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**Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective**

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Melissa T. Lonegrass*

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I. INTRODUCTION

Let us imagine a tenant living in a rented apartment. Unbeknownst to the tenant or the landlord, the circuit breaker in the apartment is faulty. While the tenant plays with her small child in the apartment one afternoon, the apartment catches fire. Although the tenant and her child are able to escape the burning apartment, both suffer severe physical injury and emotional distress. According to the residential landlord-tenant law of most American jurisdictions, our landlord has breached a contractual obligation imposed by the lease—the implied warranty of habitability—by failing to maintain the apartment circuitry in a safe condition. And yet, because the harm suffered takes the form of physical injury and emotional distress, this breach appears to fit more squarely within the framework of tort law. The classification of the tenant’s cause of action as either contractual or tort-based is essential: the rules governing the personal injury claims of the tenant and her child may be vastly different depending upon whether a court characterizes them as sounding in contract or in tort. Contractual liability likely exposes our landlord to strict liability, whereas liability in tort may be either strict or fault-based. Contractual recovery may not include damages for pain and suffering or emotional distress, whereas these damages would be awarded freely in tort. An exculpation clause may insulate the landlord from contractual, but not tort-based, liability. The statute of limitations may differ widely between the two causes of action. Moreover, a contractual theory of recovery would likely extend only to the tenant due to the rule of contractual privity, whereas a tort theory would extend equally to the tenant and the tenant’s child.

In cases such as this one, only a small minority of American jurisdictions have employed a contract theory to hold a landlord liable for personal injuries. The overwhelming majority of American courts have found contract inapplicable to tenants’ personal injury lawsuits and instead apply a tort-based negligence analysis. The American majority approach to landlord liability is the result of decades of debate that followed the “revolution” of residential landlord-tenant law—the reconceptualization of the residential lease as a contract and
the adoption of the implied warranty of habitability. Although a contract model was initially chosen to implement this newfound tenant-protection device, contract law strains to contain this state-imposed obligation relating not to economic expectations, but to physical safety and emotional security. American jurisdictions have dealt with the problem of contract law's awkward fit with legally imposed duties by adopting a bifurcated approach to landlord liability. Economic harm is compensated in contract; physical injury is compensated in tort. As a result, depending on the type of harm suffered, a tenant may have two very different claims against the landlord based on the same wrongful act. Now that the dust has settled following the landlord-tenant revolution, the time is ripe for assessing whether this bifurcated approach is optimal, or whether an alternative model would better address the needs of residential tenants, who comprise nearly thirty percent of the American population.

The relatively recent transformation of landlord-tenant law has imported into the common law landlord-tenant relationship a number of obligations that have been recognized in civil law leases for centuries. Thus the common law's embrace of an implied warranty of habitability closed a long-existing gulf between the two legal traditions' approaches to the obligations of residential landlords. In both traditions today, breach of the landlord's obligation to provide a safe and habitable dwelling gives rise to traditional contractual remedies, including termination of the lease and damages. However, the treatment of personal injuries, property damage, and nonpecuniary losses continues to differ across jurisdictional lines. While American tenants who suffer such losses are largely restricted to a tort theory of recovery, civil law tenants have both contractual and tort theories at their disposal. This Article turns to the civilian tradition to determine

2. See infra Part II.
4. See infra Part III.
5. See infra Parts II & III.
6. See infra Parts II & III.
whether this concurrent approach to landlord liability better allocates the risk of harm between residential landlords and their tenants.\footnote{This Article focuses exclusively on residential, rather than commercial, leases. Although American residential landlord-tenant law has undergone a dramatic transformation through the adoption of the implied warranty of habitability, in most jurisdictions commercial landlords are still heavily insulated from responsibility for the condition of the premises. \textsc{Thompson on Real Property} § 44.07(a) (David A. Thomas & N. Gregory Smith eds., 2d ed. 2007).}

The increasing convergence among the oft-polarized common law and civil law traditions has been of late a subject of great interest.\footnote{See generally \textsc{The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century} (B.S. Markesinis ed., 1994); Pierre Legrand, \textit{European Legal Systems are not Converging}, 45 \textit{Int'l & Comp. L.Q.} 52, 54 (1996); Ugo Mattei, \textit{Three Patterns of Law: Taxonomy and Change in the World's Legal Systems}, 45 \textit{Am. J. Comp. L.} 5, 8 (1997); Luke Nottage, \textit{Comment on Civil Law and Common Law: Two Different Paths Leading to the Same Goal}, 32 \textit{Victoria U. Wellington L. Rev.} 843 (2001); Mathias Reimann, \textit{The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century}, 50 \textit{Am. J. Comp. L.} 671 (2002); C.H. van Rhee, \textit{Towards a Procedural Ius Commune?}, in \textit{Remedies in Zuid-Afrika En Europa 217-32} (J. Smits & G. Lubbe eds., 2003); Reinhard Zimmermann, \textit{‘Double Cross’: Comparing Scots and South African Law, in Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa} 1-2 (Reinhard Zimmermann et al. eds., 2004).} Comparative scholarship not only provides fodder for legal reform, but also furthers understanding of differences, whether they result from history, social policy, or sheer chance.\footnote{See \textit{Mixed Legal Systems in Comparative Perspective}, supra note 8, at v. Above all, comparative law seeks to resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergencies in law, attributable not to the political, moral, or social qualities of the different nations but to historical accident or to temporary or contingent circumstances.} And yet, comparative examination of residential landlord-tenant law is relatively scarce.\footnote{A few comparative works were undertaken during the initial phases of the United States landlord-tenant "revolution." See, e.g., E.J. Cohn, \textit{Some Comparative Aspects of the Law of Landlord and Tenant}, 11 \textit{Mod. L. Rev.} 377 (1948); Michael Lipsky & Carl A. Neumann, \textit{Landlord-Tenant Law in the United States and West Germany—A Comparison of Legal Approaches}, 44 \textit{TuL. L. Rev.} 36, 66 (1969). Additionally, the European University Institute recently completed a comprehensive comparative study of European tenancy laws that is the first of its kind. \textit{See Tenanty Law and Procedure in the EU}, \textsc{European Univ. Inst.}, http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/ProjectTenancyLaw.aspx (last updated Sept. 25, 2009); see also \textsc{Richard Ford, A}
The paucity of comparative research in this area likely stems from the fact that regulation of residential leases is inextricably intertwined with housing policy, a matter generally thought of as local in character. Moreover, the fact that landlord-tenant relations, like many consumer protection regimes, are governed by an amalgam of contract, property, administrative, tort, and occasionally, constitutional law, makes them particularly difficult to study even in the domestic context, much less comparatively. Nonetheless, comparative study of tenancy law is critical. Such analysis allows for the pooling of knowledge, and it permits the study of more recent common law reforms against a backdrop of legal systems that have applied similar concepts for many years. To that end, this Article endeavors both to fill a gap in the comparative literature and to provide a critical appraisal, through a comparative lens, of the American approach to habitability in residential lease.

A close examination of the apparently disparate regimes governing the obligations of residential landlords reveals that the action against the landlord who has breached the obligation to maintain the premises, whether classified as contract- or tort-based, is treated similarly in many respects across jurisdictional lines. Where differences between the approaches exist, they stem primarily from the rules governing the distinction between contract and tort. Moreover, regardless of the theory of recovery employed, each system suffers from unique anomalies and injustices. These difficulties are a direct product of the system of classification and the interplay between contract and tort. Comparative observation leads to the conclusion that the landlord’s liability for defective premises has been shaped more by the arbitrary dividing line between contract and tort than by reasoned policy making. Thus this Article argues that landlord liability for defective premises is best characterized as “contort,” a hybrid obligation whose contours reflect elements of both contract and tort.


12. See Cohn, supra note 10, at 400.

13. See Lipsky & Neumann, supra note 10, at 37.

14. The term “contort” was coined by Grant Gilmore in his The Death of Contract lectures, in which he concluded “‘contract’ is being reabsorbed into the mainstream of ‘tort.’”
In so doing, this author seeks to anchor the landlord's obligation to maintain the premises among other contorts, including, for example, legal malpractice, medical malpractice, and products liability. These and other examples illustrate that recasting an obligation as contort emancipates it from the confines of classification and permits lawmakers to choose the attributes that best suit social policy, regardless of taxonomy. Landlord liability for defective premises could benefit from similar liberation.

Part II of this Article traces the development of the American approach to landlord liability for the condition of the premises, from its historical roots through its twentieth-century revolution to its modern application. In so doing, Part II highlights the reasons for the American approach and its resulting anomalies. Part III examines the approaches of several "mixed" jurisdictions whose landlord-tenant law is grounded in the civilian tradition. This analysis demonstrates that each of these jurisdictions has struggled with the nature of a landlord's obligation for the condition of the premises, and explores the difficulties each jurisdiction has encountered at the border between contract and tort. Part IV revisits the timeless struggle to define contract and tort as two distinct types of obligations, and reviews the recognition of "contorts"—obligations that defy classification by their very nature. Part IV concludes that landlord liability for defective premises is best characterized as contort and argues that such recasting is necessary to eliminate the conceptual difficulties and practical injustices that to date have infected the regimes of not only some civilian jurisdictions, but those of the United States.
II. THE COMMON LAW REGIME

A. Historical Approach: Caveat Lessee and Tort Immunity

Historically, the common law regarded the residential lease as a blend of contract and conveyance of real property. One result of characterizing the lease as a conveyance was the adaptation of the common law doctrine of *caveat emptor* to the lease context as *caveat lessee*. Like a purchaser of real property, a tenant was expected to inspect the premises prior to the inception of the lease, and in the absence of any express covenant to the contrary, the landlord owed no obligation relating to the condition of the premises or their fitness for use. The standard common law residential lease consisted merely of two principal obligations: the landlord's obligation to maintain the tenant in peaceful possession of the premises (the covenant of "quiet enjoyment") and the tenant's obligation to pay rent.

Of course, a tenant could negotiate for the landlord to assume a covenant of repair, but such express contractual protections were rarely available to residential tenants, who generally had little bargaining power. Even where the landlord did covenant for the maintenance and repair of the premises, breach of that obligation did not entitle the tenant to dissolve the lease or withhold rent. Rather, an aggrieved tenant's only right was an action for damages. Because a lease was regarded as a type of conveyance, the covenants of the landlord and tenant were construed as independent of one another.

The property law paradigm had ramifications in the tort context as well. The common law of occupier's liability generally imposed

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17. See Glendon, *supra* note 1, at 505-09. Glendon notes that the contractual and proprietary aspects of the residential lease were stressed to different degrees at different times in history. *Id* at 505-06. Thus the nature of the lease varied substantially between the thirteenth century (when the lease was used primarily as a security device) and the fifteenth century (by which time the lease was used more commonly for farming). *Id*


19. *Id*

20. *Id* at 32.

21. *Id*

22. *Id* at 31.

