George Washington University v. Weintraub: Implied Warranty of Habitability as a (Ceremonial?) Sword

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As anglo-american society has evolved from rural to urban, our law of property, which had its origin in the English feudal system, has been slow to adapt to our culture's changing needs.¹ The primary purpose of the ancient agrarian lease was to transfer an interest in land. All structures upon the land were merely incidental, and therefore the condition of the buildings transferred was insignificant.² Although the acquisition of a decent place to live has long been the urban tenant's primary purpose for entering into a lease, only recently have courts recognized the lease as both a housing contract and a conveyance of a nonfreehold estate.³

In view of the increasing importance of residential leases, courts have developed legal doctrines to protect the lessee from the unscrupulous lessor.⁴ The implied warranty of habitability is the most recent of these doctrines.⁵ The landmark case of Javins v. First National Realty


2. See, e.g., Javins, 428 F.2d at 1074; King, 495 S.W.2d at 69.


5. AMERICAN LAW OF PROPERTY, supra note 1, at ¶ 3.45. See infra notes 23-29 and accompanying text. The implied warranty of habitability is a warranty running from the landlord to the tenant and implied in the lease contract. Javins, 428 F.2d at 1080; King, 495 S.W.2d at 75. The landlord warrants by offering in the lease that he will provide liveable premises and maintain them so as not to threaten the life, health, or safety of the tenant. Javins, 428 F.2d at 1080-81; King, 495 S.W.2d at 75. Most courts have relied on local housing codes to justify finding that an implied warranty of habitability existed in a lease. Javins, 428 F.2d at 1080; Steele v. Latimer, 214 Kan. 329, 521 P.2d 304, 309-10 (1974). Therefore those courts have made the scope of the warranty coextensive with the scope of the state or local housing codes. Javins, 428 F.2d at 1082; King, 495 S.W.2d at 74. Other courts have
Corp.\(^6\) incorporated an implied warranty of habitability into every residential lease in the District of Columbia.\(^7\) In \textit{Javins}, the implied warranty of habitability was used as a defense to an action by a landlord for recovery of rent.\(^8\) Defensive use of the implied warranty of habitability is its most common application.\(^9\) Recently, however, in \textit{George Washington University v. Weintraub},\(^10\) the District of Columbia Court of Appeals allowed the tenant to use it as an offensive weapon.

In \textit{Weintraub}, the tenant sued the landlord for damages arising from the landlord's breach of the implied warranty of habitability.\(^11\) The court of appeals, following the holding in \textit{Javins}, concluded that all contract remedies for breach of the implied warranty of habitability were available to the tenant.\(^12\) The \textit{Weintraub} court, however, limited its holding to situations where the landlord had actual or constructive notice of the defective condition which caused the injury to the tenant's habitation and personal property. Furthermore, the court stated that the landlord should have a reasonable amount of time to repair the condition before damages accrue.\(^13\)

In addition, the \textit{Weintraub} court held that the implied warranty could not be disclaimed by the landlord in the lease agreement.\(^14\) This holding, indicated that the implied warranty of habitability may be breached by conditions that would not be a violation of the applicable housing code. Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831, 844 n.16 (1973); Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 999-1000, 343 N.Y.S.2d 406, 410 (Civ. Cl. 1973). \textit{See infra} notes 29-42 and accompanying text. \textit{See generally} R. Powell, supra note 3, at ¶ 225(2)(a) (discussing origin and scope of implied warranty of habitability); \textit{American Law of Property}, supra note 1, at § 3.45 (explaining generally the implied warranty of habitability); \textit{Comment, The Implied Warranty of Habitability: A Dream Deferred}, 48 UMKC L. Rev. 237, 238-43 (1980) (justification for, and scope and effect of, implied warranty of habitability).

8. \textit{Javins}, 428 F.2d at 1082.
11. \textit{Id.} at 47.
12. \textit{Id.} at 48.
13. \textit{Id.} \textit{See infra} notes 43-69 and accompanying text.
when read together with the trial court's opinion,\textsuperscript{15} created the tantalizing possibility that in the future a District of Columbia trial court could assess punitive damages against a landlord who leads a tenant to believe that he has waived implied warranty of habitability rights.\textsuperscript{16}

This Note will explore the evolution of the law of implied warranty of habitability. It will discuss how the holding in \textit{Weintraub} affects the development of equitable rules of law in the field of nonfreehold estates in the District of Columbia. Finally, this Note will suggest how courts in the future may use \textit{Weintraub} to balance the interests of both the landlord and the tenant.

\section{Implied Warranty of Habitability: The Tenant's Shield}

Until recently, the laws of property were governed by the common law rule of \textit{caveat emptor},\textsuperscript{17} which placed the burden upon the lessee to discover defects on the premises before entering into a lease.\textsuperscript{18} In Medieval England the stringent rule of \textit{caveat emptor} was fair because the leasehold interest was in land, not in the buildings upon it.\textsuperscript{20} This rule pre-
vailed in both English and American law until the emergence of modern urban society and the use of the lease as a residential housing contract. Courts responded to the changing housing practices by incorporating in the leases implied warranties that favored the tenant, even though there were no express warranties or covenants.

The first cases to imply a warranty of habitability in a residential lease involved furnished premises that were rented for a short period of time.

21. Other warranties, besides that of habitability, included the implied warranty of fitness, the implied covenant of quiet enjoyment, and the doctrine of constructive eviction. The implied warranty of fitness is similar to the implied warranty of habitability, but refers only to the fitness of a dwelling for occupancy at the inception of the tenancy.

The implied warranty of quiet enjoyment is an implied warranty that the landlord will not interfere with the tenant's use of the residence. R. Powell, supra note 3, at ¶ 225(3). The origin of this covenant is uncertain. G. Thompson, Commentaries on the Modern Law of Real Property § 1129 (1980). A landlord's breach of the covenant of quiet enjoyment may allow the tenant to recover damages, R. Powell, supra note 3, at ¶ 225(3), or to invoke the doctrine of constructive eviction. Under this doctrine, the tenant may vacate the premises and defend against subsequent action by the landlord for enforcement of the lease. Id. Constructive eviction also may be used as a defense by the tenant when the landlord has broken other express or implied lease covenants. See Line, Implied Warranties of Habitability and Fitness for Intended Use in Urban Residential Leases, 26 Baylor L. Rev. 161, 178-82 (1974).

22. Express covenants traditionally had been the only way the tenant could assure the fitness of a dwelling. See, e.g., American Law of Property, supra note 1, at § 3.45. The Javins court noted that a great number of standardized written lease covenants had resulted from the changing of tenants' expectations over the years. 428 F.2d at 1074.

23. See supra note 21 for a description of the furnished-house exception which began in England, and was later adopted in the United States. American Law of Property, supra note 1, at § 3.45; Ingalls v. Hobbs, 156 Mass. at 348, 31 N.E. at 286. This concept was attached first to furnished residences rented for a short period of time. R. Powell, supra note 3, at ¶ 225(2)(a). A short-term furnished rental as opposed to a longer term lease more clearly comprises a package of property rights pertaining to a living area. As such, it bears more resemblance to a contract for the sale of goods than does an ordinary lease. Contracts for the sale of goods had long been subject to implied warranties of fitness. See, e.g., Jaeger, Warranties of Merchantability and Fitness for Use: Recent Developments, 16 Rutgers L. Rev. 493 (1962). Additionally, the short-term rental of a furnished room resembles the innkeeper situation, to which an elevated standard of care traditionally has been attached. See, e.g., W. Prosser, Handbook of the Law of Torts § 28 (4th ed. 1971); see also Javins, 428 F.2d at 1077 n.33 (Inns were "the only multiple dwelling houses known to common law . . . . Their guests were interested solely in shelter and could not be expected to make their own repairs."). See supra note 21; infra notes 24-25 and accompanying text.
Implied Warranty of Habitability

The rationale for this exception to caveat emptor was that the circumstances surrounding the rental implied an intention to occupy the premises immediately. The tenant had the time to neither inspect nor repair the premises before occupancy. Moreover, because of the limited duration of the lease, repairs were not economically feasible.

