of applicable housing codes; but this does not mean that every violation of a housing code is a breach of warranty, nor that there can be no breach of warranty without a violation of a housing code.").

[53] *See Sweatt*, 733 So. 2d at 210 ("It is thus apparent that the concurrence in *O'Cain* advocated a general implied warranty of habitability for residential leases, and not the sort of strict liability for all housing code defects advocated by Sweatt herein.") (emphasis in original).

[54] *See generally* POWELL, *supra* note 26, at § 16B.08.

[55] *See* Hudson, *supra* note 30, at 1503.

[56] *See generally* POWELL, *supra* note 26, at § 16B.08.

[57] Kline v. Mass Ave. Apartment Corp., 439 F.2d 477, 478 (D.C. Cir. 1970).

[58] *Id.* at 478-79.

was locked after 9:00 p.m.[59] However, these security measures dramatically decreased throughout the term of the lease despite the landlord's knowledge of increased crimes of violence committed against tenants in the complex's common areas.[60] The district court found in favor of the landlord, concluding that a residential landlord had no duty to protect tenants from third-party criminal acts.[61]

On appeal, the court stated that "the logic of the situation itself" warranted imposing a duty of protection upon residential landlords. The court predicated its decision on three primary principles of law: (1) foreseeability;[62] (2) control over the common areas;[63] and (3) special relationships.[64] Additionally, the court noted that the landlord was contractually obligated to keep the premises in repair throughout the lease term under the implied warranty of habitability; therefore, the landlord had an obligation to maintain the same security measures that existed at the inception of the lease throughout the lease term.[65]

The court held that the applicable standard of care was the standard that existed at the inception of the lease.[66] The court

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[59] *Id.* at 479.

[60] *Id.* ("By mid-1966, however, the main entrance had no doorman, the desk in the lobby was left unattended much of the time, the 15th Street entrance was generally unguarded due to a decrease in garage personnel, and the 16th Street entrance was often left unlocked all night. The entrances were allowed to be thus unguarded in the face of an increasing number of assaults, larcenies, and robberies being perpetrated against the tenants in and from the common hallways of the apartment building.").

[61] *Id.* at 478.

[62] *Id.* at 483 ("In the instant case, the landlord had notice, both actual and constructive, that the tenants were being subjected to crimes against their persons and their property in and from the common hallways.").

[63] *Id.* at 484 ("Not only as between landlord and tenant is the landlord best equipped to guard against the predictable risk of intruders, but even as between landlord and the police power of government, the landlord is in the best position to take the necessary protective measures. Municipal police cannot patrol the entryways and the hallways, the garages and the basements of private multiple unit apartment dwellings.").

[64] *Id.* at 485 ("Thirdly, if we reach back to seek the precedents of common law, on the question of whether there exists or does not exist a duty on the owner of the premises to provide protection against criminal acts by third parties, the most analogous relationship to that of the modern day urban apartment house dweller is not that of a landlord and tenant, but that of innkeeper and guest. We can also consider other relationships, cited above, in which an analogous duty has been found to exist.").

[65] *Id.* at 482.

[66] *Id.* at 486.

perfectly articulated the policy considerations for departing from the traditional common law rule in the landlord-tenant context:

> [T]he rationale of this very broad general rule falters when it is applied to the conditions of modern-day urban apartment living, particularly in the circumstances of this case. The rationale of the general rule exonerating a third party from any duty to protect another from a criminal attack has no applicability to the landlord-tenant relationship in multiple dwelling houses. *The landlord is no insurer of his tenants' safety, but he certainly is no bystander*. And where, as here, the landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises exclusively within his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants.[67]

The LPA stands in stark contrast to the justifiable policy considerations that influenced the court in *Kline*. Under the LPA, a landlord is *precisely* a bystander because he will only face liability for actively impelling the third party's conduct.[68] Theoretically, a landlord could personally witness repeated assaults in the common areas and face no liability in tort because he did not actively contribute to the tenant's injuries. However, before proposing a solution, let us consider the final approach.

3. Strict liability under the implied warranty of habitability: the *Trentacost* approach

A discussion of *Trentacost v. Brussel* would be incomplete without first examining *Braitman v. Overlook Terrace Corp.*, which preceded *Trentacost* and laid the blueprints for the standard pronounced therein. *Braitman* concerned a tenant's action to recover damages against his landlord for theft of personal property after a thief ransacked the tenant's apartment.[69] Prior to the incident, the plaintiff notified complex management several times

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[67] *Id.* at 481 (emphasis added).

[68] *See* MISS. CODE ANN. § 11-1-66.1 (2019).