23. *Id*

24. *Id* at 32. In practice, the landlord's covenant of quiet enjoyment and the tenant's obligation to pay rent were construed as mutually dependent by courts despite their technical independence. *Id* at 33. However, the same treatment was never applied to any other express or implied covenants of the landlord. *Id*

duties on landowners to protect persons lawfully on the premises from unreasonable risks of harm.\textsuperscript{26} The rationale for the imposition of liability was that between the landowner and the person entering the land, only the former had any meaningful ability to prevent such harm.\textsuperscript{27} This rationale only holds, however, when the landowner is in possession or control of the premises.\textsuperscript{28} In the context of lease, the tenant acquires both possession and control of the premises, and the landlord enjoys a mere reversionary interest.\textsuperscript{29} That transfer of possession and control not only absolved the landlord from tort responsibility to the tenant, it shifted the responsibility owed to third persons from the landlord to the tenant as well.\textsuperscript{30}

Thus common law landlords enjoyed complete immunity from liability, whether in contract or in tort. According to the doctrine of \textit{caveat lessee}, under which the tenant assumed all risks associated with defects in the premises, the landlord could not be held contractually responsible for the premises’ condition.\textsuperscript{31} Furthermore, the landlord was not liable in tort to anyone, including the tenant or family and guests, due to the lack of possession.\textsuperscript{32} This was true even in the rare case in which the landlord assumed a contractual obligation to maintain the premises in good condition.\textsuperscript{33} As articulated by the King’s Bench in 1905, “A landlord who lets a house in a dangerous state, is not liable to the tenant’s customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house.”\textsuperscript{34}

\textsuperscript{26} Browder, \textit{supra} note 25, at 102-03. In fact, the common law imposed varying degrees of care on occupiers of premises based upon whether the person entering the premises, who was then injured, was properly classified as an invitee, licensee, or trespasser. Robert S. Driscoll, \textit{The Law of Premises Liability in America: Its Past, Present, and Some Considerations for Its Future}, 82 \textit{NOTRE DAME L. REV.} 881, 883-84 (2006). This tripartite classification system was abolished in England in 1957 by the Occupiers’ Liability Act, under which a landowner owes a general duty of care to anyone lawfully on the premises. \textit{See id.} at 885; Occupiers’ Liability Act, 1957, 5 & 6 Eliz. 2, c. 31, § 2(1). In the United States, the tripartite classification system has been abolished in many, but not all, jurisdictions. \textit{See Driscoll, supra, at} 888-91.

\textsuperscript{27} \textit{See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS} § 57 (5th ed. 1984).

\textsuperscript{28} \textit{See id.} §§ 57, 63.

\textsuperscript{29} \textit{5 THOMPSON, supra} note 7, § 41.09(a).

\textsuperscript{30} \textit{Love, supra} note 18, at 48-49.

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} Cavalier \textit{v. Pope}, [1905] 2 K.B. 757 (Eng.).

\textsuperscript{34} \textit{Id.}
B. Modern Variation: The United States

1. From Caveat Lessee to Landlord Liability

The doctrine of *caveat lessee* was received in the United States as a part of the common law of England. At the turn of the twentieth century, landlord-tenant law was so firmly entrenched in agrarian, feudalistic principles that Justice Holmes was prompted to remark that “the law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke.” In the near century since this remark was made, United States landlord-tenant law has undergone a “revolution” which has, in large part, detached the residential lease from its historical moorings.

Initially, allocation of responsibility for the condition of the premises to tenants seemed both fair and sensible. The “no-duty” rule was thought to reflect the implied intentions of the parties. Many leases were agrarian in nature, and the agricultural leaseholder was generally capable, in terms of both skill and financial means, to inspect the premises at the outset of the lease and to make repairs as they became necessary. However, as urban leases of dwellings became more prevalent, courts in the United States began to view the rule of *caveat lessee* as inappropriate when applied to residential leases. The leased premises, which once consisted primarily of land and occasionally of simple improvements, were now complex, multiunit


37. The transformation of U.S. landlord-tenant law and the broader implications of this transformation have been fully treated elsewhere. For an excellent discussion of the transition, see generally Glendon, supra note 1. The implied warranty of habitability, upon which this paper focuses, comprised only a part of this revolution. Other revolutionary changes, all pro-tenant, included impositions of rent control and the development of prohibitions on retaliatory eviction. See id.


40. Id at 29-31; see, e.g., Young v. Povich, 116 A. 26, 27 (Me. 1922); Ingalls v. Hobbs, 31 N.E. 286, 286-87 (Mass. 1892); Morgenthau v. Ehrich, 136 N.Y.S. 140, 142 (App. Term 1912).
The tenants of these dwellings were generally poor, unskilled laborers who had neither the funds nor the skills to make inspections or repairs.

Inroads into the doctrine of *caveat lessee* were made slowly at first. For example, first English courts, and then American courts, recognized a limited implied warranty of habitability in short-term leases of furnished apartments. Later, American courts held that an implied covenant of fitness existed in all leases of premises to be used for a specific purpose, so long as the premises were under construction at the time the lease was negotiated. Soon after, an exception to *caveat lessee* was imposed when the landlord failed to disclose a dangerous defect in the premises of which the landlord knew and which was not discoverable by the tenant. However, these exceptions were narrow in their application and were not widely adopted. The few judicial exceptions to *caveat lessee* were ultimately viewed as inadequate to protect urban residential tenants. Later, statutory housing codes were enacted in an effort to establish and maintain minimum standards for residential dwellings, but governmental enforcement was ineffective at producing results, and statutes providing for private causes of action were narrowly drawn.

Meaningful change did not appear until the judicial imposition of the implied warranty of habitability in all residential leases. Although first recognized in the early 1930s, the implied warranty did not become widespread until the 1970s. The seminal case adopting the warranty is *Javins v. First National Realty Corp.*, decided in 1970 by the United States Court of Appeals for the District of Columbia Circuit. The court repudiated the doctrine of *caveat lessee* as

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42. *Id.*
43. *Id.* at 29-30.
44. *Id.* at 30-31.
45. *Id.* at 31.
46. See 5 Thompson, supra note 7, § 41.04(a)(2)(i). For example, these exceptions only covered defects that existed at the time of the inception of the lease, and not defects that arose thereafter. The utility of these exceptions was further hampered by the doctrine of independent covenants. See Love, *supra* note 18, at 31-33.
47. See 5 Thompson, supra note 7, § 41.05(b).
48. The first case to recognize an implied warranty of habitability in residential leases was *Delamater v. Foreman*, 239 N.W. 148, 149 (Minn. 1931).
49. 428 F.2d 1071, 1072-73 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). It is worth noting that that Judge J. Skelly Wright, the author of the opinion, was a graduate of the Loyola University New Orleans College of Law, where he studied the Louisiana civil law. Vernon V. Palmer, *The Residential Lease in the Civil Law—A Consideration in Social Context*, 4 Tul. Cív. L.F. 3, 6 (1988). In justifying the characterization of the lease as a
outmoded in light of modern urban housing conditions, recognized an implied warranty of habitability in all residential leases, and held that this warranty and the tenant’s duty to pay rent are correlative.30

As of this writing, all American jurisdictions except Arkansas recognize an implied warranty of habitability in residential leases.51

Some jurisdictions recognize the warranty jurisprudentially, while others have enacted the warranty statutorily.52 Additionally, many

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Jurisdictions with statutory warranties include Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. ALA. Code § 35-9A-204 (2010); ALASKA STAT. § 34.03.100 (2010); ARIZ. REV. STAT. ANN. § 33-1324 (2010); CAL. CIV. CODE § 1941 (West 2010); COLO. REV. STAT. § 38-12-503 (2010); CONN. GEN. STAT. ANN. § 47a-7 (West 2010); DEL. CODE ANN. tit. 25, § 5305 (2010); FLA. STAT. ANN. § 83.51 (West 2010); GA. CODE ANN. § 44-7-13 (2010); HAW. REV. STAT. ANN. § 521-42 (LexisNexis 2010); IDAHO CODE ANN. § 6-320 (2010); IND. CODE ANN. § 32-31-8-5 (West 2010); IOWA CODE ANN. § 562A.15 (West 2010); KAN. STAT. ANN. § 58-2553 (West 2010); KY. REV. STAT. ANN. § 383.595 (LexisNexis 2010); LA. CIV. CODE ANN. art. 2691 (2010); ME. REV. STAT. ANN. tit. 14, § 6021 (2010); MD. CODE ANN., REAL PROP. § 8-211 (LexisNexis 2010); MASS. GEN. LAWS ANN. ch. 111, §§ 127-127P, ch. 239, §§ 1-9 (West 2010); MICH. COMP. LAWS ANN. § 554.139 (West 2010); MINN. STAT. ANN. § 504B.161 (West 2010); MISS. CODE ANN. § 89-8-23 (2010); MONT. CODE ANN. § 70-24-303 (2010); NEB. REV. STAT. ANN. § 76-1419 (LexisNexis 2010); NEV. REV. STAT. ANN. § 118A.280 (LexisNexis 2010); N.M. STAT. ANN. § 47-8-20 (West 2010); N.Y. REAL PROP. LAW § 235-b (McKinney 2010); N.C. GEN. STAT. § 42-42 (2010); N.D. CENT. CODE § 47-16-13.1 (2010); OHIO REV. CODE ANN. § 5321.04
states have adopted the Uniform Residential Landlord and Tenant Act, which contains both a general obligation of habitability as well as a detailed list of additional maintenance responsibilities allocated to the landlord. Generally, a defect is considered actionable if it renders the premises unsafe or unsanitary. Thus the obligation of maintenance is tied directly to the health and safety of the tenant. In all jurisdictions,

(LeXisNexis 2010); OKLA. STAT. ANN. tit. 41, § 118 (West 2010); OR. REV. STAT. ANN. § 90.320 (West 2010); R.I. GEN. LAWS ANN. § 34-18-22 (West 2010); S.C. CODE ANN. § 27-40-440 (2010); S.D. CODIFIED LAWS § 43-32-8 (2010); TENN. CODE ANN. § 66-28-304 (2010); TEX. PROP. CODE ANN. § 92.052 (West 2010); VT. STAT. ANN. tit. 9, § 4457 (2010); VA. CODE ANN. § 55-248.13 (2010); WASH. REV. CODE ANN. § 59.18.060 (LexisNexis 2010); W. VA. CODE ANN. § 37-6-30 (LexisNexis 2010); WIS. STAT. ANN. § 704.07 (West 2010); WYO. STAT. ANN. § 1-21-1202 (2010).


A landlord shall

(1) comply with the requirements of applicable building and housing codes materially affecting health and safety;
(2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;
(3) keep all common areas of the premises in a clean and safe condition;
(4) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him;
(5) provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and
(6) supply running water and reasonable amounts of hot water at all times and reasonable heat [between [October 1] and [May 1]] except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.

waiver of the warranty of habitability is either entirely foreclosed or very limited, in recognition of both the importance of the social policy underpinning the warranty and the residential tenant’s relative lack of bargaining power. 55

2. The Tort Aspects of the Warranty of Habitability

As they were adopted, both statutory and judicial warranties recognized a variety of contractual remedies, including dissolution of the lease, reformation of the lease, repair-and-deduct rights, rent withholding, and awards for compensatory damages. 56 However, it was not immediately apparent whether consequential losses for personal injury and property damage arising from breach of the warranty of habitability would be available to tenants, and, if so, whether such recovery would be predicated on breach of contract or tort.