The Wisconsin Supreme Court, in *Pines v. Perssion*, was the first court to extend the implied warranty of habitability to all residential leases. In *Pines*, the court held that the existence of state laws and housing code regulations evidenced a public policy that caveat emptor was no longer applicable to residential leases. Since the *Pines* decision, most states have recognized an implied warranty of habitability through either legislative enactment or judicial fiat.

The District of Columbia established its implied warranty of habitability in the 1970 landmark decision of *Javins v. First National Realty Corp.* The *Javins* court incorporated the requirements of the District of Columbia Housing Regulations into every lease for residential property in the District of Columbia. This wholesale incorporation of the housing code...

24. AMERICAN LAW OF PROPERTY, supra note 1, at § 3.45; see supra note 21.
25. See, e.g., Ingalls v. Hobbs, 156 Mass. at 348, 31 N.E. at 286; see also supra note 21.
27. 14 Wis. 2d at 590, 111 N.W.2d at 412. *Pines* cited English and American cases for support of the “furnished-house” exception. *Id.* See AMERICAN LAW OF PROPERTY, supra note 1. Similarly, the “furnished-house” exception is equally applicable to the rental of an unfurnished house to be occupied immediately. 14 Wis. 2d at 590, 111 N.W.2d at 412.
28. *Pines* construed Wisconsin laws, regulations, and administrative guidelines as an expression of a public consensus that the furnished-house exception should be expanded so as to become a general implied warranty of habitability. *Pines*, 14 Wis. 2d at 590, 111 N.W.2d at 412-13. The *Pines* court, however, did not explicitly make the warranty of habitability coextensive with specific state laws or regulations.
29. See, e.g., AMERICAN LAW OF PROPERTY, supra note 1, at § 3.45 n.15 (listing 13 jurisdictions that have judicially adopted an implied warranty of habitability); *id.* at n.21 (stating that Minnesota has adopted an implied warranty of habitability by statute); see also R. POWELL, supra note 3, at ¶ 225(2)(a) nn.23-28.
30. 428 F.2d at 1071.
32. *Javins*, 428 F.2d at 1077. It should be noted that the *Javins* court made the District of Columbia's implied warranty of habitability coextensive with the requirements of the D.C. Housing Regulations. *Id.* Cf. *Pines*, 14 Wis. 2d at 590, 111 N.W.2d at 409. The *Pines* warranty, however, appears to be independent of Wisconsin laws and regulations. See supra note 28. Implied warranties of habitability may generally be divided into two categories: those that incorporate a particular code to define their limits (e.g., District of Columbia's warranty) and those that may be breached without the necessity of violating a set of governmental rules (e.g., Wisconsin's and Massachusetts' warranties). *See* Boston Hou. Auth. v. Hemingway, 363 Mass. at 184, 293 N.E.2d at 831; Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970); O. BROWDER JR., R. CUNNINGHAM, J. JULIN, & A. SMITH, BASIC PROPERTY LAW 420-21 (3d ed. 1979) [hereinafter cited as BASIC PROPERTY LAW]; see also infra notes 151-58 and accompanying text.
required the landlord to provide habitable premises not only at the com- 
mencement of the lease, but also throughout its duration.\textsuperscript{33} Moreover, the \textit{Javins} court emphasized the contractual nature of the lease agreement 
rather than its character as the conveyance of a nonfreehold estate. Specif-
ically, the court stated that a breach of the implied warranty that rendered 
the premises uninhabitable would give rise to the "usual remedies for 
breach of contract."\textsuperscript{34} It noted, however, that \textit{de minimis} violations of the 
housing code that did not affect habitability would not be considered a 
breach of the lease agreement.\textsuperscript{35} In addition, the \textit{Javins} court intimated 
that the District of Columbia's implied warranty of habitability could not 
be disclaimed by provisions within the written lease, yet stopped short of 
such an affirmative holding.\textsuperscript{36}

Other states quickly followed \textit{Javins} in establishing their implied war-
ranties of habitability.\textsuperscript{37} Many have since recognized that the contractual 
nature of the lease may give rise to an offensive action for recovery of rent 
that has been paid or for abatement of rent.\textsuperscript{38} Others have recognized that 
the protection of the implied warranty of habitability may not be waived 
by the tenant simply by the act of his signing a complicated lease contain-

\begin{itemize}
  \item \textsuperscript{33} \textit{Javins}, 428 F.2d at 1081.
  \item \textsuperscript{34} \emph{Id.} at 1073. \textit{Javins} did not list the "usual" remedies available, but the decision 
explicitly provided for specific performance as a remedy. \emph{Id.} at 1082 n.61. Other contract 
remedies allowed under an implied warranty of habitability theory have included damages, 
rescission, and abatement or withholding of rent. R. \textit{Schoshinski, American Law of 
Landlord and Tenant} \textsection{3:19} (1980). The traditional law of the District of Columbia, 
which limits direct and consequential contract damages, is discussed \emph{infra} note 62 and 
accompanying text.
  \item \textsuperscript{35} 428 F.2d at 1082 n.63. This is the rule in most jurisdictions. \textit{See Basic Property 
Law, supra} note 32, at 420.
  \item \textsuperscript{36} The \textit{Javins} court stated that the landlord could not exclude by a clause in the lease 
the duty of repair placed on him by the implied warranty of habitability. 428 F.2d at 1081-
82 & n.58. This statement, however, was not central to the holding of the case and the issue 
of the propriety of the lease provisions in \textit{Javins} was not squarely addressed. \emph{Id.} at 1080 
n.49.
  \item \textsuperscript{37} The citations to \textit{Javins} by other state courts are myriad. \textit{See, e.g.,} Green v. San 
Francisco, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (citing \textit{Javins} and estab-
lishing California's implied warranty of habitability); LeClair v. Woodward, 6 Conn. Cir. 
Ct. 727, 316 A.2d 791 (1970) (citing \textit{Javins} and finding that Connecticut had enacted a 
statutory implied warranty of habitability in 1969); Kline v. Burns, 276 A.2d 248 (N.H. 1971) 
(citing \textit{Javins} and establishing New Hampshire's implied warranty of habitability); Teller v. 
McCoy, 253 S.E.2d 114 (W. Va. 1979) (citing \textit{Javins} and establishing West Virginia's im-
plied warranty of habitability).

Once a few courts began to find implied warranties of habitability in residential leases, 
many more quickly followed. \textit{See generally American Law of Property, supra} note 1, at 
\textsection{3.45} nn. 12 & 15 and accompanying text.
  \item \textsuperscript{38} \textit{Weintraub}, 458 A.2d at 47.
\end{itemize}
ing a waiver provision. Until Weintraub, however, those issues had lan-
guished in the District of Columbia.

The Weintraub court specifically stated that in the District of Columbia
the warranty may not be disclaimed by inserting an exculpatory clause in
the lease. Additionally, the court recognized that the contractual nature
of a lease for residential property gives rise to an affirmative action by the
tenant for recovery of damages caused by a landlord’s breach of the im-
plied warranty of habitability.