[69] Braitman v. Overlook Terrace Corp., 346 A.2d 76, 77-78 (N.J. 1975).

that the lock on his door was defective, but management took no action to repair the lock until after the theft occurred.[70]

The Supreme Court of New Jersey held that the landlord was liable for the damages, regardless of whether liability was based on ordinary principles of negligence, or the standard pronounced in *Kline*.[71] The pertinent part of *Braitman* for purposes of this analysis is contained in dicta, where the court opined that rising crime rates necessitated the need to reconsider the assertion that the mere relationship of landlord and tenant does not create a heightened duty of care with respect to criminal acts.[72] The court indicated that, if the doctrine proved flexible enough, the implied warranty of habitability could serve as a medium to impose that heightened duty of care.[73] In *Trentacost*, the court confirmed that the implied warranty was flexible enough to encompass security from harm.[74]

In *Trentacost*, the plaintiff sued her landlord after she was assaulted in a common staircase at her apartment.[75] The assailant entered the building through the front door, which remained unlocked despite the landlord's substantial notice of criminal activity in the area.[76] The court held that the ample reports of

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[70] *Id.* at 77-78 ("The lock was repaired two days after the robbery.").

[71] *Id.* at 84.

[72] *Id.* at 86-87.

[73] *Braitman*, 346 A.2d at 86-87 ("It is appropriate to observe that the depressing specter of rising crime rates in our urban areas may soon call for reconsideration of the general principle that the mere relationship of landlord and tenant imposes no duty on the landlord to safeguard the tenant from crime. Whether this duty should be founded upon a frank recognition that the landlord is in a superior position to take the necessary precautions or whether the concept of an implied warranty of habitability of residential premises . . . is flexible enough to encompass appropriate security devices (facilities vital to the use of the premises), is a question we need not resolve today.") (citations omitted).

[74] *See* Trentacost v. Brussel, 412 A.2d 436, 443 (N.J. 1980) ("[In *Braitman* we considered but declined to resolve whether the implied warranty is 'flexible enough to encompass appropriate security devices.' We now conclude that it is and therefore hold that the landlord's implied warranty of habitability obliges him to furnish reasonable safeguards to protect tenants from foreseeable criminal activity on the premises.").

[75] *Id.* at 438.

[76] *Id.* at 438-39 ("There was considerable evidence at trial regarding criminal and other suspicious activity in the vicinity of plaintiff's residence. A Passaic city detective testified that in the three years preceding the incident, the police had investigated from 75 to 100 crimes in the neighborhood, mostly burglaries and street muggings. Another policeman stated that 'civil disturbances' had occurred in the area between 1969 and 1971. Two months before she was attacked, Mrs. Trentacost had herself reported to defendant an attempt to break into the building's cellar. At other times she had notified the landlord of the presence of unauthorized persons in the hallways. Plaintiff claimed

criminal activity on the premises, as well as the landlord's failure to install adequate locks to the building, indisputably justified finding in favor of the plaintiff based on ordinary principles of negligence but went on to examine liability under the implied warranty of habitability.[77]

In assessing the scope of the warranty of habitability, the court declared that security from harm was among the bare-minimum requirements for a habitable dwelling, and tenants residing in multi-unit apartments have no authority to provide such security because they have no control of the premises outside the confines of their apartment.[78] The landlord's control and financial capacity, coupled with the tenant's lack of bargaining power, prompted the court to "give effect to the legitimate expectations which characterize the modern residential tenancy."[79] Accordingly, the court held "that the landlord's implied warranty of habitability obliges him to furnish reasonable safeguards to protect tenants from foreseeable criminal activity on the premises."[80] The landlord's failure to do so, in the court's view, subjected him to strict liability for the tenant's injuries.[81]

B. Analysis

Although the approaches differ, they all impose an affirmative duty on landlords to exercise a reasonable degree of diligence in maintaining the leased premises in a safe condition.[82] The LPA is analogous to the common-law approach, but is even more extreme. Even the common law approach allows liability for negligence if the incident giving rise to the tenant's injuries falls within one of the recognized exceptions to landlord immunity.

In contrast, the LPA requires active misconduct to subject landlords to liability for third-party acts committed against tenants

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the defendant had promised to install a lock on the front door, but he denied ever discussing the subject prior to the assault on plaintiff.").

[77] *Id.* at 441.

[78] *Id.* at 442. "Under modern living conditions, an apartment is clearly not habitable unless it provides a reasonable measure of security from criminal intrusion." *Id.* at 443.

[79] *Id.* at 442.

[80] *Id.* at 443 (citation omitted).