By the time the warranty of habitability arrived in the mainstream, the rule of complete landlord immunity from responsibility in tort had begun to falter slightly. 57 But once the implied warranty of habitability was recognized in all residential leases, courts gradually began to favor a broad tort model of recovery for tenants and third parties. As early as 1973, the New Hampshire Supreme Court announced that by adopting the implied warranty of habitability several years earlier, it had “discarded the very legal foundation and justification for the landlord’s immunity in tort for injuries to the tenant or third persons” and abandoned the rule of landlord immunity in favor

55. THOMPSON, supra note 7, § 41.06(a)(5). For example, the Restatement (Second) of Property § 5.6 states that the parties “may agree to increase or decrease what would otherwise be the obligations of the landlord with respect to the condition of the leased property” as long as the agreement is not “unconscionable or significantly against public policy.” Id. (quoting RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 5.6 (1977)).

56. Id. § 43.05(a).

57. Several exceptions to the rule emerged from the jurisprudence. For example, landlords were held liable for preexisting defects known to the landlord, but not the tenant. Love, supra note 18, at 50-51. Also, injuries caused by defects in premises leased for admission to the public were compensable in tort. Id. at 53-54. Injuries caused by defects in common areas, over which the landlord was said to retain control, were also found to be compensable. See id. Landlords were held responsible for injuries resulting from the failure to effect expressly covenant repairs as well as for injuries caused by the negligent making of repairs. See id. at 57-65. Tort liability was also occasionally premised on violations of housing codes setting forth statutory repair obligations. See id. at 68-78. Finally, a minority of jurisdictions held that a landlord in breach of the implied warranty of habitability in furnished dwellings was also liable in tort. Id. at 54-57. The standard of liability imposed under these theories ranged from negligence to strict liability. See generally id at 48-78.
of a general negligence theory. 58 Another approach to tort liability was
adopted in 1977 by the Restatement of Property, which provides that
landlords may be liable for personal injury and property damage
cased by the landlord's failure to exercise reasonable care to repair a
defect in violation of the implied warranty of habitability or other
statutory or administrative duty. 59

A few isolated decisions went so far as to hold residential
landlords strictly liable in tort for defects in the premises. 60 For
example, in 1985, the California Supreme Court held in Becker v. IRM
Corp. that a landlord was strictly liable for injuries suffered by a tenant
who slipped and fell against an untempered glass shower door. 61 The
court justified its imposition of strict liability on the ground that
modern urban tenants are neither in the position to inspect residential
premises for latent defects nor to bear the costs of repairs. 62 The court
also drew an analogy to the context of the sale of goods, where well-
settled products liability principles hold manufacturers strictly liable in
tort for personal injuries arising from latent defects. 63 The court
remarked, “The landlord who markets the product bears the costs of
injuries resulting from the defects.” 64

The Restatement provides:

A landlord is subject to liability for physical harm caused to the tenant and others
upon the leased property with the consent of the tenant or his subtenant by a
dangerous condition existing before or arising after the tenant has taken possession,
if he has failed to exercise reasonable care to repair the condition and the existence
of the condition is in violation of:

(1) an implied warranty of habitability; or
(2) a duty created by statute or administrative regulation.

Id. The term “physical harm” contained in section 17.6 has been interpreted to include harm
to land and chattels as well as harm to the person. RESTATEMENT (SECOND) OF TORTS § 7.3
(1965); Miller v. Christian, 958 F.2d 1234, 1240 (3d Cir. 1992). States adopting the
Restatement approach include Georgia, Maryland, Massachusetts, Texas, and Washington.
Thompson v. Crownover, 381 S.E.2d 283, 285 (Ga. 1989); Richwind Joint Venture 4 v.
Brunson, 645 A.2d 1147, 1152 (Md. 1994), overruled on other grounds by Brooks v. Lewin
Realty III, Inc., 835 A.2d 616, 622 (Md. 2003); Scott v. Garfield, 912 N.E.2d 1000, 1006
(Mass. 2009); Morris v. Kaylor Eng’g Co., 565 S.W.2d 334, 335 (Tex. Civ. App. 1978); Lian
60. See, e.g., Kaplan v. Coulston, 381 N.Y.S.2d 634, 638 (N.Y. Civ. Ct. 1976); see
also Shroades v. Rental Homes, Inc., 427 N.E.2d 774, 777-78 (Ohio 1981) (holding violation
of statutory warranty of habitability constitutes negligence per se).
62. Id. at 122-23.
63. Id. at 118.
64. Id. at 123.
The *Becker* decision generated a great deal of controversy and academic debate regarding the suitability of the analogy between residential leases and sales of goods, and more broadly, the propriety of subjecting landlords to strict liability.\(^65\) Ten years after *Becker*, the California Supreme Court reevaluated its ruling and ultimately overruled it, holding that "we erred in *Becker* in applying the doctrine of strict products liability to a residential landlord that is not a part of the manufacturing or marketing enterprise of the allegedly defective product that caused the injury."\(^66\) The few decisions in other jurisdictions finding landlords strictly liable were not followed; rather, several courts specifically considered and rejected the application of strict liability to residential landlords.\(^67\)

A number of jurisdictions have wrestled with the issue of whether to permit tenants to recover on a breach of contract theory. A minority of courts have held that a tenant may recover damages for personal injuries or property damage on the contract.\(^68\) These tribunals considered consequential damages for personal injury and property damage to be fairly within the contemplation of the parties at the time of contracting.\(^69\) However, these decisions have largely either been overruled or not followed.


\(^{66}\) Peterson v. Superior Court, 899 P.2d 905, 906 (Cal. 1995).


\(^{69}\) See Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 762 (Ind. Ct. App. 1976) ("[T]here appears to be a growing recognition that a residential landlord may be held liable for breach of the implied warranty of habitability contained in the lease (a contract) resulting in personal injury or personal property damage to the tenant. The consequential damages envisioned by Hadley v. Baxendale logically come to fruition in breach of an implied warranty of habitability."). *superseded as moot*, 369 N.E.2d 404 (Ind. 1977); see also Boudreau, 625 P.2d at 390 (arguing that "the implied warranty of habitability does not extend to personal injuries seems to us to be logically meritless").
The majority of courts to consider the issue have determined that a claim on the contract is not the proper vehicle for recovery of personal injury or property damages. A 1991 decision of the Vermont Supreme Court, *Favreau v. Miller*, squarely addressed this issue. The court stated that where personal injury is concerned, tort principles provide a "more straightforward way" to delineate the rights and duties of the parties. The court was particularly concerned with issues of causation, fault, and comparative negligence, all of which, it opined, a tort model is better equipped to handle. Still other courts have based their refusal to award personal injury and property damages on the notion that the landlord should not be cast in strict liability as an "insurer" of the tenant. The preference for adjudication of the landlord's fault is thus one compelling basis for refusing to award personal injury or property damages on a contract theory.

Beyond fault, additional grounds have been articulated for refusal to award personal injury damages for breach of the warranty of habitability. The Pennsylvania Commonwealth Court ruled in 2003 that to permit the recovery of personal injury damages on an implied warranty of habitability theory "would eliminate the fundamental distinctions between contract and tort and only lead to further confusion regarding the nature and role of these two theories of recovery." Other jurisdictions have refused to award damages for personal injury or property damage on the ground that such consequential damages are not within the contemplation of the parties at the time of contracting. Another contingent of courts have applied

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70. 591 A.2d 68 (Vt. 1991).
71.  Id. at 73; see also Schuman v. Kobets, 760 N.E.2d 682, 687 (Ind. Ct. App. 2002) ("We agree that these are questions better left to be resolved by the rules developed under tort and negligence law.").
72.  *Favreau*, 591 A.2d at 73.
74.  See, e.g., Antwaun v. Heritage Mut. Ins. Co., 596 N.W2d 456, 469 (Wis. 1999) ("An injured parties' [sic] claim for personal injuries is a tort claim in negligence . . . . It is not the breach of warranty . . . . that gives rise to the cause of action for the personal injury. Instead, it is the negligent act or omission.").
76.  See, e.g., *Johnson v. Scandia Assocs*, Inc., 717 N.E.2d 24 (Ind. 1999). Indiana has not recognized a warranty of habitability implied by law in every residential lease; rather, an implied warranty of habitability exists only when implied in fact in a particular agreement. *See id.* at 32. On the issue of personal injury damages, the court held: "Where the warranty
a more extreme approach, refusing to award consequential damages of any kind. 77

Massachusetts courts have most thoroughly vetted the problem of contractual recovery for personal injury and property damages. In its 1979 decision in Crowell v. McCaffrey, the Massachusetts Supreme Court recognized the availability of recovery for personal injury damages resulting from breach of the warranty of habitability.78 In the ensuing years, a number of tenants relied on Crowell to assert claims against their landlords for personal injury or property damage sounding not in tort, but in breach of contract.79 Even still, following Crowell, the scope and nature of claims for personal injuries resulting from landlords' breach of the implied warranty of habitability remained unsettled. First, Crowell declined to address whether the standard of liability in a breach of warranty claim was strict liability or negligence.80 Later appellate decisions and commentary appeared to favor a showing by the injured party that the landlord was negligent in failing to remedy a defect of which he had notice, but no court ever made such a ruling.81 Second, as Crowell involved an injured tenant, the question of whether a lawful visitor who was not a signatory to the lease could invoke the implied warranty of habitability to recover for

is express, consequential damages for injury to the person may be available as a remedy. Where the warranty is implied-in-fact, however, consequential damages may not be awarded because personal injury is outside the parties' contemplation." Id.

77. See, e.g., Chiu v. City of Portland, 788 A.2d 183, 188 n.6 (Me. 2002); Auburn v. Amoco Oil Co., 435 N.E.2d 780, 782-83 (Ill. App. Ct. 1982).

78. 386 N.E.2d 1256, 1261 (Mass. 1979). The court justified the extension of the implied warranty of habitability to personal injury claims with reference to jurisprudence permitting tenants to recover for personal injuries resulting from the previously recognized but more limited implied warranty of habitability in short-term rentals of furnished dwellings. Id. The court remarked that "extension of the warranty [of habitability] to the ordinary residential tenancy . . . logically carries with it liability for personal injuries caused by a breach." Id.