II. GEORGE WASHINGTON UNIVERSITY v. WEINTRAUB: THE TENANT’S
SWORD

A. District of Columbia Superior Court: Strict Liability in Contract

George Washington University v. Weintraub arose when a law student’s
apartment became flooded under mysterious circumstances. The stu-
dent, Weintraub, returned to his apartment one day to find water pouring
through the ceiling from the locked apartment above. Weintraub was
forced to leave his apartment for twelve days because the water had dam-
aged the apartment and some of his personal property. To compensate
Weintraub for the cost of other lodging, George Washington University,
his landlord, reimbursed him in the amount of sixty dollars, although his
actual lodging expenses were $120.00. Weintraub sued the University in
the District of Columbia Superior Court for his additional lodging ex-
penses and for the damage done to his personal property, estimated at

39. Id.
40. Weintraub, 108 Daily Wash. L. Rep. at 480, col. 2 (no appellate decisions ruling on
an action for damages for breach of implied warranty of habitability in the District of Co-
lumbia before Weintraub).
sion infra notes 118-31, 182-87 and accompanying text.
42. Weintraub, 458 A.2d at 46.
44. The cause of the flood was never ascertained. The water service had been shut off
on the day of the flood and then resumed later that day. The trial court referred vaguely to
the development of a blockage in a valve, id. at 473, col. 1, but never suggested the cause,
where it was located, or how a blockage could have caused the flooding. No proof of the
existence of a blockage was introduced, and the trial court characterized the testimony as
consisting almost entirely of hearsay. Id.
45. “Damage [was] claimed to a bed, blanket, pillows, towels, bath mats, shoes, a wool
jacket, books, and an electric shaver.” Id. at 482, col. 1. Weintraub spent four nights in
hotels, and eight nights with friends at no cost. Id. at 479, col. 1.
46. The cheaper of the two hotels at which Weintraub had stayed cost $15.00 per night.
He changed hotels because he found the lodgings unsatisfactory. Id. The university paid
Weintraub $60.00 for the four nights he spent at hotels. Id.
$450.00. 47

In the superior court, Judge Schwelb analyzed Weintraub’s claims under the theories of negligence and breach of implied warranty of habitability. 48  With respect to the negligence theory, Judge Schwelb noted that a landlord owes his tenants a general duty of reasonable care in providing premises free from defective conditions. 49  He emphasized, however, that such a duty does not make the landlord an insurer since the landlord may not reasonably be required to foresee all possible harm that may befall the tenant. 50  Thus, because there was no evidence that the University should have known of the defect that led to the flooding, Judge Schwelb concluded that Weintraub failed to prove that George Washington University was responsible for the flood. 51

Addressing the landlord’s liability under the implied warranty of habitability, Judge Schwelb reasoned that a breach of warranty does not depend upon proof of negligence because under the Javins ruling, the warranty was a contractual obligation. 52  Therefore, to establish a prima facie case

47. Id. at 482, col. 1.

48. The court supplied the causes of action for Weintraub. Id. at 479, col. 2-3. The Small Claims Branch of the District of Columbia Superior Court observed a liberal procedure, Interstate Bankers Corp. v. Kennedy, 33 A.2d 165, 166 (D.C. 1943), which allowed the court to consider causes of action both in negligence and contract, as well as to consider the validity of the exculpatory clause in Weintraub’s lease, even though the issues and causes of action were not specifically pleaded in his complaint. Weintraub, 108 Daily Wash. L. Rep. at 481, col. 3.

49. Id. at 479, col. 2 (quoting Noble v. Worthy, 378 A.2d 674, 677 (D.C. 1977)).

50. Id. at 479.

51. Id. at 479, col. 2-3. Weintraub alleged that university agents had not been on the premises to provide access to the apartment from which the water was flowing. The court held that any such absence of the landlord’s agents could not have been the proximate cause of the water damage to Weintraub’s belongings. Id. at 479, col. 2. Theories that would have created a presumption of negligence on the part of the landlord were also considered and then rejected by the court. Although the court did not explicitly divulge these theories, the theories contained elements of negligence per se and res ipsa loquitur. Id. at 479, col. 2-3. Judge Schwelb cited other District of Columbia cases in which a presumption of negligence was drawn when latent defects in an apartment became patent during the tenancy, thereby causing injury. Id. at 479, col. 3 (citing Kanelos v. Kettler, 406 F.2d 951 (D.C. 1968); Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. 1960)). In Kanelos and Whetzel, the United States Court of Appeals for the District of Columbia Circuit held that the landlord could be found by a jury to be at fault because he could have known that the defective condition existed (that is, the landlord could have had constructive knowledge of the defects). See infra note 78. The Weintraub trial court found that as a matter of law there was insufficient evidence to find constructive knowledge on the part of the university because no evidence was submitted showing that it could have anticipated the leak. 108 Daily Wash. L. Rep. at 479, col. 3. Therefore, the trial court refused to raise a presumption of negligence. Id.

of breach of contract, the tenant need only prove that the dwelling had become uninhabitable through no fault of his own. The burden is then shifted to the landlord to establish that a third party had been responsible for the uninhabitable or defective condition of the premises.

In Weintraub, the court, acting as factfinder, determined that the tenant's apartment was uninhabitable. The court then reasoned that, since the cause of the flood was unknown, the landlord could not satisfy the burden of proving that a third party was responsible for the defect resulting in the flood. Thus, the court reasoned that George Washington University was liable for the breach of the implied warranty of habitability.

The court proceeded to consider the remedies available to Weintraub. It noted that, while he was entitled to an abatement of rent under Javins, that holding was not dispositive of his right to recover damages. Nevertheless, Judge Schwelb relied on Javins in determining that a breach of the implied warranty of habitability could indeed form the basis for a tenant's action for consequential damages. First, he noted that Javins extended all contract remedies to lessees where the landlord had breached the implied warranty of habitability. Carrying that concept to its logical conclusion,

CONTRACTS § 174 (1970) [hereinafter cited as THE LAW OF CONTRACTS]. "Contract liability is strict liability. It is an accepted maxim that pacta sunt servanda (contracts are to be kept). The obligor is therefore liable in damages for breach of contract even if he is without fault . . . ." RESTATEMENT (SECOND) OF CONTRACTS ch. 11, introductory note (1981).


54. Id. Performance may become impractical because of the acts of third parties. In such a case, the obligor's duty to render the performance is discharged. See RESTATEMENT (SECOND) OF CONTRACTS § 261 & comment d (1981). The trial court stated that once a breach of the implied warranty is shown, "the burden shifts to the landlord to show that a third party was responsible, that he (the landlord) has done all that he reasonably could to make the apartment habitable, and that the implied warranty has not been breached." 108 Daily Wash. L. Rep. at 480, col. 1-2. Judge Schwelb cited as support for this proposition § 2902.1(b) of the D.C. Housing Regulations, which states that when a housing code violation causes a dwelling to become uninhabitable, the lease will be rendered void. The voiding of the lease is conditioned upon the tenant's lack of fault and the landlord's failure to repair the condition within a reasonable time after the landlord has had actual or constructive notice of the defect. See D.C. HOUSING REGULATIONS, supra note 6, at § 2902.1(b). See supra text accompanying note 50.


56. See supra note 44 and accompanying text.


58. Id.

Judge Schwelb stated that the remedies foreseen by *Javins* included an action for consequential damages flowing from a breach of warranty.  

Judge Schwelb reasoned that if damages were to be allowed for the breach of an implied warranty of habitability, they should be the same as those for any other contract warranty in the District of Columbia. Therefore, the courts must allow “such damages as are the natural consequence and proximate result of [the landlord’s] conduct.” In considering the appropriate amount of recovery in the instant case, the court consid-

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62. *108 Daily Wash. L. Rep.* at 480, col. 3 (quoting *Thompson v. Rector*, 170 F.2d 167, 169 (D.C. Cir. 1948)). The passage quoted in the text is the traditional statement of the standard of recovery for contract damages in the District of Columbia. *See, e.g.*, *Sundown, Inc. v. Canal Square Assoc.*, 390 A.2d 421 (D.C. 1978); *Meyers v. Antone*, 227 A.2d 56, 58 (D.C. 1967); *Fries, Beall & Sharp Co. v. Livingstone*, 12 F.2d 150 (D.C. Cir. 1926); D.C. CODE ENCYCL. § 28:2-714, comment § 2, n.22 (West 1967). In *Thompson*, a seller had warranted that the premises were licensed to operate as a restaurant, when in fact they were not. The buyers recovered the cost of renovations necessary to obtain the required licenses. The “natural consequences and proximate result” language from *Thompson*, which was used by the *Weintraub* trial court, had been interpreted by the *Thompson* court as allowing those damages. *Thompson*, 170 F.2d at 169.

In *A.P. Woodson Co. v. Sakran*, 129 A.2d 175, 177 (D.C. 1957), the court explained the “proximate result” portion of the traditional District of Columbia formula used by the *Weintraub* trial court. In *Woodson*, a fuel dealer did not deliver oil on the day promised, although the dealer had been told that the owner’s oil supply was low and the weather forecast for the area predicted low temperatures for several days including the promised date of delivery. The oil ran out and pipes in the untenanted house froze, causing property damage. Knowledge of the predicted cold weather was imputed to the fuel dealer because he could reasonably have foreseen it. Therefore, the damage was held to be “proximately caused” by the breach of the fuel oil contract. *Id.* at 177.