[81] *Id.*

[82] *See* POWELL, *supra* note 26, at § 16B.08 (stating that courts now apply even the common-law rule liberally).

and is now a category of itself.[83] As the foregoing discussion demonstrates, landlord-tenant law has come too far to allow this standard to go uncontested. Since the LPA represents a clear legislative intent to depart from the *Kline* approach, which was the prior law in Mississippi,[84] the best approach is to re-impose a duty of reasonable care under the implied warranty of habitability.

III. SOLUTION: EXTEND THE IMPLIED WARRANTY OF HABITABILITY

The strict liability approach from *Trentacost* was not well accepted among commentators and has gained little recognition as a viable option for holding landlord's responsible for tenant safety.[85] Yet, courts have accepted the general notion that the implied warranty of habitability requires landlords to provide reasonable security measures on the leased premises.[86] In light of this, an amended version of the *Trentacost* approach is a viable solution to the current problem that is inherent with the LPA.

The implied warranty of habitability provides a solution that is narrowly-tailored to meet the needs of multi-dwelling tenants without immediately creating a host of exceptions to the LPA.[87] In addition, using the warranty of habitability in this capacity is a logical and reasonable extension of current Mississippi law.[88]

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[83] *See* MISS. CODE ANN. § 11-1-66.1 (2019).

[84] *See* Part I, section A *supra*.

[85] *See, e.g.*, Mostafa, *supra* note 30, at 989-90; Hudson, *supra* note 30, at 1516-18; Browder, *supra* note 20, at 150; POWELL, *supra* note 26, at § 16B.08 & n.204 (indicating that most courts require notice of the defective condition before defendant can be liable for breach of the implied warranty).

[86] *See, e.g.*, Flood v. Wis. Real Estate Inv. Trust, Inc., 497 F. Supp. 320, 322 (D. Kan. 1980) (holding that issues of material fact as to whether defendants breached implied warranty of habitability precluded summary judgement in action for personal injuries stemming from criminal assault in apartment); Brownstein v. Edison, 425 N.Y.S.2d 773, 774-75 (N.Y. 1980) (permitting plaintiff to amend complaint to include claim for breach of implied warranty of habitability in wrongful death action where tenant was killed in apartment lobby because landlord assumed obligation to provide adequate locks on apartment doors); Kwaitkowski v. Superior Trading Co., 123 Cal. App. 3d 324, 333, 176 Cal. Rptr. 494, 500 (Ct. App. 1981) (holding that landlord owed a duty to tenant to furnish reasonable security measures on premises based in part on the implied warranty of habitability).

[87] *See generally* Mostafa, *supra* note 30, at 984-85.

[88] *See generally* WEEMS, *supra* note 8, at § 5:14.

A. Mississippi's Implied-Warranty Precedent

The Mississippi Supreme Court officially recognized the implied warranty of habitability in *O'Cain v. Harvey Freeman and Sons, Inc.*, through Justice Sullivan's concurring opinion, which was joined by the majority of the court.[89] In *O'Cain*, the plaintiff brought suit against her landlord for emotional distress damages after she witnessed her roommate get sexually assaulted in their apartment by an assailant who entered the premises by removing the patio door from its tracks.[90] Finding that the door was a latent defect to which the landlord had a duty to repair once it was known by him, the majority reversed the trial court's grant of summary judgment for the landlord and remanded the case to determine whether the landlord had notice of the defect.[91]

Justice Sullivan concurred, but declared that the general movement among states at that time was in favor of an implied warranty of habitability for residential leases.[92] He argued that abandoning the doctrine of *caveat emptor* aligned with the legislature's recent enactment of the Residential Landlord and Tenant Act (RLTA),[93] which imposed a duty upon landlords to comply with local housing codes.[94] However, because local housing codes varied widely depending on the municipality, Justice Sullivan declared that the bare-minimum standard to implement the warranty as a uniform rule of law was to require landlords to provide their tenants with a "reasonably safe premises at the inception of a lease . . . ."[95]

Subsequently, in *Sweatt v. Murphy*, the Mississippi Supreme Court confirmed the standard pronounced in *O'Cain*, but held that

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[89] O'Cain v. Harvey Freeman & Sons, Inc., 603 So. 2d 824, 831-32 (Miss. 1991) (Sullivan, J., concurring).

[90] *Id.* at 825 (majority opinion).

[91] *Id.* at 830-31.

[92] *Id.* at 831-32 (Sullivan, J., concurring).

[93] *See* MISS. CODE ANN. § 89-8-1, et seq.

[94] *O'Cain*, 603 So. 2d at 832 (Sullivan, J., concurring).