80. Crowell, 386 N.E.2d at 1261-62.

81. See, e.g., Fletcher v. Littleton, 859 N.E.2d 882 (Mass. App. Ct. 2007). The Massachusetts Academy of Trial Attorneys filed an amicus brief arguing vociferously in favor of a strict liability standard, which would subject the landlord to liability in the absence of a violation of a statutory housing code. Id. at 885-86 & n.7. The court declined to adopt such a standard. Id.; see also Jeffrey C. Melick, The Standard of Care in Warranty of Habitability Cases, 82 MASS. L. REV. 187, 193 (1997).
personal injuries remained.82 Following Crowell, several courts extended the warranty to third party claimants, but others declined to do so.83 As noted by a leading Massachusetts authority on the warranty of habitability, those decisions refusing to extend the warranty of habitability to guests and visitors did so by emphasizing the contractual nature of the claim.84

In its 2009 decision in Scott v. Garfield, the Massachusetts Supreme Court clarified that the "implied warranty of habitability ... is a multi-faceted legal concept that encompasses contract and tort principles, as well as the State building and sanitary codes."85 According to the court, the contractual nature of the implied warranty permits tenants to recover for economic losses resulting from the landlord's breach.86 The tort-like nature of the warranty, on the other hand, permits both tenants and third parties lawfully on the premises to recover damages for personal injuries.87 The court went on to explain that the conclusion that lawful visitors may recover for injuries resulting from the landlord's breach of warranty is predicated on

the expectation that a tenant might invite a guest into his home, and the concomitant expectation that the tenant's home must be safe for a guest to visit—which together go to the very heart of the landlord's contractual obligation to deliver and maintain habitable premises that comply with the building and sanitary codes.88

Thus, even in authorizing extension of the warranty to protect third parties, the court emphasized the contractual aspect of the expectations of the parties. Moreover, the court in Scott explained that although the principles of comparative fault are applicable to general negligence

82. Crowell, 386 N.E.2d at 1259.
84. See Jeffrey C. Melick, Actions Based on the Warranty of Habitability, in RESIDENTIAL AND COMMERCIAL LANDLORD-TENANT PRACTICE IN MASSACHUSETTS § 7.2.2 (2009).
86. Id.
87. Id. Here, the court appeared to draw an analogy between the warranty of habitability in lease and the implied warranty of merchantability in sales of goods. See id. at 1006; Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1040-41 (Mass. 1983) (recognizing product liability claims for personal injuries based on breach of warranty sound essentially in tort).
88. Scott, 912 N.E.2d at 1005.
claims, they are inapplicable to breach of implied warranty claims under Massachusetts statutory law. At present, Massachusetts is alone in its recognition of a hybrid contract-tort theory of recovery for personal injuries. In other jurisdictions, it is clear that consequential losses of this type are not compensable in contract.

3. Critique of the American Approach

A number of anomalies result from the bifurcation of personal injury and property damage claims from claims for economic harm. First, most American courts permit aggrieved tenants suing in contract to recover economic damages only. The measure of damages is generally taken as the “difference between the fair rental value of the premises if they had been as warranted and as they were during the occupation in the unsafe and unsanitary conditions.” This has been “criticized on the ground that a tenant rents a dwelling for shelter, not profit, and that tenant’s losses, in discomfort and worry over dangers, are intangible.” However, very few courts have recognized the possibility of recovery for emotional distress suffered by a tenant. Other jurisdictions have gone so far as to entirely foreclose the possibility of recovery of any consequential losses in contract, relegating claims for consequential damages relating to personal injury, property damage, and emotional distress entirely to tort.

Such a restriction is artificial and inconsistent with other comparable areas of law. First, the view that consequential losses are not within the contemplation of the parties at the time of contracting is not credible, given that the warranty of habitability is inextricably tied

89. [Id. at 1005-06 & n.7 (citing MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2000)); Correia, 446 N.E.2d at 1033. The court's holding on the issue of comparative fault is curious. The court's conclusion that comparative negligence does not apply to the breach of implied warranty of habitability is based upon its previous holdings in the products liability context that Massachusetts' comparative fault regime does not apply to claims involving the implied warranty of merchantability. See Scott, 912 N.E.2d at 1005-06 & n.7 (citing Correia, 446 N.E.2d at 1033). In the seminal case on that issue, the Massachusetts Supreme Court held that the comparative negligence scheme is inapplicable to implied warranty of merchantability claims because the standard of care is strict liability, and not negligence. Correia, 446 N.E.2d at 1039-40. However, in Scott, the court specifically declined to address whether the landlord's standard of care in an implied warranty of habitability case involving personal injuries is one of strict liability or negligence. See Scott, 912 N.E.2d at 1006 n.8.]


91. [Id.]


to health and safety standards. Moreover, since 1952, consequential awards for injury to both person and property have been explicitly recoverable under the Uniform Commercial Code for a seller’s breach of the contractual warranty of merchantability implicit in sales of goods.94 Perhaps more pertinent, given the body of jurisprudence distinguishing the lease of a dwelling from the sale of a product,95 the Uniform Commercial Code similarly provides for consequential damages resulting from injury to person or property in the context of leases of goods.96 Moreover, the Restatement (Second) of Contracts explicitly provides for the availability of nonpecuniary damages in contract claims involving bodily harm.97 The strongest reason for relegateing claims for consequential losses to tort is the policy-based preference against imposing strict liability on landlords. And yet, even this rationale is flawed. Although the traditional American view of contractual liability is liability without fault,98 fault is not entirely foreign to American contract law.99

Moreover, the complete removal of claims for consequential losses from the realm of contract has unintended consequences. Although an injured plaintiff is permitted to cumulate actions in contract and in tort under American law, such cumulation of claims does not necessarily provide the tenant with full relief. One problematic area concerns a tenant’s protection from so-called “retaliatory eviction” by landlords, or eviction of a tenant in retribution for the

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94. U.C.C. § 2-715(2)(b) (2002). The U.C.C. abandons the requirement of “foreseeability” in this context in favor of a requirement that the consequential losses for injury to person or property be “proximately” caused by the seller’s breach. 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2:715:6 (2010).

95. See infra notes 61-67 and accompanying text.


97. RESTATEMENT (SECOND) OF CONTRACTS § 353 (1982) (“Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.”). This rule has been adopted in most U.S. jurisdictions. See 24 SAMUEL WESSON, A TREATISE ON THE LAW OF CONTRACTS § 64:7 & n.21 (4th ed. 2002). Note, however, that the original Restatement’s formulation of the rule required not only bodily injury but also “wanton or reckless breach.” RESTATEMENT OF CONTRACTS § 341 (1982).


99. See Posner, supra note 98, at 1431 (“[A]lthough Anglo-American contract law is usually called a strict-liability system, it does contain pockets of fault.”). See also infra Part IV.C.2.
bringing of an implied warranty of habitability claim. Many states prohibit such retaliatory eviction either jurisprudentially or by statute. However, because retaliatory eviction remedies may be available only when the aggrieved tenant has brought a contract-based warranty claim, and not in connection with a tort-based claim, tenants who are physically injured or suffer property damage as a result of a defect in the premises are anomalously less protected than those who suffer mere inconvenience and out-of-pocket expenses associated with repairs.

The Supreme Court of Alaska recently addressed this issue in its 2009 decision in *Helfrich v. Valdez Motor Corp.* Following an on-premises slip and fall that resulted in several days of hospitalization, Helfrich, a residential tenant, retained an attorney. The attorney issued a demand letter, in response to which the landlord took steps to evict Helfrich. Helfrich sued, alleging negligence and violation of the URLTA's antiretaliation provisions. The court rejected Helfrich's retaliatory eviction claim on the ground that the statutory protections extend only to tenants alleging harm governed by the URLTA. According to the court, although defective premises may fall within the ambit of the URLTA's obligation to maintain the premises, the damages claimed by Helfrich were beyond the scope of the statutory regime, which deals only with contractual claims. After reluctantly holding that a retaliatory eviction claim was unavailable to a plaintiff suing in tort for personal injury, the court reflected that "[a]s a matter of policy, those tenants are no less worthy of protection from retaliation." A dissenting Justice decried the result as producing a "perverse framework of anti-retaliation protection." As observed by

100. Many states provide such protection via statute. 5 THOMPSON, supra note 7, § 43.06(a); see, e.g., CAL. CIV. CODE § 1942.5 (West 2010); FLA. STAT. ANN. § 83.64 (West 2010); N.Y. UNCONSOL. LAW § 8590(2) (McKinney 2010). The URLTA includes a retaliatory conduct provision, § 5.101.

101. 5 THOMPSON, supra note 7, § 41.08(a) & nn.483-84.

102. 207 P.3d 552 (Alaska 2009).

103. Id. at 555.

104. Id.

105. Id.

106. Id. at 558-59.

107. Id. at 559.

108. Id. at 560.

109. Id. at 564 (Winfree, J., dissenting). Several other states have adopted the URLTA's anti-retaliation provision, including New Mexico, Tennessee, and Washington. N.M. STAT. ANN. § 47-8-39 (West 2010); TENN. CODE ANN. § 66-28-514 (2010); WASH. REV. CODE. ANN. § 9.18.240 (West 2010). However, not all states' anti-retaliation eviction schemes foreclose tort claimants from invoking protection. For example, Oregon's statute
the court, this unjust result is not limited to the URLTA; New York's antiretaliation statute, which is not based on the uniform act, likewise limits the scope of protection to those tenants exercising contract-based rights emanating from landlord-tenant legislation.\textsuperscript{110}

III. THE CIVIL LAW REGIME

Now that the historical evolution of the American approach and its theoretical underpinnings have been fully explored, foreign systems will be examined to consider how the problem of landlord liability for defective premises is dealt with abroad. To this end, the functionalist method of comparative law shall be employed. The functionalist method is primarily concerned with determining whether different legal systems are confronted with a similar legal problem, whether those systems have the same or different legal rules to address that problem, and whether those rules lead to similar or differing results.\textsuperscript{111} The aim is to look past terminology, or, in this case, taxonomy, to determine whether jurisdictions use common approaches to address common problems.\textsuperscript{112} Part III of this Article thus turns to the civil law tradition for a study in contrast and similarity.

A. The Historical Approach: Concurrent Liability in Contract and Tort

The civil law approach to the lease is profoundly different from the historical approach of the common law. Whereas the common law viewed the residential lease primarily as a conveyance, akin to a sale, the civil law has long characterized the lease as a contract that transfers to the tenant a personal right of use and enjoyment rather than any form of "title," as understood in the common law.\textsuperscript{113} The fundamental

prohibits retaliation against any tenant who "has performed or expressed intent to perform any other act for the purpose of asserting, protecting or invoking the protection of any right secured to tenants under any federal, state or local law." OR. REV. STAT. ANN. § 90.385 (West 2010).


112. See id. at 622-24.

113. See 1 AMERICAN LAW OF PROPERTY § 3.11 (A. James Casner ed., 1952) ("The lease is primarily a conveyance, executed as to the lessor at the time the lease is made, to which the covenants are merely incidental"); James Gordley, The Common Law in the Twentieth Century: Some Unfinished Business, 88 CALIF. L. REV. 1815, 1867 (2000) ("While the common law leasehold roughly corresponds to the civil law lease, there is a
nature of the civil law lease and the principal elements of its governing scheme date back to Roman law. The Roman law lease was regarded as a bilateral contract that transferred to the tenant the mere use and enjoyment of the leased premises, not an ownership interest. Modern civil law systems continue to recognize the lease as a contract, bilateral in nature, and thus replete with a number of continuing, mutually dependent duties on the part of both the parties.

At Roman law, one such implied obligation was the obligation of repair. The landlord was required to turn the property over to the tenant in a state of good repair, and to maintain the premises in good condition throughout the term of the lease. If the property was not fit for the use intended by the parties, the tenant could demand that the lease be dissolved. The landlord was also liable for damages if the tenant suffered harm from an undisclosed defect of which the landlord knew or should have known. The current civilian approach to the fundamental difference.