The District of Columbia formula was more completely articulated in *Sundown, Inc. v. Canal Square Assoc.*, 390 A.2d at 432-33, as including damages that arise naturally or “could reasonably have been in the contemplation of both parties when they made the contract.” *Id.* The language in *Sundown* is a direct quote from the well-known case of *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854), a landmark case limiting consequential contract damages. *See, e.g.*, *THE LAW OF CONTRACTS, supra* note 52, at §§ 206-08.
ered three possible bases for measuring damages: abatement of rent, lodging expenses, and damage to personal property. The court held that allowing both abatement of rent and recovery of hotel costs would constitute double recovery; thus, it awarded actual lodging expenses but did not allow for rent abatement. In addition, the court compensated Weintraub for the damage done to his personal property. The damages were calculated by determining the reasonable cost to repair the personal property and comparing that repair cost to the diminution in the value of the personalty as a result of the flood. Following established District of Columbia law, the court then awarded Weintraub the lesser amount—the loss of value in his property because of the flood.

B. District of Columbia Court of Appeals: Making the Sword Ceremonial

George Washington University appealed the lower court's decision, alleging that a landlord's breach of the implied warranty of habitability could not be used to recover damages to personal property and that the trial court's decision constituted the application of strict liability in contract, thereby wrongly making the landlord an insurer of the tenant's property. The District of Columbia Court of Appeals held that an affirmative cause of action was indeed available under Javins and that all remedies otherwise available in contract were allowable to the tenant. The court of appeals, however, severely limited the damages recoverable in a situation such as Weintraub's. The court determined that the D.C. Housing Regulations which set forth the limits of the implied warranty of habitability...
ity in the District of Columbia, do not contemplate a strict liability standard. Rather, the court of appeals found that the duty imposed on a landlord by the language of the housing code was one of reasonable care. The court also noted that, in some circumstances, violations of the regulations may occur without liability attaching to the landlord. On the facts in Weintraub, the court reasoned that since the housing code had not been violated, there was no breach of duty of reasonable care; thus, there was likewise no breach of the implied warranty of habitability.

The court of appeals noted that, under the housing code, a landlord must have had either actual or constructive notice of the defect before the landlord may be held to the reasonable care standard. Therefore, absent a finding that the landlord had notice, the Weintraub court determined that the trial court had wrongly held that the uninhabitable condition of the apartment alone constituted a prima facie breach of the implied warranty of habitability. As a result, the court of appeals found that the lower court had erroneously imposed a strict liability standard on the landlord. The court specifically struck down the lower court's holding that any non-

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73. 458 A.2d at 47. See supra note 32.
74. 458 A.2d at 47-48. The court cited § 2902.1(b) of the D.C. HOUSING REGULATIONS, supra note 6, which states that a landlord may avoid invalidation of the lease by repairing violations within a reasonable time after he receives actual or constructive notice of the defects. Id. See infra note 78.
75. 458 A.2d at 49. This judicial imposition of a duty of reasonable care is consistent with D.C. HOUSING REGULATIONS § 2902.1(b). See supra note 74.
77. 458 A.2d at 48.
78. Constructive notice is implied by law when the landlord could have known about a defect through the exercise of reasonable care. Weintraub, 458 A.2d at 56 (Ferren, J., dissenting); Husovsky v. United States, 590 F.2d 944, 950 n.14 (D.C. Cir. 1978). The D.C. Housing Regulations contain language which states that a breach of the housing code will not occur unless the landlord “reasonably should have knowledge” of the housing code violation. D.C. HOUSING REGULATIONS, supra note 6, at § 2902.1(b). This language translates into a requirement of constructive notice before there can be a breach of the housing code.

The appellate court, however, did not state that notice of the defect and a reasonable opportunity to repair would be necessary in every case. The court left open the possibility that product liability theories could be used to recover damages for defects without the necessity of constructive notice. 458 A.2d at 49 n.9. For instance, the court noted that a strict liability theory would be appropriate if the landlord could be said to have placed a defective product into the stream of commerce. It was suggested that the installation of or the failure to replace defective equipment in a rented apartment could constitute the placing of a defective product into the stream of commerce. Id. The court further suggested that if the defect in Weintraub could have been traced to equipment, such as the plumbing in the appellant’s apartment, a strict liability theory could possibly have been entertained. Id.
79. See supra text accompanying note 53.
80. Weintraub, 458 A.2d at 48.
de minimis\textsuperscript{81} violation of the housing code would engender liability unless the landlord could prove that either the tenant or a third party was at fault. Instead, it conditioned recovery on a showing that the landlord had not met his duty of reasonable care.\textsuperscript{82} Turning to the facts in \textit{Weintraub}, the appellate court then found that the George Washington University had established that it had not had notice of the defect.\textsuperscript{83} Thus, the \textit{Weintraub} court found that, despite the uninhabitable condition of the apartment, a breach of the warranty had not occurred because the landlord had not had constructive notice of the defect.\textsuperscript{84}

The appellate court implied that Weintraub could recover for rent abatement under a clause in his lease that explicitly suspended the rent if the apartment became uninhabitable.\textsuperscript{85} The implication of this portion of the court’s holding is that rent abatement and lodging costs would not be available to Weintraub on an implied warranty of habitability theory, even though his apartment was not habitable, until the landlord had time to repair the objectionable conditions. Such a holding appears to make recovery for damages due to an unanticipated latent defect impossible.

\textbf{C. The Weintraub Dissenting Opinion: Trying to Save the Sword}

Judge Ferren, who dissented in \textit{Weintraub}, differed from the majority and the trial court on both the negligence and the implied warranty of habitability causes of action. In analyzing the negligence claim, Judge Ferren did agree with the majority that the landlord should be held to a

\textsuperscript{81} The trial court implied that a violation rendering the premises uninhabitable was necessary to cause a breach of the implied warranty of habitability. 108 Daily Wash. L. Rep. at 480, col. 1. \textit{Javins} recognized that violations of the housing code that do not affect the residence’s habitability are de minimis. 428 F.2d at 1082 n.63.

\textsuperscript{82} \textit{Weintraub}, 458 A.2d at 48.

\textsuperscript{83} The burden of proof to show lack of notice of the defect was placed upon the landlord without explanation. \textit{Id.} at 49. The trial court had placed the burden of proof on the landlord by reasoning that a breach of the warranty invoked strict liability in contract. \textit{See supra} note 52. Therefore, under the trial court’s formula, once the tenant showed that his apartment was uninhabitable, he had proved his prima facie case. The burden was then placed on the landlord to explain why the warranty had been breached. The trial court found this placement of the burden of proof to be necessary because the landlord had greater access than the tenant to the plumbing system and because the landlord was in the better position to discover the true cause of the problem. 108 Daily Wash. L. Rep. at 480, col. 1.

The appellate court found that the landlord had met the burden of proving that it could not have foreseen the problem by offering testimony that there were no existing violations, that the problem had never occurred before, that due care was used in disconnecting and reconnecting the water service, and that an inspection subsequent to the incident revealed no systemic plumbing problems. 458 A.2d at 49.

\textsuperscript{84} 458 A.2d at 49.

\textsuperscript{85} \textit{Id.} at 49-50.
duty of reasonable care. He differed, however, by relying on the law of property rather than on the housing regulations, as the majority had done, for the source of this duty. Like the majority, he found that the duty of reasonable care was not breached until the landlord had received notice of the defect and had had a reasonable time to repair the condition. Similarly, Judge Ferren concluded that constructive notice to the landlord, coupled with failure to repair the defect, should be sufficient to attach tort liability for damages caused by the defect.

Turning to the cause of action for breach of implied warranty of habitability, Judge Ferren again agreed with the majority that actual or constructive notice to the landlord is required before the landlord may be held liable for a breach of the warranty. He then identified three distinct legal theories by which courts have allowed causes of action. First, he stated that the general law of property does not distinguish between negligence and warranty theories, but espouses a unified cause of action requiring both notice to the landlord and an opportunity to repair before liability may attach. Second, he noted that New York courts have applied a strict liability theory to the breach of an implied warranty of habitability, requiring no notice to the landlord of the defect before liability attached. Third, he recognized that Massachusetts courts have allowed recovery for rent abatement immediately upon notice to the landlord.