[95] *Id.* at 833 (Sullivan, J., concurring) ("Recognizing that building and housing codes which affect health and safety generally are often governed locally, I advocate that the bare minimum standard for an implied warranty of habitability should require a landlord to provide reasonably safe premises at the inception of a lease, and to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless expressly waived by the tenant.").

the warranty did not create a negligence *per se* standard for housing code violations.[96] Justice Sullivan's standard, coupled with the court's opinion in *Sweatt*, evolved into the warranty's current treatment within the state as a negligence action.[97] Although the warranty is created by a contractual relationship, tenants are entitled to pursue both contractual and tort remedies for its breach.[98] Accordingly, the implied warranty imposes a duty on landlords to provide a reasonably safe premises at the inception of a lease and exercise reasonable care to repair dangerous defective conditions throughout the lease term upon receiving notice of their existence from the tenant. Breach of the warranty is based on a "landlord's failure to act as a reasonable landlord under the circumstances."[99]

Given the warranty's treatment as a negligence action, it did not take long for plaintiffs to allege liability for third-party criminal acts under the implied warranty. In *Martin v. Rankin Circle Apartments*, the Mississippi Court of Appeals rejected the use of the warranty of habitability in that context.[100] *Martin* stands for the proposition that the implied warranty does not subject landlords to liability for third-party criminal acts absent proof that a physical defect on the premises contributed as a proximate cause to the tenant's injuries.[101] The case provides a thorough analysis of the inherent issues, the foremost being proximate causation, with using the warranty as a cause of action for third-party criminal acts.[102] Therefore, a thorough analysis of *Martin* is in order.

In *Martin*, the wrongful-death beneficiaries of a man that was killed in the parking lot of an apartment complex brought an action against the complex's owners and managers, alleging tortious breach of the implied warranty of habitability.[103] Prior to the shooting, the decedent engaged in an all-day altercation with

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[96] *See* Sweatt v. Murphy, 733 So. 2d 207, 210 (Miss. 2002).

[97] *See* WEEMS, *supra* note 8, at § 5:14.

[98] *See* Joiner v. Haley, 777 So. 2d 50, 51 (Miss. Ct. App. 2000).

[99] WEEMS, *supra* note 8, at § 5:14.

[100] *See* Martin v. Rankin Circle Apartments, 941 So. 2d 854, 862 (Miss. Ct. App. 2006) (citing Sweatt v. Murphy, 733 So. 2d 207, 210 (Miss. 1999)).

[101] *Id.* at 862.

[102] *Id.* at 863-64.

[103] *Id.* at 856.

another group of people near the apartment complex, including the eventual shooter.[104]

The altercation eventually culminated into a heated argument in the complex's parking lot that evening, which ended with the fatal shooting that gave rise to the action.[105] Applying premises-liability standards, the trial court entered summary judgment for the defendants.[106] On appeal, the plaintiffs claimed that the correct legal standard was the warranty of habitability, arguing that the defendants breached their warranty to provide the deceased with freedom from criminal actions.[107]

On appeal, the court began its analysis by stating "[u]nlike *O'Cain,* here there is no allegation of an undeniably repairable defect in the property such as a broken lock . . . [i]nstead, the claim is based on the atmosphere of violence and crime at this apartment complex and the defendants' failure to remove the threats."[108] After performing a thorough analysis of *O'Cain* and the precedents that followed,[109] the court of appeals held that the warranty of habitability was not an alternative cause of action for the plaintiffs' claims alleging that an atmosphere of violence existed at the apartment.[110] The court prefaced its holding by stating that the fact pattern from *O'Cain*, a defective door that led to a criminal assault, was the type of scenario that "fit smoothly within the bare minimum building and housing code standards that *O'Cain* relied upon."[111] Upon finding that the warranty of habitability was inapplicable, the court moved to premises-liability standards.

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[104] *Id.*

[105] *Id.*

[106] *Id.* at 858.

[107] *Id.* at 860.

[108] *Id.*

[109] *Id.* at 862 ("We have reviewed each of the thirteen reported precedents starting with *O'Cain* that interpret Mississippi law and use *O'Cain* or the warranty that it recognized in the premises-liability context. Only in the *O'Cain* concurring opinion is the implied warranty of habitability discussed as relevant to a landlord's duty to protect against criminal conduct. We have quoted relevant excerpts from that opinion. It is evident that those judges are using the vehicle of the *O'Cain* appeal to urge the abandonment of *caveat emptor* in the landlord-tenant relationship. Reliance by the concurrence on the then-recent Residential Landlord and Tenant Act, which is not focused on protections against criminals but instead on more general standards arising under local housing codes, is also an indication of the reach of the warranty.").

[110] *Id.*

[111] *Id.* (citations omitted).