In common law, the lease was conceived not as an on-going contract, as it is in civil law, but as the conveyance of an interest in land.

114. For a detailed, contemporary discussion of the Roman law of lease, see W.W. Buckland, A Text-Book of Roman Law from Augustus to Justinian 498-503 (2d ed. 1950).

115. Id. at 498-99.

116. Greenfield & Margolies, An Implied Warranty of Fitness in Nonresidential Leases, 45 ALB. L. REV. 855, 866 (1981) ("The crucial difference is that the common law views the lessor's obligations as substantially completed on the first day of the lease, whereas the civil law views the lease as a continuing bilateral contract whereby each day the lessor must hold out the property for the tenant.").

117. Buckland, supra note 114, at 500.

118. Cohn, supra note 10, at 302. However, the recognition of this real right does not affect the fundamentally contractual nature of the lease.

119. Buckland, supra note 114, at 302. In fact, the question of whether, at Roman law, the landlord was liable for consequential damages only when the landlord failed to disclose a defect of which the landlord knew or should have known, or whether the landlord was liable in the absence of fault, is disputed. Buckland writes that

[The lessor also was liable for culpa levis in relation to the thing, and must compensate for damage due to defects, not disclosed, of which he knew or ought to have known. If the thing was in such a state that it did not serve for the ordinary uses of such things, he was responsible, not on the ground of negligence, but for not supplying what he contracted to supply.

Id. at 500. A number of scholars have interpreted the Roman law as requiring a showing of fault by the tenant. See Hugo Grotius, The Jurisprudence of Holland § 3.14.12 (R.W. Lee trans., 1936); Pothier, Contrat de Louage § 119 (G.A. Mulligan trans., 1953). Modern South African scholars challenge the validity of these conclusions. See, e.g., W.E. Cooper, Landlord and Tenant 108-09 (2d ed. 1994). The resolution of the question of the proper interpretation of the Roman law is beyond the purview of this Article, particularly given the position of this Author that regardless of what standard of liability may have been
landlord's responsibility for the condition of the premises has changed strikingly little since its Roman formulations. Many contemporary civilian systems retain the rule that the landlord is required to let the property in a condition fit for its intended use and to maintain the premises in good repair.120

The basis for the landlord's responsibility for the condition of the premises is directly tied to the fact that the civilian lease is not a conveyance.121 The civil law has historically recognized the rule of res perit domino, according to which the risk of loss or damage to a thing is borne by its owner.122 Because the lease entails no transfer of ownership, it likewise entails no transfer to the tenant of responsibility for damage or deterioration.123 Thus the landlord remains responsible for all repairs and items of damage to the leased thing, except for those resulting from the fault of the tenant.124

The civil law approach to premises liability in tort likewise has roots in the Roman law. According to the lex Aquilia de damno, a statutory enactment of the third century B.C., the owner of certain types of damaged property had a right to compensation from the wrongdoer.125 The Aquilian action was eventually expanded to include all negligent property damage and personal injury.126 In the seventeenth and eighteenth centuries, the Natural Law scholars used this seed from the Roman law to bring forth the so-called general principle of tort responsibility, that everyone is responsible for the harm caused by his or her fault.127 This principle lies at the foundation of most continental tort regimes.128 Subsumed within the general principle is the notion that a person in control of immovable property

received by a modern civilian or mixed jurisdiction from the Roman law, the standard of care imposed on a landlord should reflect a contemporary policy assessment, and not slavish repetition of historical norms. See infra Part III.B.2.


122. See VERNON VALENTINE PALMER, THE CIVIL LAW OF LEASE IN LOUISIANA § 3-6 (1997).

123. See id; POTHIER, supra note 119, § 3-4.

124. See Palmer, supra note 122, § 3-6; Pothier, supra note 119, § 219.

125. ZWEIGERT & KÖTZ, supra note 9, at 291-92.

126. Id.; Cohn, supra note 10, at 395.

127. Zweigert & KötZ, supra note 9, at 292.

128. Id.

In the civil law, as in the common law, the rationale for premises liability in tort stems at least in part from the obligor's control of the premises. However, unlike the historical common law landlord, the civilian landlord is not absolved from tort liability by the mere relinquishment of possession of the premises.\footnote{130}{See Cohn, supra note 10, at 396.} Rather, although the landlord is not technically the occupier of the premises, the fact that the landlord is obligated to deliver the premises in good repair and to keep them in a safe condition maintains the element of control necessary to preserve tort duties to all persons lawfully on the premises.\footnote{131}{See id.} Thus the landlord's obligation in contract serves indirectly as a basis for liability in tort.

As a general rule, civilian tenants have the ability to cumulate their tort claims together with their contract claims, with the effect of providing tenants the "best of both worlds." The prominent exception falls under the French doctrine of non-cumul, under which a plaintiff who has suffered an act that is simultaneously both a breach of a contractual obligation and a delictual responsibility may only pursue his claim in contract.\footnote{132}{6 Saul Litvinoff, Louisiana Civil Law Treatise § 16.8 (1999). The doctrine of non-cumulis adhered to in France and in Belgium. See id.} Other jurisdictions freely permit the cumulation of actions regardless of the theory of liability at issue. Thus, in most systems of the civilian tradition, tenants may cumulate contractual and tort claims to garner the full extent of the benefits of each.

B. Modern Variations in Mixed Jurisdictions

To illustrate the modern variations on the civilian approach to landlord liability, the regimes of three mixed jurisdictions—South Africa, Scotland, and Louisiana—will be studied here.\footnote{133}{The mixed jurisdictions studied in this Article are Scotland, South Africa, and Louisiana. Other mixed jurisdictions not explored here include Quebec, Puerto Rico, The Philippines, Israel, Sri Lanka, Zimbabwe, Namibia, Lesotho, Swaziland, St. Lucia, Mauritius, and the Seychelles. Vernon Valentine Palmer, Mixed Jurisdictions Worldwide: The Third Legal Family 4-5 (Vernon Valentine Palmer ed., 2001) [hereinafter Palmer, Mixed Jurisdictions]. Mixed jurisdictions have been described as "fruitful laboratories for comparative purposes" due to their unique ability to selectively borrow from either legal tradition. Ronald J. Scalise Jr., Undue Influence and the Law of Wills: A Comparative
is useful for a number of reasons. First, mixed jurisdictions have been lauded for their value in comparative tort analysis, because "[t]ort is the area par excellence of common law penetration" in mixed systems.\textsuperscript{134} Each of the mixed jurisdictions studied here has a tort system firmly rooted in the Roman civil law, while at the same time heavily influenced by the common law.\textsuperscript{135} Thus, the efforts of these jurisdictions to deal with the tort aspects of the landlord-tenant relationship are directly influential in "pure" common law jurisdictions, such as those in the United States. Additionally, while the law of South Africa and Scotland was heavily influenced by seventeenth-century Dutch scholars, Louisiana law was more heavily influenced by French and Spanish sources.\textsuperscript{136} While the basic elements of the law of lease in each of these jurisdictions derives from a common source—the Roman law—each jurisdiction’s approach bears the distinct markings of other, individual influences. Further, each of the mixed jurisdictions studied here has a unique history and culture.\textsuperscript{137} Because the observation of common legal trends among diverse cultures can be quite telling, an analysis of the level of similarity or difference across jurisdictional lines such as these is invaluable.\textsuperscript{138}

1. South Africa

The legal system in South Africa is a hybrid of civilian Roman-Dutch law and English common law.\textsuperscript{139} However, the legal regime governing the landlord-tenant relationship in South Africa is decidedly civilian in character. Many of the principles governing the landlord-tenant relationship are found in the uncodified principles of South African law which, even today, are drawn directly from Justinian’s Digest and the commentaries of such seventeenth-century jurists as

\textsuperscript{134} Vernon Valentine Palmer, \textit{The Fate of the General Clause in a Cross-Cultural Setting: The Tort Experience of Louisiana}, 46 Loy. L. Rev. 535, 535 (2000) ("The subject of tort in a mixed jurisdiction is of the greatest interest to the comparative lawyer and to those interested in the modern \textit{ius commune}.")

\textsuperscript{135} Vernon Valentine Palmer, \textit{Mixed Jurisdictions, supra} note 133, at 118 (South Africa), 226 (Scotland), 303 (Louisiana).

\textsuperscript{136} \textit{Id.} at 118, 303.

\textsuperscript{137} \textit{See id.} at 4.

\textsuperscript{138} \textit{See id.}

\textsuperscript{139} For a detailed discussion of the history and elements of South African law, see H.R. Hahlo & Ellison Kahn, \textit{The South African Legal System and its Background} 329-596 (1968).
Since the 1920s, residential leases have also been subject to a number of statutory controls designed for the protection of tenants. These statutes concern issues such as rent control and rights of eviction, but do not touch upon the landlord's responsibility for the condition of the premises.

According to established principles of Roman-Dutch law, a residential landlord owes two interconnected obligations to the tenant relating to the condition of the premises: the landlord must first deliver the premises in a condition suitable for habitation and must thereafter maintain the premises in a condition suitable for habitation. In fact, the term "habitability" does not make its way into the doctrinal writings or case reports involving these obligations. Rather, the landlord's obligations are couched in terms of delivering and maintaining the dwelling in a condition fit for the purpose for which it was let, which in the case of residential lease, means that the property must be fit for habitation.

The landlord's breach of either the obligation to deliver or the obligation of maintenance entitles the tenant to a number of traditional contractual remedies, including dissolution of the lease, rent abatement, repair-and-deduct rights, and specific performance. However, in South Africa, a tenant may only recover consequential damages if the landlord either knew or ought to have known of the defect and neglected to take reasonable measures to remedy it. Though some jurisprudence has indicated that a landlord has constructive knowledge of defects only when the landlord's trade or profession "renders him an

140. See generally A.J. Kerr, The Law of Sale and Lease (3d ed. 2004); Cooper, supra note 119; see also Hahl & Kahn, supra note 139, at 578-81.
142. See Rent Control Act 80 of 1976 (S. Afr.); Rental Housing Act 50 of 1999 (S. Afr.).
143. Cooper, supra note 119, at 85, 98.
144. See id. at 85.
145. Id. at 85-90. Although a lessee may in theory compel a lessor to place or maintain the premises in good condition, South African courts (under the influence of English law) hold that as a general rule an order of specific performance will not be granted against a lessor. The justification advanced for this rule is that it would be difficult for a court to enforce its order. This trend has been criticized by a leading commentator as inconsistent with South African law. Id. at 89.
146. Id. at 90; see also Hunter v. Cumnor Invs. 1952 (1) SA 735 (CPD) at 741 (S. Afr.) ("[T]he authorities appear to have intended to fix the lessor's liability on the basis of a neglect on his part. It is the knowledge of the defect on the part of the lessor coupled with a failure by him to remedy the defect that fixes him with liability. Mere knowledge, but with no opportunity to act on that knowledge towards the remedying of the defect, would not render the lessor liable for damage flowing from the unremedied defect.").
expert in matters related to building,” other case law has suggested that a landlord derives constructive knowledge “from the nature of his occupation, or from the other circumstances.” 147 In either case, a tenant must essentially prove negligence on the part of the landlord before recovering consequential damages on the contract, including damages resulting from personal injury or property damage.