86. Id. at 50 (Ferren, J., dissenting).
87. Judge Ferren found that the landlord had a duty to exercise reasonable care to comply with the D.C. Housing Regulations. He found, however, this duty in the general law of property rather than in the regulations themselves. Id. (quoting RESTATEMENT (SECOND) OF PROPERTY § 5.5 (1977)). The majority found the same duty within the D.C. Housing Regulations. See supra notes 75-76 and accompanying text.
88. Weintraub, 458 A.2d at 50-51. The dissent would determine the time it takes to perform a specific repair task and designate that period as the repair time. To determine when liability would attach, the dissent would find the date that the landlord could be said to have had actual or constructive notice and add to it the reasonable repair period. Liability would lie for the period of time after the repair period had run. Id. at 51.
89. Id. at 56-57.
90. Id. at 52. Judge Ferren, however, differed from the majority by finding the notice requirement in case law instead of in the D.C. Housing Regulations. See supra notes 74-78 and accompanying text. Additionally, the case law which Judge Ferren used was not District of Columbia law. Weintraub at 52-53 (citing Old Town Development Co. v. Langford, 349 N.E.2d 744, 763-64 (Ind. App. 1976), vacated, 369 N.E.2d 404 (Ind. 1977); Berman & Sons v. Jefferson, 379 Mass. 196, 396 N.E.2d 981, 984 (1979)).
91. 458 A.2d at 52 (citing RESTATEMENT (SECOND) OF PROPERTY § 5.5 (1977)).
93. 458 A.2d at 52 (citing Berman & Sons v. Jefferson, 379 Mass. at 196, 396 N.E.2d at 985-86 (1979)).
Judge Ferren recognized that the difference between attaching liability immediately upon notice and granting the landlord time to repair after notice became more important when the plaintiff claimed damages for injury to person or property than when the issue was rent abatement. This was because damages accruing between the time of notice and the expiration of a reasonable time to repair were potentially far greater for injury to person or property than for abatement of rent. The dissent recognized that Massachusetts had only gone so far as to hold that rent abatement was available to the tenant without giving the landlord an opportunity to repair after notice. Judge Ferren, however, held that an opportunity to repair must be given to the landlord, before damages for injury to person or property begin to accrue to the tenant's benefit, starting from the time he is deemed to be on notice of a defect.

Judge Ferren recognized that the crucial factor in determining the landlord's liability under either a negligence or a warranty theory was the fixing of the time when the landlord had constructive notice of the injury-causing defect. He found that the landlord is deemed to have constructive notice of defects in areas which he controls "at all times." Further, Judge Ferren imputed to the landlord notice of all defects existing at the inception of the tenancy. He recognized, however, that it would be difficult to impute notice to the landlord of a defect arising in an occupied apartment because the tenant's presence diminished the amount of the

94. Judge Ferren would hold that either actual or constructive notice would suffice to attach a duty to the landlord under either a negligence theory, or a contract theory. Id. at 51-52.
95. Id. at 53.
96. Id. Judge Ferren's opinion does not state whether a landlord could be held liable for damages to person or property that happened, as did Weintraub's, at the moment the defect became patent. See infra note 103 for a discussion of the latent/patent concepts. Presumably, in that case, the landlord would not have had actual notice of the defect until after the damage occurred. He may still be held to have had constructive notice, however, at some time before the defect became patent. If the landlord were held to have had prior constructive notice, he would be held liable for the injury to person or property under a liability-upon-notice theory. In contrast, the time of the notice would presumably have to be fixed before it could be known whether liability would also attach under a time-to-repair theory.
97. 458 A.2d at 53.
98. Id. at 57. Judge Ferren dismissed as too harsh the New York view that would allow liability to accrue for consequential damages immediately upon the time of notice to the landlord. Id. at 52.
99. Id. at 53.
100. Id. (citing RESTATEMENT (SECOND) OF PROPERTY § 5.5 (1977)).
101. Id. (citing RESTATEMENT (SECOND) OF PROPERTY § 17.6, comment c; Old Town, 349 N.E.2d at 775-76). This is similar to the implied warranty of fitness concept. Id.; see supra note 21.
landlord's control over the premises.\textsuperscript{102}

Judge Ferren noted that even the above presumptions would not be helpful where the defect, as in \textit{Weintraub}, was latent,\textsuperscript{103} and it would be difficult to determine whether the defect arose during the tenancy or not.\textsuperscript{104} Thus, allocation of the burden of proof would become crucial.\textsuperscript{105} If the tenant could not meet his burden of proving that the landlord should have known of the defect, his prima facie case of either negligence or breach of warranty would fail.\textsuperscript{106} Once the tenant stated a valid cause of action, the burden would shift to the landlord to produce sufficient evidence to rebut the inference of breach of duty arising from the plaintiff's case.\textsuperscript{107}

In the \textit{Weintraub} situation, Judge Ferren would infer the landlord's negligence in either of two ways: by application of the doctrine of res ipsa loquitur\textsuperscript{108} or by finding that the plumbing constituted a common area that

\begin{footnotes}
\item[102] The dissent noted that constructive notice of a latent defect will seldom be found during a tenancy, since the landlord has largely lost the ability to inspect the area once it is occupied. 458 A.2d at 51.
\item[103] For purposes of this Note, a latent defect is defined as one that is normally hidden or lies dormant. The term patent defect is used to designate one that is evident. A latent defect that manifests itself becomes a patent defect. In the landlord-tenant situation, latent defects will give rise to the inquiry whether the landlord could have known of the defect in the exercise of reasonable care. If yes, then he can be said to have had constructive notice of the defect. See supra note 78. Therefore, the issue in latent defect cases is whether the landlord had constructive notice.

The determination of when the notice becomes effective in latent defect cases presents problems. If no one was aware of the defect, it is difficult to say when the constructive notice should have become effective. 458 A.2d at 53 (Ferren, J., dissenting). On the other hand, the landlord will usually have actual notice of patent defects, either by personal observation or because the tenant brings them to his attention. Therefore, it is easy to determine when the landlord's repair period has run in most patent defect cases. If the landlord has not had actual notice of a patent defect, it may be because the tenant was negligent in not informing the landlord. In that case, the implied warranty of habitability would not have been breached by the landlord. \textit{Id} at 50 n.1 (Ferren, J., dissenting).
\item[104] \textit{Id} at 53.
\item[105] \textit{Id}.
\item[106] \textit{Id} at 56.
\item[107] \textit{Id}.
\item[108] The doctrine of res ipsa loquitur allows the court to infer from the circumstances of the case that an accident was the defendant's fault. W. Prosser, \textit{Handbook of the Law of Torts} § 39 (4th ed. 1971). The conditions necessary to permit a finding that the defendant is at fault are:

1) the event must be of a kind which ordinarily does not occur in the absence of negligence;
2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.
\end{footnotes}
was under the landlord's control. It would then be for the fact-finder to
determine whether the landlord had produced sufficiently compelling
evidence to rebut the inference. Application of the tort doctrine of res ipsa
loquitur would allow a finding of liability only under a negligence the-
ory, and would, therefore, require the running of a reasonable time to
repair before liability could attach. Use of the "common area" doctrine
to impute notice to the landlord would allow recovery under a contract
theory as well as a negligence theory, and therefore entitle the plaintiff
to rent abatement from the time notice was imputed to the landlord.
Judge Ferren would have found as a matter of law that the plaintiff in
Weintraub had stated a prima facie case for purposes of both the res ipsa
loquitur and the "common areas" doctrines. Additionally, he would
have found that the uninhabitable condition of Weintraub's apartment
was a prima facie breach of warranty. He would thus have remanded
the case to the trial court to determine whether, as a matter of fact, the
landlord's evidence rebutted the inference raised by the plaintiff.

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Id. These factors have been held to be necessary to the application of the doctrine in the District of Columbia. See Marshall v. Townsend, 464 A.2d 144, 145 (D.C. 1983).