Under premises-liability standards, the dispositive issue in the case was proximate causation.[112] The court defined proximate cause as the "cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred."[113] The court found that the shooter's appearance at the apartment was an intervening cause, a doctrine that is recognized in both premises-liability cases and implied-warranty cases.[114] Finding that the decedent was fully aware of the shooter's violent nature and initiated the altercation that led to the shooting, the court held that the defendants' actions were not the proximate cause of the decedent's death.[115]

B. Proposed Standard

Against this backdrop, this Comment proposes that the warranty of habitability serve as the standard of care for multi-dwelling residential landlords. In doing so, the duty shall be the same as it has always been for any implied-warranty action: for a landlord "to provide a reasonably-safe premises at the inception of the lease, and to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless expressly waived by the tenant."[116] However, the word "safe" should encompass adequate security measures in the common areas of the apartment complex.

To this end, the reasoning in *Trentacost* is instructive.[117] Security from harm is necessary for, and ought to be characteristic

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[112] *Id.* at 863.

[113] *Id.* (quoting Titus v. Williams, 844 So. 2d 459, 466 (Miss. 2003)).

[114] *See Martin*, 941 So. 2d at 863.

[115] *Id.* at 864. "[I]t is evident that the deceased . . . was fully cognizant of the developing dangers around him. To the extent his heirs argue that allowing a[n] atmosphere of danger to exist at this location was a breach of the defendant's duty, the deceased had been participating in that atmosphere for a substantial period of time before the actual shot was fired. He had been in a position to 'observe and fully appreciate the peril' that was imminent, given the day's events of which he had clearly been a part."

[116] O'Cain v. Harvey Freeman & Sons, Inc., 603 So. 2d 824, 833 (Miss. 1991) (Sullivan, J., concurring).

[117] Trentacost v. Brussel, 412 A.2d 436, 443 (N.J. 1980) ("Among the 'facilities vital to the use of the premises' are the provisions for the tenant's security. Unfortunately, crime against person and property is an inescapable fact of modern life. Its presence threatens the suburban enclave as well as the inner city. Tenants universally expect

of, a habitable dwelling. Thus, lack of adequate security in such areas would necessarily be classified as a "defective condition" on the premises. This common-law principle was best articulated in *Kline*, where the court stated:

> And where, as here, the landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises *exclusively within his control*, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants.[118]

However, a proper solution using the warranty in this context shall not end with merely fashioning a standard of care. As noted, implied-warranty actions are regarded as negligence actions under Mississippi law, requiring tenants to prove duty, breach, causation, and damages in order to prevail against their landlords.[119] Since proof of damages needs no elaboration, the remaining sections discuss the requisites for satisfying the elements of breach and causation under this Comment's proposed standard.

As noted, Mississippi currently analyzes breach of the warranty on a case-by-case basis.[120] Therefore, breach of the duty owed to tenants under this standard shall be analyzed on a case-by-case basis. To be clear, this is not the strict-liability approach adopted in *Trentacost*. The warranty of habitability under this proposed standard merely requires landlords "to act as a reasonable

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some effective means of excluding intruders from multiple dwellings; without a minimum of security, their well-being is as precarious as if they had no heat or sanitation. Recognizing that a safer and more secure apartment is truly more livable, landlords frequently offer superior protective measures as an inducement for entering into premium lease agreements. Under modern living conditions, an apartment is clearly not habitable unless it provides a reasonable measure of security from the risk of criminal intrusion.") (citations omitted).

[118] Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 481 (emphasis added). *See also* Lucas v. Miss. Hous. Auth. No. 8, 441 So. 2d 101, 103 (Miss. 1983) ("It is the landlord's duty to keep safe such parts over which he reserves control, and, if he is negligent in this respect, and personal injury results to a tenant or to a person there in the right of the tenant, he is liable in tort.").

[119] Mays v. Shoemaker Prop. Mgmt., LLC, 246 So. 3d 72, 76 (Miss. Ct. App. 2018).

[120] *See generally*, Sweatt v. Murphy, 733 So. 2d 207 (Miss. 1999).

landlord under the circumstances of the case."[121] Nevertheless, as commentators on this subject have noted, in fairness to landlords there must be guidance on what constitutes reasonable security measures for purposes of assessing breach.[122]

While the *Trentacost* court provided nearly no guidance on what constitutes "reasonable security measures,"[123] the potential measurements pronounced in *Kline* are instructive. Specifically, that industry custom among like landlords and consistency of security measures throughout the lease term provide sound bases of measuring landlord compliance with the warranty of habitability.[124] The second basis of measurement, decreased security measures throughout the lease term, is especially important in light of the LPA. Since the LPA provides a clear incentive for landlords to decrease security measures in order to save costs, most landlords will likely capitalize on this incentive. Accordingly, a sound approach for measuring whether a landlord breached his duty to keep the common areas reasonably safe is to assess any variance in the security measures in place before and after the LPA's effective date.[125] No matter which basis of measurement courts refer to in assessing breach, the foremost concern is simply whether the landlord acted reasonable under all the circumstances.