This negligence requirement appears to have originated in the writings of seventeenth century European scholars interpreting the relevant provisions of Roman law. 148 The accuracy of these interpretations has been questioned by modern South African scholars. 149 More importantly, these same commentators have questioned the continuing theoretical validity of the fault-based rule. 150 One contemporary justification for the negligence approach rests on the ground that under South African law, liability for positive malperformance—that is, failure to perform a contractual obligation, whether express or implied by law—requires a showing of fault. 151 Although contractual liability is usually thought of as strict in nature, an obligor may avoid liability on a showing that his breach of contract was the direct result of the act of a third party or a force beyond his control. 152 Thus, the fault requirement for recovery of consequential damages resulting from a landlord’s breach of the repair obligation is justified on the ground that fault requirements exist throughout South African contract law. 153 Another justification for the fault requirement is made by analogy to the context of sales, in which sellers are liable for defects in things sold to the extent they know or should know of the defects. 154 South African commentators have challenged both of these justifications. 155 Despite criticism of the fault requirement, courts continue to require a showing of fault before a tenant is permitted to

147. Compare Hunter, 1952 (1) SA at 744, with Nannucci v. Wilson & Co. 1894 (4) SC 233 (SC) at 234 (S. Afr.). This more lenient view is favored by modern commentators. See COOPER, supra note 119, at 110 & n.82 (citing Kerr, supra note 140, at 214).

148. See COOPER, supra note 119, at 108-09. The rule appears to have originated from the writings of Ulpian in the Digest. See id (citing DIG. 19.2.19.1 (Ulpian, Ad Edictum 32)).

149. See id; Andrew Domanski, Consequential Damages in Lease: Gingerly Sidestepping Authority, 104 SALJ 311, 311-12 (1987).

150. Domanski, supra note 149, at 311-15.

151. J.G. Lotz, Lease, in 14 THE LAW OF SOUTH AFRICA § 146 (W.A. Joubert, ed. 1981); A.D.J. Van Rensburg et al., Contract, in 5 THE LAW OF SOUTH AFRICA, supra note 151, para. 221. Positive malperformance is contrasted with negative malperformance, which is the failure to perform contractual obligations in a timely manner. Van Rensburg et al., supra.

152. Van Rensburg et al., supra note 151, at para. 221.

153. Id.

154. See COOPER, supra note 119, at 109 & n.76.

155. See id. at 109-10.
recover consequential damages. Strikingly, the issue of whether fault-based or strict liability is more desirable from a contemporary policy perspective appears to have been all but completely ignored.

In addition to the action in contract, an aggrieved tenant may bring a tort claim against a landlord for damages resulting from a defect in the premises. South African law recognizes that owners and occupiers of land and buildings owe a general obligation to take reasonable care for the safety of persons who lawfully come onto the property. As a general rule, the owner of property is responsible for its condition on the basis that the owner exercises control over the premises. But even when the premises are let, the landlord's obligation to maintain the premises in a safe condition constitutes sufficient control over the premises to subject the owner to tort liability, though the landlord is not in possession of the premises. Thus, the landlord owes to the tenant the duty to keep the premises "as safe for [the purpose of the lease] as reasonable care and skill on the part of any one can make them." Similarly, the landlord owes an obligation of reasonable care to third parties who are lawfully on the premises.

Very few reported cases involve claims for consequential damages arising from breach of the landlord's contractual obligations. The paucity of litigation on this issue may stem from the fact that South African law generally prohibits recovery of nonpecuniary damages in breach of contract claims and instead relegates recovery of so-called general damages—that is, damages for pain and suffering—

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157. See, e.g., Domanaki, supra note 149, at 312:

Strict liability would, no doubt, be harsh on the lessor in certain circumstances, but the exploration of that issue falls outside the scope of this note. Suffice it to say that, in practice, most lessors would be well able to protect themselves, either by the insertion of an appropriate clause in the agreement of lease or by way of insurance.

The tendency to focus on the historical and theoretical accuracy of the rule may be explained in light of the fact that in South Africa, many legal writings from centuries past are still routinely utilized in modern dispute resolution. See Zimmermann, supra note 8, at 4 (noting that here, "legal history and modern legal doctrine have not categorically been 'thought apart'").

158. McKERRON, supra note 129, at 240.

159. Id.

160. See id.; Cape Town Municipality v. Paine 1923 SA 207(A) at 209-10 (S. Afr.).

161. McKERRON, supra note 129, at 241 (quoting Maclenan v. Segar [1917] 2 K.B. 325 at 333 (Eng.)).

162. See id. at 242.
to the province of tort law. Thus, although theoretically a tenant may seek redress for personal injuries under a contract theory, damages will be limited to recovery of pecuniary losses, such as out-of-pocket medical expenses. Moreover, because the tenant is required to make a showing that the landlord was negligent in failing to deliver or maintain the premises in a safe condition, the tenant does not have the benefit of a more favorable standard of liability on the contract claim. Additionally, because the statute of limitations applicable to claims in both contract and tort is three years, the contract theory does not afford a longer period of time in which to sue.

The only benefit of the contract action, from the tenant’s point of view, concerns the defenses the landlord can raise to prevent or reduce the tenant’s recovery. In the contractual setting, the principle of volenti non fit injuria—essentially, assumption of the risk—applies to entirely bar the plaintiff’s recovery. In order to successfully invoke this defense, the landlord must meet the difficult burden of proving that the tenant clearly consented to the risk of injury. In the tort setting, the analysis of the plaintiff’s behavior is more complex. Contributory negligence applies in suits involving tort responsibility predicated on negligence, and therefore, the behavior of the tenant may serve to reduce the percentage of fault allocated to the landlord. Contributory negligence has thus far been restricted to the tort context in South Africa, and is not applied to contractual claims. However, at least some commentators espouse the view that comparative fault should apply to any contractual breach that is predicated on the defendant’s fault. As articulated by one author, the application of comparative

165. Cooper, supra note 119, at 111.
166. See, e.g., Tee v. McIlwraith, 1905 (19) EDC 282 at 289 (S. Afr.); Amin v. Ebrahim, 1926(47) NLR 1 at 7 (S. Afr.).
168. Id. at 656. The Supreme Court of Appeal most recently addressed this issue in Thoroughbred Breeders’ Ass’n v. Price Warehouse 2001 (4) SA 551 (SCA). According to the court, the Apportionment of Damages Act was specifically designed to alter the effect of contributory negligence and the last opportunity rule, both of which were completely unknown to the South African law of torts. Id. Therefore, “the Act was designed to address and correct a particular mischief that was identified as such within the law of delict ... it was confined to that particular mischief; and that the corresponding problem ... might arise within the law of contract was never within the legislature's compass.” Id. at 590.
fault in the contract context “should be . . . all the more necessary in the light of the recent tendency to ‘blend’ contractual and delictual liability.” Thus a plausible argument may be made by a landlord in an appropriate case for the extension of comparative fault principles to temper a tenant's recovery in contract. Such a case has not yet been decided.

Given that courts are reluctant to find sufficient evidence of consent to apply the doctrine volenti non fit injuria to bar a tenant's claim, the tenant's likelihood of success may be greater in an action on the contract. On the other hand, given that the tenant may not recover for nonpecuniary losses for pain and suffering in an action on the contract, and that the standard of care and statute of limitations are identical in both tort and contract, a tenant has little incentive to utilize a contractual theory of recovery when a tort theory is concurrently available.

An additional distinction between tort-based and contractual theories of recovery is the respective availability of each theory to third parties who are not signatories to the lease. An action for breach of contract exists only in favor of the tenant. Therefore, family members or guests of the tenant who are injured due to the landlord's breach of contractual obligations must pursue their claims in tort alone.

The South African approach to landlord liability for defective premises is characterized by rigid maintenance of the line of demarcation between contract and tort. This staunch separation, coupled with the particular attributes of tort and contract under South African law, has led to the marked underutilization of the contract theory of recovery for consequential losses resulting from breach of the landlord's obligation to deliver and maintain the premises in a tenantable condition.

2. Scotland

Scotland's mixed legal system, like that of South Africa, was initially heavily influenced by the Roman-Dutch law as articulated by


170. Boberg, supra note 167, at 713; see also M.M. Loubser, Concurrence of Contract and Delict, 8 STELLENBOSCH L. REV. 113, 137 (1997).


172. Id. at 241-42.
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authorities such as Grotius and Voet. And, as in South Africa, many tenets of the landlord-tenant relationship are governed by an uncodified body of case law and doctrinal writings. A number of statutes designed to impose additional obligations on landlords not recognized under the Scottish common law have also been enacted within the past century.

The Scottish land law imposes an implied obligation on the landlord to deliver the premises to the tenant in a condition reasonably fit for the purpose of the lease. In the case of urban tenancies, fitness for use translates to a requirement that the premises be wind- and water-tight, and in a reasonably habitable or tenantable condition. Moreover, the jurisprudence has further developed the notion of habitability and has tied the concept to human safety. As articulated by the Court of Session of Scotland, the landlord’s obligation “include[s] seeing that there [is] no part of the subjects in a condition likely to endanger the tenant.” If the landlord fails to deliver the premises in a fit condition, the tenant can repudiate the lease or demand a reduction in the rent. Scottish landlords also owe a continuing duty to maintain the premises in a habitable condition throughout the lease term. If the tenant discovers a defect, the landlord is given a reasonable time in which to repair it. If the landlord fails to do so, the tenant is entitled to dissolve the lease or claim an abatement of rent. In either case, the tenant may claim damages.