Prosser notes that at an early stage in the development of the doctrine, it became mixed with an older rule of law which held that a carrier had the burden of proof to show that he was not negligent when a passenger was injured at his hands. Prosser at § 39. Consequently, its procedural effect may vary. Id. at § 40. In most cases, the effect of res ipsa loquitur is to allow an inference of negligence to be drawn. The jury is free to accept or reject the inference, as it would any circumstantial evidence. Id. If the inference is so strong that no reasonable man could reject it, a directed verdict for the plaintiff will ensue. Id. Some courts have gone further and held that application of res ipsa loquitur creates a presumption of fault that the defendant must rebut if he is to win his case. Id. Under District of Columbia law, no presumption is created; therefore, invoking the doctrine of res ipsa loquitur does not shift the burden of proof but simply allows the case to go to the fact finder to test the strength of the presumption. Stewart v. Ford Motor Company, 553 F.2d 130, 138 (D.C. Cir. 1977).

109. 458 A.2d at 57. The trial court had also tried to apply theories that would infer negligence from the circumstances. 108 Daily Wash. L. Rep. at 479, col. 3. The court suggested the possibility of an inference through language consistent with negligence per se (arising from the existence of a breach of the housing code), id. at 479, col. 2-3, or res ipsa loquitur theories of liability, id. at 479, col. 3. The court, however, refused to draw the inferences. Id. See supra note 51 and accompanying text.

110. 458 A.2d at 58.

111. Id. at 57.

112. Id.

113. Id.

114. Id.

115. Id. at 56-57.

116. Id. at 50, 52, 56. Judge Ferren, however, would allow no recovery under a contract theory unless the landlord had had time to repair. Id. at 52, 57.

117. Id. at 58.
D. Safeguarding the Sword and Shield: Exculpatory Clauses May Not Counteract the Implied Warranty of Habitability

In Weintraub, the landlord university had attempted to waive some of its duties under the implied warranty of habitability through the use of an exculpatory clause in Weintraub's lease. Among other things, the provision explicitly barred recovery for any water damage to the tenant's property caused by defects in the plumbing. The university maintained that this provision was standard in leases in the District of Columbia.

The trial court found three reasons why this clause was ineffective as a matter of law in the District of Columbia. First, the court relied on Javins for authority that a landlord could not avoid the implied warranty of habitability by inserting in the lease a provision that placed the duty of repair on the tenant. The Javins rationale, as restated by the Weintraub trial court, was based on an unwillingness to allow private parties to shift the burden placed upon them by city regulations to their tenants. Second, the D.C. Housing Regulations, which, under Javins, were incorporated into the lease, specifically prohibited a waiver of the implied warranty of habitability. Third, the court found that, if such a waiver were permitted, it would contradict the underlying policies of both the housing regulations and the implied warranty of habitability.

119. Weintraub, 108 Daily Wash. L. Rep. at 480, col. 3. The lease provision was as follows:

"IT IS FURTHER UNDERSTOOD AND AGREED, That Landlord shall be under no liability to Tenant due to any discontinuance of heat, hot water, elevator service, if such service is furnished, or for the discontinuance of any other service caused by accidents, breakage or strikes or from any accident caused by the handling of electric wires or lights, and that Landlord shall not be liable for loss of or damage to property of Tenant caused by Buffalo Moths, Termites, or other vermin, or by rain, snow, water or steam that may leak into or flow from any part of said premises through any defects in the roof or plumbing, or from any other source."

120. Id. at 479, col. 1-2.
121. Id. at 480, col. 3.
122. Id. at 481, col. 1.
123. Id. (quoting Javins, 428 F.2d at 1081 n.49). The statement in Javins arguably is dictum, since there the issue was not litigated.
126. Weintraub, 108 Daily Wash. L. Rep. at 481, col. 1. These policies noted were "the inability of tenants to adequately inspect or repair rental units, the disparity of bargaining power between landlords and tenants, the scarcity of housing, and the destructive effect of uninhabitable dwellings on the public health and safety." Id. (quoting Fair v. Negley, 390 A.2d 240, 243 (Pa. Super. 1978)).
also noted that allowing a waiver of the landlord's duties could have a chilling effect on the tenant's ability to enforce his rights under the warranty.\textsuperscript{126}

Judge Schwelb's analysis did not end with a determination that the exculpatory provisions were void. He also considered assessing punitive damages against the university as a deterrent to other landlords who may attempt to waive their responsibilities.\textsuperscript{127} Judge Schwelb, however, decided not to levy punitive damages against the university for two reasons: first, he recognized that the exculpatory issue was peripheral to the true controversy in \textit{Weintraub},\textsuperscript{128} and second, he found no evidence that the landlord acted with sufficient willfulness by including the exculpatory language in the lease to warrant imposing punitive damages.\textsuperscript{129}

Thus, the District of Columbia Court of Appeals unanimously affirmed the trial court's ruling that the exculpatory clause was ineffective to bar the tenant's recovery for the landlord's breach of the implied warranty of habitability,\textsuperscript{130} emphasizing the same public policy arguments advanced by the trial court.\textsuperscript{131}

III. ASSESSING THE ARMORY: TOWARD KEEPING THE SWORD AND SHIELD INTACT

\textbf{A. How Sharp Is the Sword?}

\textit{Weintraub} firmly established that a cause of action for contract damages was available to tenants in the District of Columbia under an implied warranty of habitability theory.\textsuperscript{132} In this regard, the District of Columbia courts have kept pace with the general nationwide trend of developing laws to protect the tenant from the unscrupulous landlord.\textsuperscript{133} The \textit{Wein-
decision is also consistent with general property law in the District of Columbia. Prior to the Weintraub decision, the Javins court had suggested the availability of offensive contract remedies under an implied warranty of habitability theory, foreshadowing the explicit grant of those remedies in Weintraub. Thus, despite the discord in the trial and appellate court opinions, there was general agreement that all contract remedies were available to tenants.

1. Negligence

The trial court recognized the possibility of a cause of action in negligence, but found no breach of duty. The dissent, however, argued that Weintraub had, as a matter of law, stated a prima facie case of negligence under either the doctrine of res ipsa loquitur or the "common areas" doctrine. The trial court and the appellate majority, however, had specifically rejected these inference-creating devices.

The majority approach appears to be more sound. The court stated correctly that the doctrine of res ipsa loquitur is appropriate only when the cause of the injury is "(1) known, (2) in the defendant's control, and (3) unlikely to do harm unless the person in control is negligent." In the instant case, the cause of the leak was unknown, thus precluding application of the doctrine.

The dissent would apply res ipsa loquitur by finding that the "valve apparatus causing the flood was exclusively under the defendant's con-

damages for breach of an implied warranty of habitability, and listing Hawaii, Louisiana, Michigan and Texas as having statutes allowing such actions); see also R. Schoshinski, supra note 34, at § 3:21.
134. See supra note 59 and accompanying text.
136. 458 A.2d at 57 (Ferren, J., dissenting).
137. Id. at 56-57. See supra notes 99-114 and accompanying text.
138. 458 A.2d at 45 & n.3, 48 & n.7. See supra notes 51, 83.
139. 458 A.2d at 45 n.3 (quoting Crump v. Browning, 110 A.2d 695, 696 (D.C. 1955)). The elements of res ipsa loquitur as given by the dissent are somewhat different. Judge Ferren said that res ipsa should have been applied if these three tests were met:
1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
2) it must be caused by an agency or instrumentality within exclusive control of the defendant; and
3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.
Id. at 54 (Ferren, J., dissenting). The dissent's formulation is the same as Prosser's, W. Prosser, HANDBOOK OF THE LAW OF TORTS § 39 (4th ed. 1971), and comports with general District of Columbia law. See supra note 108.
It is difficult to see how the dissent can arrive at this conclusion, since the trial court had left the cause unspecified. All we know about the cause of the flood is that water flowed from an inhabited apartment above Weintraub's. As the dissent itself states, it is difficult to find that the landlord has control of inhabited areas. Therefore, it is difficult to see how the landlord can be said to have exclusive control of the instrumentality causing the flooding when that instrumentality could have been a toilet in an inhabited apartment. Res ipsa loquitur cannot be applied without showing such control. Similarly, the dissent's use of the "common areas" doctrine to infer negligence is questionable because there is no evidence that the flood arose in a common area. Moreover, it would be an error for the court to classify the entire plumbing system as a common area because significant parts of the plumbing system are under the control of tenants. Therefore, the appellate court properly affirmed the trial court's finding that the university was not negligent.