Turning now to causation. This Comment's proposed requisite for causation is vital to implementing a *fair* solution and will ensure that future implied-warranty actions remain separate and distinct from future premises-liability actions. Under this standard, liability will only lie when a defective condition on the premises proximately causes the tenant's injuries. This is in line with the

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[121] O'Cain v. Harvey Freeman & Sons, Inc., 603 So. 2d 824, 833 (Miss. 1991) (Sullivan, J., concurring).

[122] *See* Hudson, *supra* note 30, at 1516.

[123] *Id.*

[124] *Id.* ("In *Kline* the court established a standard of 'reasonable care in all the circumstances,' but it provided guideposts for determining whether a landlord has met the standard. These guideposts were 'the protection commonly provided in apartments of this character and type in this community' (apparently a tort standard) and 'the same relative degree of security' provided by the landlord at the commencement of the lease term (apparently a contract standard).") (citing Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 486 (D.C. Cir. 1970)).

[125] *See* S.B. No. 2901, 2019 Reg. Sess. ("This Act shall take effect and be in force from and after July 1, 2019.").

Martin court's assertion that "a lock on the apartment door, and whether that defect led to a criminal assault, are the kind of issues that fit smoothly within the bare minimum building and housing code standards that *O'Cain* relied upon . . . ."[126]

An alternative justification for this requirement is found in *Braitman*, where the court stated that liability will only lie upon proof that the landlord's conduct unreasonably enhanced the risk of injury.[127] When a tenant notifies his landlord that his lock is broken and the landlord fails to repair it, the landlord's negligence enhanced the risk that an assailant could injure the tenant by entering the apartment through the unsecure door. Additionally, this requirement again aligns with existing Mississippi law for breach of the warranty of habitability, which requires the defective condition to be the proximate cause of the tenant's injuries.[128]

Of course, any time tort liability is considered for third-party criminal conduct, it is necessary to analyze the foreseeability of the criminal act.[129] To this end, foreseeability under this proposed standard is gauged by the totality of the circumstances in the case and not by the rigid standards under the LPA.[130] However, in fairness to landlords, this more lenient standard for foreseeability is counterbalanced with an additional safeguard that is unique to implied-warranty actions. Specifically, tenants must notify the landlord of the defective condition.[131]

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[126] Martin v. Rankin Circle Apartments, 941 So. 2d 854, 862 (citations omitted).

[127] Braitman v. Overlook Terrace Corp., 346 A.2d 76, 84 (N.J. 1975) ("A residential tenant can recover damages from his landlord upon proper proof that the latter *unreasonably enhanced the risk of loss* due to theft by failing to supply adequate locks to safeguard the tenant's premises after suitable notice of the defect.") (emphasis added).

[128] Mays v. Shoemaker Prop. Mgmt., LLC, 246 So. 3d 72, 76 (Miss. Ct. App. 2018) ("Furthermore, the breach of a duty must be the proximate cause of the injury suffered. This Court held that the proximate cause is the cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred.") (internal quotations and citations omitted).

[129] *See, e.g.*, Mostafa, *supra* note 30, at 989.

[130] Again, the goal is to keep premises-liability actions and implied-warranty actions separate and distinct. If a tenant were required to resort to the LPA to prove that the criminal assault was reasonably foreseeable then it would defeat the whole purpose behind extending the scope of protection offered by the warranty of habitability. This standard considers all the circumstances, including: criminal activity in the vicinity of the premises, prior notice of criminal activity on the premises, and the geographical area's reputation among the general public as it pertains to criminal activity.

[131] *See* 43 Am. Jur. Proof of Facts 3d 329, Landlord's Liability for Breach of Implied Warranty of Habitability, § 9 (1997); *Mays*, 246 So. 3d at 76 (Miss. Ct. App. 2018);

This means that either the landlord or complex management must have actual notice, from any source, of a physical defect on the premises, or reports of loitering, violent conduct, or other like conduct of a criminal nature presented to complex management. To clarify, the injured tenant need not be the one to notify the landlord of these defective conditions. It is sufficient that the landlord or complex management receive actual notice from any source, whether it be personal communication with tenants, resident complaint forms, or obtaining knowledge of criminal conduct on the premises through routine inspections. This requirement is justified by the fact that the warranty of habitability imposes a complex-wide obligation on the landlord, not a tenant-specific obligation.[132] Finally, like any negligence action, landlords may assert all tort defenses, including intervening causation and lack of foreseeability.[133]