A unique aspect of the Scottish approach is that the standard of care imposed depends on whether the landlord failed to deliver the premises in a habitable condition, or whether the landlord failed to maintain the premises in a habitable condition. In the former case, the landlord is strictly liable for the tenant’s losses regardless of whether

173. Zimmermann, supra note 8, at 9-10.
174. See id.
175. See Housing (Scotland) Act, 1987, c. 26; Housing (Scotland) Act, 1988, ch. 43; Housing (Scotland) Act, 2001 (A.S.P. 10); The Landlord's Repairing Obligations (Specified Rent) (Scotland), 1988, S.I. 1988/2155.
177. GORDON, supra note 176, at 572.
178. Lamb v Glasgow Dist. Council, (1978) S.L.T. 64, 64 (Scot.).
179. PATON & CAMERON, supra note 176, at 132.
180. GORDON, supra note 176, at 572; PATON & CAMERON, supra note 176, at 131-32.
181. PATON & CAMERON, supra note 176, at 132.
182. Id.
the landlord knew or should have known of the defect causing harm.\textsuperscript{184} In the latter case, however, a landlord's liability has long been considered conditioned upon actual or constructive knowledge of the defect at issue.\textsuperscript{185} In other words, a landlord is liable for harm arising from a later-arising defect only if it is one of which the landlord knew or should have known, and was negligent in failing to repair. The notice requirement for later-arising defects is justified on the ground that the landlord is not in possession of the premises, and thus should not be held liable for defects for which no practical means of discovery exists.\textsuperscript{186}

The common law obligations of landlords in some classes of urban housing have been supplemented by statutes over the course of the last century.\textsuperscript{187} The statutes provide that the contract of lease shall include an implied condition that the house is "in all respects reasonably fit for human habitation," both at the commencement of the tenancy, and during the lease.\textsuperscript{188} Like the common law obligation, the statutory obligation is tied to human safety. A recent Court of Session opinion confirmed the long-held interpretation of the statutory criterion as follows: "If the state of repair of a house is such that by ordinary [use,] damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation."\textsuperscript{189} As under the common law, the landlord is strictly liable for defects that existed at the time of leasing, and only upon notice during the pendency of the lease.\textsuperscript{190} Thus, with respect to the definition of habitability and the standards of care, the common law and statutory obligations mirror each other. The primary benefit of the statutory

\begin{footnotes}
\item[184] 13 THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA § 254 (Sir Thomas Smith et al. eds., 1992).
\item[185] PATON & CAMERON, supra note 176, at 132.
\item[187] GORDON, supra note 176, at 573.
\item[188] Housing (Scotland) Act, 1987, c. 26, sch. 10, ¶ 1(2). The statutory repairing obligations apply to tenancies with a weekly rental of at least £300 per week and a term of less than three years. \textit{id}; The Landlord's Repairing Obligations (Specified Rent) (Scotland), 1988, S.I. 1988/2155. Most residential leases in Scotland are initially made for periods much shorter than three years. Tenants who remain on the premises after the expiration of the initial term usually do so through tacit relocation. In these circumstances, the statutory obligations still apply. See Common Law Tenancy Rights, SHELTER SCOTLAND, http://scotland.shelter.org.uk/getadvice/advice_topics/renting_rights/common_law_tenancies/common_law_tenancy_rights (last updated July 23, 2010).
\item[190] \textit{id}.
\end{footnotes}
scheme is that the obligations it imposes are not waivable,\textsuperscript{191} in contrast to the common law obligations, which can be freely altered by the parties.\textsuperscript{192}

Under the Scottish common law, only the tenant is protected by the landlord's contractual obligations relating to the condition of the premises. Family members and guests of the tenant have no contractual recourse against the landlord for failure to deliver the premises in a condition fit for habitation or to effect necessary repairs.\textsuperscript{193} However, landowners have always owed tort duties of care to others under Scottish law. Initially, the obligation was a general duty of care.\textsuperscript{194} In 1929, the House of Lords imposed on Scotland the English classifications of invitees, licensees, and trespassers, and the varying duties owed to each.\textsuperscript{195} This change was met with sharp criticism and was ultimately overturned with the enactment of special legislation reinstating a standard of reasonable care.\textsuperscript{196} This legislation specifically subjects landlords to the same standard of care as landowners in possession of their premises.\textsuperscript{197} Thus, landlords are liable in tort not only to tenants, but also to any person lawfully on the premises.\textsuperscript{198}

For several reasons, whether a tenant seeks recompense under a tort or contract theory is largely irrelevant. First, the tenant is entitled to recover nonpecuniary losses, including damages for pain and suffering, in contract as well as in tort.\textsuperscript{199} Although contractual

\begin{itemize}
\item \textsuperscript{191} Housing (Scotland) Act 1987, sch. 10, ¶ 1(2). By way of exception, the parties may petition the sheriff to approve the exclusion or modification of statutory obligations, which may be granted if the sheriff is satisfied that the proposed modification is reasonable. \textit{Id.} ¶ 5.
\item \textsuperscript{192} GORDON, \textit{supra} note 176, at 572.
\item \textsuperscript{193} DAVID M. WALKER, \textit{THE LAW OF CONTRACTS AND RELATED OBLIGATIONS IN SCOTLAND} 450 (3d ed. 1995); Cameron v. Young (1907) S.C. 475, 476-77 (Scot.). However, one commentator has opined that the statutory repair obligations protect "not merely tenants but those whom a landlord should reasonably foresee might use the house." DAVID M. WALKER, \textit{THE LAW OF DELICT IN SCOTLAND} 596 (2d ed. 1981) [hereinafter WALKER, DELICT].
\item \textsuperscript{194} WALKER, DELICT, \textit{supra} note 193, at 579.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Occupiers' Liability (Scotland) Act, 1960, 8 & 9 Eliz. 2, c. 30, §§ 1-2.
\item \textsuperscript{197} Id. § 3.
\item \textsuperscript{198} At one time, Scottish jurisprudence held that the tenant was protected only by contract and not by the law of tort. WALKER, DELICT, \textit{supra} note 193, at 596-97; see, e.g., Proctor v. Cowlaws Coop. Soc'y Ltd. (1961) S.L.T. 434, 434. This view was met with some criticism, and today is obsolete, as the Occupiers' Liability (Scotland) Act 1960 protects "any persons who or whose property may from time to time be on the premises." Occupiers' Liability (Scotland) Act, 1960, 8 & 9 Eliz. 2, c. 30, § 3(1).
\item \textsuperscript{199} See Eric Clive & Dale Hutchison, \textit{Breach of Contract, in MIXED LEGAL SYSTEMS}, \textit{supra} note 8, at 184-85; SCOTTISH LAW COMMISSION, \textit{DISCUSSION PAPER ON REMEDIES FOR
recovery for mere mental distress is a relatively new phenomenon in Scottish law, contractual claims for pain and suffering damages associated with personal injury date back over one hundred years.200 In fact, the earliest cases permitting contractual recovery for personal injuries involved either breaches of the landlord’s repair obligations or of the seller’s warranty of fitness.201 Second, the statute of limitations applicable to causes of action for personal injury is three years, regardless of whether the action is founded in contract or in tort.202 Claims for damage to property must be made within five years, again regardless of the theory of liability.203 Thus a tenant gains no distinct advantage by suing either in tort or on the contract, and with regard to the type of damages recoverable or the period of time during which suit may be brought, the contractual claim of the tenant and the tort claim brought by a spouse or on behalf of a child are indistinguishable.

On the other hand, the contractual and tort actions differ significantly in two key respects. First, as discussed above, the landlord is strictly liable in contract for defects existing at the time the leased premises is delivered to the tenant. Thus, the applicable standard of care may significantly affect whether a tenant, on the one hand, or a child or spouse, on the other, may recover for an injury caused by such a defect. Second, the defenses available to the landlord in the contractual realm are quite different from those available in the tort realm. A tenant’s contractual claim is barred entirely by the doctrine of 

volenti non fit injuria. Thus, if a tenant is injured by a defect of which the tenant is aware or which is obvious, recovery is entirely barred.204 More specifically, the prevailing jurisprudential rule is that a tenant who continues to occupy the premises in the presence of a known defect cannot recover unless that continued occupation rests on a belief that repairs will be carried out immediately.205 This rule is predicated

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203. Id. § 6 & sch. 1.
204. PATON & CAMERON, supra note 176, at 132. As stated by one court, "[T]he law does not hold a landlord of house property to be in the position of an insurer of the safety of his tenants.” Mechan v. Watson (1906) S.C. (Sh. Ct.) 28, 30 (Scot.).
205. PATON & CAMERON, supra note 176, at 132.
on the view that a tenant who discovers a dangerous defect in the premises should "repudiate the lease and go to live elsewhere." In contrast, in a tort suit brought by a nontenant, such as a tenant's family member or a guest, the doctrine of contributory negligence applies, and the plaintiff's recovery may be lessened proportionately based upon the failure to take reasonable care to avoid the risk of harm.

By virtue of these differences, the injured tenant has a much stronger claim than a third party such as a family member or roommate. In a case in which the defect involved arose prior to the delivery of the leased premises, a tenant's claim would lie in strict liability, while that of a spouse, child, or guest would lie in negligence alone. Further, regardless of the standard of care involved, the tenant's claim is subject to bar only when the tenant "freely and voluntarily, with full knowledge of the risk he ran, impliedly agreed to incur it." In contrast, a claim by a nontenant is much more likely to be reduced, perhaps to a great extent, by evidence establishing the less onerous standard of failure to take reasonable care.

Perhaps more than in other jurisdictions, the distinction between the tenant's claim and that of a family member is not merely academic. In Scotland, the most litigated claims by tenants concerning the condition of the premises involve asthma contracted either by the tenant or, more frequently, the tenant's children, as a result of dampness and condensation. Any disadvantage to the child's claim

207. Law Reform (Contributory Negligence) Act, 1945, C. 28, § 1(1) (Eng.).
209. Fascinatingly, the assumption of risk defense may apply to the tenant's action even if the tenant sues in tort. This is because the statute specifically authorizing tort liability for landlords contains a provision that appears to retain the defense. Occupier's Liability (Scotland) Act, 1960, 8 & 9 Eliz. 2, c. 30, § 2(3) ("Nothing in the foregoing provisions of this Act shall be held to impose on an occupier any obligation to a person entering on his premises in respect of risks which that person has willingly accepted as his; and any question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes to another a duty to show care."); see Hughes Tutrix, (1982) S.L.T. at 72-74. One commentator suggests, however, that in the tort action, "only clear evidence of voluntary acceptance of specific known risks . . . could be sufficient to make the maxim applicable." Walker, Delict, supra note 193, at 348.
stemming from its classification as tort-based rather than contractual is
difficult to justify.\footnote{\text{211} Although the unavailability of the strict liability theory to children is troublesome, it should be noted that contributory negligence is rarely assessed against children, and the contributory fault of a parent is not applied to the detriment of the child’s action for recovery.\text{Hughes’ Tutrix, (1982) S.L.T. at 74-75; Walker, Delict, supra note 193, at 368.}}

In sum, Scotland, much like South Africa, retains a relatively
staunch line between the contractual and tort claims against landlords
for defective premises. However, whereas in South Africa, the
differences between the theories are not highlighted due to the
infrequency of contractual claims, in Scotland, where contractual
claims are more prevalent, the differences are underscored and thus
more noticeably call for reconsideration.