2. Implied Warranty of Habitability

The trial court found that the tenant's cause of action in contract attached liability to the landlord at the time he breached the warranty. Liability was not contingent upon notice of the defect or upon reasonable opportunity to repair. The extent of liability was limited only by the traditional contract consideration of foreseeability of the damages.

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140. 458 A.2d at 55 (Ferren, J., dissenting).
142. 458 A.2d at 44-45 & n.3. See supra note 44 and accompanying text.
143. Judge Ferren stated that it would be difficult to prove that the landlord had constructive notice of a defect arising in a tenanted apartment because the landlord no longer had unrestricted access to the area. 458 A.2d at 51. See supra note 102.
144. The dissent states that appellees asserted in their brief that the flooding originated from a toilet. 458 A.2d at 55 n.8. Toilets in tenanted apartments would appear to be outside of the landlord's exclusive control.
145. Id. at 45 n.3, 54 (Ferren, J., dissenting); see supra note 108.
146. See supra notes 140-41, 143 and accompanying text.
147. See supra note 142 and accompanying text.
149. 108 Daily Wash. L. Rep. at 480, col. 1. This is consistent with the traditional theory of contract liability. See supra notes 53-54.
150. The District of Columbia follows the general rule in contract law derived from the seminal case of Hadley v. Baxendale, 156 Eng. Rep. 145 (1854). See supra note 62. The rule mandates that upon total breach of a contract, damages are available for all injuries that are the natural consequence of the breach or reasonably may have been "in the contemplation of both parties, at the time they made the contract." Hadley, 156 Eng. Rep. at 151. Professor Corbin, however, has stated that the two parts of the formulation are in reality the same concept. 5 A. CORBIN, CORBIN ON CONTRACTS § 1011 (1964). Both parts of the Hadley
The appellate court agreed that liability in contract arose at the time of breach. The majority, however, found that there could be no breach unless the D.C. Housing Regulations had been violated. The housing regulations impose a duty of reasonable care on the landlord; therefore, breach of the warranty is predicated on the landlord's failure to exercise reasonable care. In the majority's view, the threshold for a breach of the warranty was the landlord's failure to repair a violation of the housing code within a reasonable time after having actual or constructive notice of the defect. In Weintraub, the application of this view prevented recovery of damages for either overpayment of rent or injury to property until after the passage of a reasonable period for repair. This rationale is sound, and comports with prior law, even though the result leaves Weintraub without a remedy for his loss.
Although Judge Ferren's dissent would alleviate some of the tenant's hardships, it is not based on sound reasoning. He agreed with the majority that the D.C. Housing Regulations imposed a duty of reasonable care on the landlord. Judge Ferren, however, would have found an inference of negligence, shifting the burden to the landlord to come forth with evidence that he had exercised due care. Unfortunately, there was insufficient evidence in Weintraub to support either of the proposed inference-creating devices. Therefore, the plaintiff should not have been able to prove his prima facie case using the dissent's rationale.

On the other hand, it is questionable whether the reasoning of the majority was sound in placing the burden of showing lack of reasonable care on the landlord. The majority stated that conclusion without giving reasons for doing so. As Judge Ferren later correctly noted, there was scant evidence of lack of notice in the trial record. Thus, it would appear that a holding that the burden of showing notice was on the tenant rather than the landlord would have been more consistent with the overall analysis of the majority.

Such an analysis would have been consistent with the majority's finding that the landlord's duty of reasonable care was founded in the D.C. Housing Regulations. In order to prove a violation of the duty of care imposed by those regulations, the lessee had to show that the landlord had actual or constructive notice of the defect. Since the facts of this case reveal little evidence from which either notice or lack thereof could be inferred, the majority should have found that the plaintiff's prima facie case was not supported by the evidence.

156. 458 A.2d at 50, 52 (citing Berman & Sons v. Jefferson, 396 N.E.2d at 985-86; Old Town Dev. v. Langford, 393 N.E.2d at 774-76). The Berman and Old Town courts, however, derived their implied warranty of habitability duties from sources other than state housing codes. See infra notes 173-81.

157. 458 A.2d at 57. See supra notes 108-09.

158. See supra notes 139-45 and accompanying text (regarding the insufficiency of the facts to support res ipsa); notes 146-48 and accompanying text (regarding the insufficiency of the facts to support “common areas” doctrine).

159. 458 A.2d at 49.

160. Id.

161. Id. at 57-58 (Ferren, J., dissenting).

162. 458 A.2d at 48. See supra notes 73-77 and accompanying text.

163. 458 A.2d at 48. See supra note 78 and accompanying text.

164. 108 Daily Wash. L. Rep. 473, col. 1; 458 A.2d at 57-58 (Ferren, J., dissenting); see supra note 44.
case was lacking. In sum, one could reasonably use the legal theories espoused by either the majority or the dissent to find, on the facts in Weintraub, that the plaintiff had not carried his initial burden of proving a breach of warranty.

Setting aside the question of burden of proof, the next area of disagreement was over the timing of damages. The dissent would have found the landlord liable for rent abatement without being liable for injury to the plaintiff’s person or property. Unlike the majority and the trial court, Judge Ferren found separate thresholds for attaching liability for actual damages in the form of loss of value of the apartment and for consequential damages in the form of damages to Weintraub’s personal property.

Judge Ferren would have awarded recovery for rent abatement beginning at the time the landlord had notice of the defect, but would have deferred awarding further damages until a reasonable opportunity to repair had elapsed. This proposed rule is attractive because it would allow the plaintiff to recover for his lost value in the “package of goods and services” that constituted his apartment, while at the same time limiting the landlord’s loss for damage caused by an unforeseeable event.

Such an allocation, however, does not follow the District of Columbia law regarding the awarding of damages. In the District of Columbia, once contract damages are found to be recoverable, a plaintiff is entitled to all damages that are legally foreseeable at the time he entered into the contract. In this case, both the decrease in value to the apartment and damage to personalty are legally foreseeable consequences of the flooding that resulted from the breach of warranty. Thus, recovery for both should be awarded simultaneously.

Judge Ferren was able to reach a conclusion at odds with the prevailing law because he blended two inconsistent theories of the implied warranty

165. Section 2902.1(b) sets forth the requirements for a prima facie case to void a lease:
   1) Violations of the D.C. HOUSING REGULATIONS exist which cause the premises to become unsafe or unsanitary, and
   2) the violations are not the tenant’s fault, and
   3) the violations are not corrected within a reasonable time after the landlord has had actual or constructive notice.