As a brief summation of the elements for breach of the implied warranty of habitability under this Comment's proposed standard, in the future tenants must prove duty, breach, causation and damages. Liability is based on whether the landlord, after receiving notice of the defective condition on the premises, acted reasonable under all the circumstances. The laxed foreseeability standard, coupled with a notice requirement provides a fair compromise between the strict-immunity standard under the LPA, and the strict-liability standard from *Trentacost*. As opposed to the LPA, this proposed standard will serve as an effective medium for maintaining the incentive for landlords to provide their tenants with a dwelling that is reasonably protected from the risk of third-party criminal acts.

Stribling Inv., LLC v. Mike Rozier Const. Co., 189 So. 3d 1216, 1219 (Miss. 2016). *See also* POWELL, *supra* note 26, at § 16B.04 (noting that courts usually require the landlord's notice of the defect as a prerequisite for claiming breach).

[132] *See* Joiner v. Haley 777 So. 2d 50, 51 (Miss. Ct. App. 2000); Sample v. Haga, 824 So. 2d 627, 631 (Miss. Ct. App. 2001).

[133] *See Haga*, 824 So. 2d at 632 ("As this cause of action sounds in tort, the landlord has available all standard tort defenses, including intervening cause and unforeseeability.").

C. Examples

The following section applies the proposed standard to two cases that provide examples of fact patterns which would be actionable under the implied warranty of habitability and is meant to test the standard. This section demonstrates the proposed solution's practicality by showing that it would have produced the same result that was originally reached in both cases, while contemporaneously demonstrating the proposed solution's necessity by showing that tenants would be barred from even commencing an action under the LPA.

1. *O'Cain v. Harvey Freeman and Sons, Inc. of Mississippi*

The broad facts of *O'Cain* have already been discussed in detail.[134] The majority ultimately concluded that the defective door was a latent condition on the premises to which the landlord had a duty to repair if it were known by him and remanded the case to determine the issue of notice.[135] The tenant had no idea that the lock on her patio door was defective; therefore, she never notified her landlord of the defect.[136] However, the evidence indicated that a locksmith had notified at least two management officers at the complex that he recommended to them that additional security devices be installed on the patio doors due to their inherent insecurity.[137]

This case is the ideal fact pattern to demonstrate the proposed standard. Under the implied warranty of habitability, the landlord would have owed the plaintiff a duty to provide a reasonably safe premises at the inception of the lease and to repair defective conditions on the premises upon receiving notice of their existence. In *O'Cain*, the defective locking mechanism on the door constituted a defective condition and the tenant's injuries were proximately caused by the condition. The assailant entered the apartment through the defective door. Thus, the only issue that would have precluded the plaintiff from recovering for breach of the implied

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[134] *See* Part III, section A *supra*.

[135] O'Cain v. Harvey Freeman & Sons, Inc., 603 So. 2d 824, 831 (Miss. 1991).

[136] *Id.* at 830.

[137] *Id.* at 826.

warranty of habitability is whether the landlord had notice of the defective condition.

However, under the proposed standard, the notice requirement is satisfied if the landlord receives actual notice of the defect, *from any source*. Thus, the locksmith's advice *could have* constituted notice of the defective condition, but that issue would be one for the jury to determine. Accordingly, the case would have been remanded to determine the issue of notice under the proposed solution just as it was in the original case. In contrast, the plaintiff would be barred from bringing an action under the LPA because the landlord did not impel the conduct of the assailant.

2. *Davis v. Christian Brotherhood Homes of Jackson, Mississippi, Inc.*

In *Davis*, Lucius Davis's wrongful-death beneficiaries brought a premises-liability action against the owners and managers of Christian Brotherhood Apartments ("CBA") after he was shot and killed in the parking lot.[138] The record showed that Davis had been socializing with the eventual shooter for multiple hours at CBA on the afternoon that the incident occurred, and that Davis was not a tenant at CBA but lived there with his mother.[139]

Christian Brotherhood Homes of Jackson, Mississippi, Inc., owned CBA, which participated in a rent-subsidy program funded by the Department of Housing and Urban Development (HUD).[140] Southland Management Company ("Southland") managed CBA, and had the authority to make decisions concerning the daily operations at CBA, including the security measures.[141] At the time of the shooting, there were no security measures in place at CBA to prevent unauthorized access to the premises.[142] Southland claimed that security was not necessary because there had been no recent incidents on the premises, and the money that would have been

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[138] Davis v. Christian Bhd. Homes of Jackson, Miss., Inc., 957 So. 2d 390, 394 (Miss. Ct. App. 2007).