D.C. HOUSING REGULATIONS, supra note 6, at § 2902.1(b).
166. 458 A.2d at 57. See supra notes 97-98 and accompanying text.
167. 458 A.2d at 53. See supra notes 94-98.
168. 458 A.2d at 57.
169. See Javins, 428 F.2d at 1074 (modern urban tenant seeks “well known package of goods and services” when entering into a lease); R. SCHOSHINSKI, supra note 34, at § 3:25.
170. See supra notes 62, 150.
171. See supra note 150.
172. Id.
of habitability, one of which is inapplicable in the District of Columbia.\textsuperscript{173} To support his theory on rent abatement, Judge Ferren cited the Massachusetts case of \textit{Berman \& Sons, Inc. v. Jefferson}.\textsuperscript{174} The \textit{Berman} court, however, did not address the availability of damages in addition to rent abatement.\textsuperscript{175} To resolve this issue, the judge relied upon the Indiana case of \textit{Old Town Development Co. v. Langford}.\textsuperscript{176} In that case, the court held that the tenant was entitled to damages in addition to rent abatement, but only after the landlord had received notice of the defect and had had a reasonable opportunity to make the repairs.\textsuperscript{177} The \textit{Old Town} court, however, did not address the availability of rent abatement.\textsuperscript{178} The \textit{Berman} court had applied a warranty theory which was not based on a housing code. This allowed the Massachusetts court to find a breach of warranty without first finding a breach of a duty of reasonable care.\textsuperscript{179} Neither the majority nor the dissent in \textit{Weintraub} would have so found.\textsuperscript{180} Therefore, a Massachusetts court could allow recovery for all damages as soon as the premises became uninhabitable, while a District of Columbia court could not. The Indiana court, on the other hand, imposed an implied warranty of habitability that included a reasonable time for repair.\textsuperscript{181} Therefore,

\textsuperscript{173} To justify holding the landlord liable for rent starting from the time the landlord received notice of significant housing code violations, the dissent relied upon \textit{Berman \& Sons v. Jefferson}, 379 Mass. 196, 396 N.E.2d 981 (1979). The implied warranty of habitability applied in \textit{Berman}, however, was first announced in an earlier Massachusetts decision, \textit{Boston Hous. Auth.}, 363 Mass. at 184, 293 N.E.2d at 831. This warranty exceeds the relevant housing code in scope by warranting against uninhabitability even if the offending condition is not the result of housing code violations. \textit{See Restatement (Second) of Property} § 5.5 reporter's note 2 (Discussion Draft 1973) (noting other courts that apply similarly broad theories of implied warranty of habitability). In Massachusetts, therefore, a breach of the warranty is based upon the condition of uninhabitability itself. This allows damages to accrue from the time the landlord has notice of the condition. The \textit{Javins} court's limiting reference to the D.C. Housing Regulations in creating the District of Columbia's implied warranty of habitability, however, may prevent this result in the District of Columbia. \textit{See supra} notes 5-7, 30-42 and accompanying text.

It is beyond the scope of this Note to discuss whether the District of Columbia courts should extend the implied warranty of habitability beyond \textit{Javins} to situations where residences become uninhabitable for reasons that do not constitute violations of the D.C. housing code. In \textit{Old Town}, 349 N.E.2d at 780 n.44, however, the court mentions that purely judicial standards of habitability suffer from being less precise than code-based standards.

\textsuperscript{174} 396 N.E.2d at 981. \textit{See supra} note 173.

\textsuperscript{175} \textit{Berman}, 396 N.E.2d at 984 n.5.

\textsuperscript{176} \textit{Old Town}, 349 N.E.2d at 744. \textit{See Weintraub}, 458 A.2d at 52 n.4, 57.

\textsuperscript{177} \textit{Old Town}, 349 N.E.2d at 776.

\textsuperscript{178} Id. at 747.

\textsuperscript{179} \textit{See supra} notes 32, 173.

\textsuperscript{180} 458 A.2d at 48, 50, 52 (Ferren, J., dissenting); \textit{see supra} note 86 and accompanying text.

\textsuperscript{181} \textit{Old Town}, 349 N.E.2d at 780.
the Indiana theory did not permit recovery immediately upon notice to the
landlord. It is apparent that the Weintraub dissent based its theory of re-
covery on incompatible warranty theories that arose from two different
courts. Both the Massachusetts and Indiana theories award damages for
breach of implied warranty of habitability, yet the onset of the damages
occurs at different times in the two states. It is significant, however, that
although the period for measuring damages begins at different times in
Massachusetts and Indiana, neither state staggered the damages, as the dis-
sent suggested in Weintraub.

B. Keeping the Sword and the Shield in the Armory: Ineffectiveness of
Exculpatory Clauses

The court of appeals, by unanimously affirming the trial court's opinion
regarding the invalidity of exculpatory clauses, took a major step toward
assuring that the new weapon would be available to the tenant whenever
an action for damages was deemed appropriate. The voiding of an excul-
patatory clause, however, is not a sufficient deterrent to the continuing use of
those clauses in lease agreements. As long as the only penalty is voiding
the clause, landlords will continue to use exculpatory language because
most tenants would believe that the exculpatory clause is effective. This
would undoubtedly have a chilling effect on the tenants' enforcement of
their rights under the implied warranty of habitability. 182

The trial court advanced as a solution to this problem the assessment of
punitive damages against landlords willfully using such language. Judge
Schwelb noted, however, that the lack of appellate cases explaining the
unlawfulness of exculpatory clauses within lease agreements 183 would
make it difficult to ascertain whether the landlord had willfully attempted
to abridge the tenant's rights. 184 This language may have actually been a
subtle request for an appellate pronouncement that would enable the trial
court to threaten the imposition of punitive damages against the landlord.
If that request were granted by the court, such a threat could act as a deter-
tent to prevent landlords from using their superior bargaining power to
depive tenants of their legal rights. The Weintraub appellate court re-
sponded by explicitly declaring the unlawfulness of clauses that disclaim a

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183. Judge Schwelb also stated that the lack of case law on the issue made it difficult to
impute knowledge of the law to landlords. Id. at 481, col. 3.
184. Id. The defendant's testimony that the clause was "standard" in D.C. leases, id. at
480, col. 3, may have added to the court's difficulty in finding the requisite willfulness. See
supra note 120 and accompanying text.
landlord's implied warranty of habitability, thus imputing knowledge of the law to landlords.

The question still remains, however, whether punitive damages are now available to the tenant where a landlord has included an unlawful exculpatory clause in a contract. Traditionally, punitive damages are not appropriate in contract cases. If, however, the inclusion of such a clause in a contract is deemed a tortious act, punitive damages may be recovered. In the District of Columbia, for instance, conduct performed with fraudulent intent and in willful disregard of another's legal rights is viewed as tortious and thus sufficient to justify an award of punitive damages. It therefore appears that Weintraub has provided tenants with the ammunition they need to collect punitive damages from landlords who attempt to make them believe that they have waived their right to an implied warranty of habitability.

IV. CONCLUSION

The District of Columbia Court of Appeals in Weintraub provided tenants with the sword they were promised earlier by the Javins court. The express language of Weintraub allows tenants to collect damages under an implied warranty of habitability. The court dulled the blade of the sword, however, by effectively allowing Weintraub no more damages than would normally be awarded under a negligence theory. Indeed, the holding could be construed as removing the shield given tenants by Javins since Weintraub disallows the use of the implied warranty of habitability unless the landlord is first given notice and a reasonable amount of time to repair the housing code violations. Nevertheless, the Weintraub court permits a tenant to recover damages for injuries caused by latent defects that the landlord could have discovered in the exercise of reasonable care. Damages are therefore available in cases where injury has been caused by a latent defect that the landlord should have repaired. Viewed in this light, the result is equitable. The tenant may recover in an affirmative action, but the landlord is only liable for those injuries which should have been within the contemplation of the parties at the time the contract was executed.

Weintraub also shapes the District of Columbia's implied warranty of habitability in other ways. For example, the court has clearly adopted a

185. 458 A.2d at 47.
186. A. CORBIN, supra note 150, at § 1077.
187. See, e.g., Rainbolt v. Johnson, 669 F.2d 767, 769 (D.C. Cir. 1981) (an award of punitive damages is appropriate if a trustee, in breaching his fiduciary duty, acted with gross fraud or in willful disregard of his client's rights).
standard of reasonable care that provides the landlord with a reasonable opportunity to make repairs after actual or constructive notice of a housing code violation. Furthermore, Weintraub makes it clear that the District's implied warranty of habitability is still coterminous with its housing code. The court, however, missed an opportunity to neutralize the potentially difficult problem of allocating the burden of proving the existence or absence of constructive notice of a latent defect. By recognizing section 2902.1(b) of the housing regulations as placing the burden on the plaintiff, the court could have ensured that landlords would not unjustly be held liable for unforeseeable damages.

Finally, by confirming the invalidity of exculpatory clauses in leases, Weintraub makes a great stride in safeguarding the tenant's rights under the implied warranty of habitability. When read together with the lower court's opinion, the Weintraub decision leaves open the possibility of an award of punitive damages against a landlord who willfully causes tenants to sign a lease containing such a disclaimer clause. By the mere promise of such an action, Weintraub has made a lasting contribution to the fairness of District of Columbia law.

C. Stephen Lawrence