[139] *Id.* at 395.

[140] *Id.* at 396.

[141] *Id.*

[142] *Id.*

spent on security was needed to perform routine maintenance on the property.[143]

In contrast, the plaintiffs submitted evidence that "a log of criminal activity" on and around CBA was reported to the Jackson Police Department both before and after CBA provided security measures.[144] Finding the issue of proximate causation dispositive, the trial court held that no security measures could have prevented the shooting and granted summary judgment to the defendants.[145]

On appeal, analyzing the case under prior premises-liability standards,[146] the court found that Davis was an invitee at CBA at the time of the shooting and that the plaintiffs' evidence was sufficient to create a fact issue as to whether the shooting was reasonably foreseeable.[147] The court also found that fact issues precluded summary judgment on the issue of whether the defendants breached their duty to Davis by failing to provide reasonable security measures due to the fact that there was no access gate or security guards on the premises at the time of the shooting.[148] However, the court held that CBA's lack of security measures was not the cause in fact of Davis's death because the record revealed that the shooter would have been on the premises anyway by virtue of Davis's invitation.[149]

Now let us apply the proposed standard to the facts of *Davis*. Under the implied warranty of habitability, the landlord would have owed Davis the duty to provide a reasonably safe premises at the inception of the lease and to repair defective conditions on the premises throughout the lease term after receiving notice of their existence. Although the case did not indicate that the landlord or complex management had actual notice of criminal activity on the premises, assume *arguendo* that they had received actual notice. The absence of a gate, security guards, and security cameras clearly constitutes a defective condition under the proposed standard. Accordingly, both duty and notice of the defective condition are

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143 *Id.*
144 *Id.* at 396-97.
145 *Id.* at 397.
146 *See* Part I, section A *supra*.
147 *Davis*, 957 So. 2d at 400-03.
148 *Id.* at 404.
149 *Id.* at 407-08.

satisfied. The analysis then turns to whether the landlord breached his duty to the tenant.

Considering the fact that there were *zero* security measures on the premises, breach of the warranty is obvious. No reasonable landlord would leave a residential apartment complex completely void of any security measures in a location where, as the record indicated,[150] violent criminal activity frequently occurred. However, the defective condition must be the proximate cause of the tenant's injuries and the evidence indicated that the shooter was on the premises because Davis invited him. Therefore, like the instant case, the defendants would face no liability for breach of the implied warranty of habitability because the inadequate security measures were not the proximate cause of Davis's death. Alternatively, in the absence of actual notice of the criminal activity on the premises, the defendants would face no liability for breach of the implied warranty of habitability.

While *Davis* serves as a demonstration that the proposed standard is workable in practice, it also serves equally as an example of the type of conduct that will be permissible under the LPA. There was no evidence in the record that any of the alleged criminal activity at CBA actually resulted in three or more felony arraignments *on the premises*. Accordingly, the plaintiffs would not be able to commence an action under the LPA. If the old standards did not even incentivize landlords to provide a gate, security guards, or security cameras on the premises of a residential apartment complex, then the sky is the limit for the type of negligent conduct that will be tolerable under the LPA. Landlord-tenant law has come too far to let this statute go uncontested.

CONCLUSION

The LPA does have positive aspects when applied to commercial establishments. It defines exactly what constitutes an atmosphere of violence, which has seemingly been difficult to condense to a concrete standard in practice.[151] It also alleviates the

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[150] *Id.* at 401-03.

[151] *Compare* Gatewood v. Sampson, 812 So. 2d 212, 220-21 (Miss. 2002) (holding that reports of sixty violent crimes in the neighborhood surrounding the premises in question were sufficient to create fact issue as to atmosphere of violence); *with* Crain v. Cleveland Lodge 1532, Order of Moose, Inc., 641 So. 2d 1186, 1187-92 (Miss. 2002) (holding that

time and financial resources that commercial establishments expense in defending premises-liability suits for third-party acts that will undoubtedly get dismissed for either want of proof of an atmosphere of violence or intervening causation.

Nevertheless, it should not be applicable to residential landlords. The LPA's active misconduct standard presents a real problem for residential tenants. Extending the implied warranty of habitability to encompass security from harm provides a narrowly-tailored solution to that problem. As the *Kline* court stated, "[t]he landlord is no insurer of his tenants' safety, but he certainly is no bystander."[152]

plaintiff's claim of foreseeability was "without merit," despite evidence of 110 commercial burglaries, 11 assaults, and 152 larcenies, all within two blocks of the subject premises).

[152] Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 481 (D.C. Cir. 1970).