3. Louisiana

Louisiana enjoys its status as a mixed jurisdiction due to the fact
that while much of its private law originated in French and Spanish
sources, it also has been heavily inundated with American influences.\footnote{\text{212 Vernon Valentine Palmer, Two Worlds in One: The Genesis of Louisiana’s Mixed Legal System, 1803-1812, in Louisiana: Microcosm of a Mixed Jurisdiction 23-39 (Vernon Valentine Palmer ed., 1999).}}

Louisiana’s law of lease is similar to that of the French Civil Code, and
though it was extensively revised in 2005, it continues to reflect many

Unlike most modern jurisdictions (whether civil, common, or mixed), Louisiana does not
employ a special statutory regime under which residential leases are
governed.\footnote{\text{214 This is the case despite the call for such a regime by the academic commentary. See Palmer, supra note 49, at 38.}} Thus the residential lease is governed primarily by the
provisions of the Louisiana Civil Code.\footnote{\text{215 Various ancillary statutes relating to residential leases are found in the Louisiana Revised Statutes, Title 9. See La. Rev. Stat. Ann. §§ 9:3221, 3241, 3251-54, 3258-3259.2, 3260-61 (2010). With one exception discussed infra at notes 230-234 and accompanying text, none of these provisions addresses the landlord’s obligation to maintain the premises.}}

Drawing from the Roman law, the Louisiana Civil Code imposes
significant obligations on the landlord with respect to the initial
suitability and the continued maintenance of leased property. The
landlord is required to deliver the thing in a condition “suitable for the
purpose for which it is leased,” which, in the residential context,
translates to habitation.\textsuperscript{216} The landlord is also required to maintain the habitability of the premises through the making of necessary repairs to the premises,\textsuperscript{217} and warranting against vices or defects which may arise during the pendency of the lease.\textsuperscript{218} The landlord's failure with respect to any of these obligations may entitle the tenant to obtain dissolution of the lease,\textsuperscript{219} as well as to claim actual and consequential damages resulting from a landlord's failure to perform.\textsuperscript{220} A landlord's breach of the repair obligation may also entitle the tenant to demand repairs or to make repairs and deduct the amount expended from the rent provided the repairs were necessary and the amount expended reasonable.\textsuperscript{221} The addition of the "warranty" against vices and defects in Louisiana law, which does not appear in either Scotland or South Africa, adds an additional level of analysis to a landlord's liability.\textsuperscript{222} The landlord's standard of care in warranty is one of strict liability, given that the landlord is liable to the tenant even in the absence of knowledge of the defect or any negligence in failing to discover it.\textsuperscript{223}

Notably, under current law, the parties may not contractually alter the warranty against vices and defects in residential leases if that waiver would insulate the landlord from liability for defects that "seriously affect health or safety" or in cases involving physical injury.\textsuperscript{224} The statutory restriction against waiver is new and was added

\begin{itemize}
\item \textsuperscript{216} LA. CIV. CODE ANN. art. 2684 (2010).
\item \textsuperscript{217} Id. art. 2691.
\item \textsuperscript{218} Id. art. 2696.
\item \textsuperscript{219} Id. art. 2719; GEORGE M. ARMSTRONG, LOUISIANA LANDLORD AND TENANT LAW § 7.1 (1992).
\item \textsuperscript{220} LA. CIV. CODE ANN. art. 1994; ARMSTRONG, supra note 219, § 7.22.
\item \textsuperscript{221} LA. CIV. CODE ANN. art. 2694; ARMSTRONG, supra note 219, § 7.22.
\item \textsuperscript{222} The warranty derives immediately from the French Civil Code, which is itself drawn from the writings of Pothier. John C. Morris, Jr., Comment, Lessor's Liability for Personal Injuries, 7 LA. L. REV. 406, 407 (1947). The French Civil Code provides:
\begin{quote}
A warranty is due to the tenant for all vices or defects of the thing leased which prevent use of it, although the lessor did not know of them at the time of the lease. Where any loss results to the lessee from those vices or defects, the lessor is obliged to indemnify him.
\end{quote}
\begin{itemize}
\item CODE CIVIL [C. CIV.] art. 1721 (Fr.); see also POTHIER, supra note 119, §§ 109-120. However, the imposition of strict liability on the landlord for consequential loss does not necessarily follow from Pothier's treatise. POTHIER, supra note 119, §§ 118-120. Some commentators have observed that the strict liability standard adopted in the French Civil Code represents a departure from the Roman law requirement of fault for consequential loss. See Cohn, supra note 10, at 381.
\item \textsuperscript{223} LA. CIV. CODE ANN. art. 2697 ("The warranty ... also encompasses vices or defects that are not known to the lessor."); see, e.g., Freeman v. Julia Place Ltd. Partners, 95-0243, p. 7 (La. App. 4 Cir. 12/10/95), 663 So. 2d 515, 519.
\item \textsuperscript{224} LA. CIV. CODE ANN. arts. 2004(2), 2699(2)-(3).
\end{itemize}
\end{itemize}
during the 2005 overhaul of the law of lease in recognition of the fact that most Western jurisdictions, whether common law or civilian, prohibit waivers of obligations relating to habitability in residential leases.225 Prior to the 2005 revision, Louisiana courts were reluctant to uphold waivers of the landlord's repair obligations.226 Although restrictions on contractual waivers are contrary to the general principle of contractual freedom, Louisiana courts recognized that residential tenants have relatively little bargaining power and are therefore deserving of protection from the possibility of an unfair imposition of a contractual waiver of their rights.227 Another effect of the 2005 revision was the extension of contractual protection in warranty beyond the confines of privity to "all persons who reside in the premises in accordance with the lease."228 This new provision clearly extends the protection of contractual privity to family members as well as roommates who are not related by blood or marriage.229

Although guests of the tenant do not receive the benefit of the contractual scheme, landowners have always owed tort obligations to protect the public from harm resulting from dangerous conditions on the premises.230 This obligation stems not from the so-called "general clause," according to which everyone is liable for whatever damage is caused by fault, but instead comprises a special type of tort liability governing damage caused by the ruin of a building.231 Under the applicable provisions of law, the owner of a building is liable for any "damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction."232

This liability was at one time strict in character, but recent tort reform initiatives have reduced the standard of care in tort to one of negligence, so that now an owner is only liable for damages which could have been prevented by the exercise of reasonable care, but were not.233 As a result, under current law, the landlord's liability to the
tenant and others residing at the premises lies in strict liability, while liability to others lawfully on the premises lies in negligence only.\textsuperscript{234} The distinction between a landlord's liability in contract and in tort does not end with the standard of care, however. Louisiana retains a bifurcated limitation of claims scheme under which contractual actions are subject to a limitations period of ten years, while tort claims are subject to a mere one year.\textsuperscript{235}

The line between contract and tort in Louisiana is not so bright, however; the intermingling of tort and contract concepts is seen in several important instances. In the strict contractual setting, that is, when a tenant demands dissolution of a lease or economic damages for failure to effect repairs, the meaning of a "defect" is tied to the "cause of the contract."\textsuperscript{236} In other words, if the defect prevents the leased premises from being used as intended by the parties, then the defect is actionable. When a tenant seeks contractual recovery for personal injuries, however, dangerousness and the foreseeability of injury have been factored in to determine whether the cause of the injury was in fact a compensable "defect."\textsuperscript{237} Here, the very meaning of the term "defect" is derived from the law of tort.\textsuperscript{238} Thus, whether a tenant pursues a personal injury claim under a contract or tort theory of recovery, the central question is whether the defect at issue presents an unreasonable risk of harm that can be anticipated through normal use of the premises.\textsuperscript{239} Occasionally, courts even employ the doctrine of res

\begin{footnotesize}
\textsuperscript{234} Driscoll v. Provenzano, 01-1115, p.1 (La. 6/1/01); 793 So. 2d 201, 201 (Calogero, C.J., concurring); Barnes v. Riverwood Apartments P'ship, 38,331, pp. 6-7 (La. App. 2 Cir. 4/7/04); 870 So. 2d 490, 494-95 (finding that tort reform legislation reducing tort standard of care to negligence did not impact strict liability standard of care applicable to landlords in contract).
\textsuperscript{235} Compare LA. CIV. CODE ANN. art. 3499 (applying ten-year prescriptive period to personal actions, including contracts) with art. 3492 (applying one-year prescriptive period to tort actions). Louisiana's prescription regime has been criticized as both complex and inequitable. See Benjamin West Janke, The Failure of Louisiana's Bifurcated Liberative Prescription Regime, 54 LOY. L. REV. 620, 672 (2008).
\textsuperscript{236} PALMER, supra note 122, § 3.17.
\textsuperscript{237} Id.; ARMSTRONG, supra note 219, § 8.21.
\textsuperscript{238} PALMER, supra note 122, § 3.18.
\textsuperscript{239} See, e.g., Johnson v. Bellefonte Ins. Co., 449 So. 2d 1134, 1337-38 (La.App. 3 Cir. 1984) (finding lessor's liability for vices and defects analyzed in terms of negligence because the result is "the same"); see also Barnes, 38,331 at p. 5 n.3; 870 So. 2d at 494 n.3; Freeman v. Julia Place Ltd. Partners, 95-0243, p. 7 (La. App. 4 Cir. 10/26/95); 663 So. 2d 515, 519; Zanders v. Lambert, 514 So. 2d 617, 619 (La. App. 4 Cir. 1987); Ivey v. Hou. Auth. of Mansfield, 514 So. 2d 661, 663-64 (La.App. 2 Cir. 1987); Wood v. Cambridge Mut. Fire Ins. Co., 486 So. 2d 1129, 1132 (La. App. 2 Cir. 1986); Gallagher v. Favrot, 499 So. 2d 1205, 1207-08 (La. App. 5 Cir. 1986).
\end{footnotesize}
*ipsa loquitur* in the contract setting to find a presumption of defectiveness that must be rebutted by the landlord.240

Recovery for breach of the landlord's tort obligations clearly extends to nonpecuniary damages such as those for pain and suffering.241 And, in the contract setting, courts have awarded nonpecuniary damages stemming from a tenant's anxiety, worry, and loss of time occasioned by the defect.242 Whether personal injury damages are recoverable in the contract setting is less clear. The jurisprudence tends to deal with personal injuries in the lease setting under the rubric of tort.243 However, many of the cases deal with personal injuries to tenants' family members, who lack contractual privity with the landlord, and before the 2005 revisions could not recover on a breach of warranty theory. Thus, the past tendency of the courts to apply a tort theory to third-party claims is not necessarily indicative of any reluctance to award nonpecuniary damages on the contract in the proper case. Even in those cases involving physical injury to the tenant rather than a third party, the courts’ utilization of a tort theory does not necessarily foreclose the possibility of contractual recovery in this context, since the tenant has both tort and contract theories at his disposal.

The Louisiana Civil Code generally restricts recovery in contract for nonpecuniary loss to a small subset of contracts. Nonpecuniary damages are allowed when the contract, due to its nature or the intent of the parties, is intended to "gratify a nonpecuniary interest" of the obligee so long as the obligor either knew or should have known of that interest.244 The Louisiana Supreme Court has made clear that the

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240. See, e.g., Keller v. Kelly, 378 So. 2d 1006, 1008 (La. App. 4 Cir. 1979), *writ denied*, 380 So. 2d 624 (La. 1980).
241. See, e.g., Davis v. Hochfelder, 95 So. 598, 599 (La. 1923) (delict); Breen v. Walters, 91 So. 50, 52-53 (La. 1922) (delict); Badie v. Columbia Brewing Co., 77 So. 768, 771 (La. 1918) (delict); Boutte v New Orleans Terminal Co., 72 So. 513, 514-16 (La. 1916) (delict); Warren v. Metro. Life Ins. Co., 190 So. 855, 858 (La.App. 2 Cir. 1939) (delict).
243. See, e.g., Davis, 95 So. at 599; Breen, 91 So. at 52-53; Badie, 77 So. at 771; Boutte, 72 So. at 514-16; Warren, 190 So. at 858.
244. LA. CIV. CODE ANN. art. 1998 (2010) provides:

Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss. Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.
nonpecuniary interest of the obligee must be "significant." Prototypical examples of this type of contract include those for the tailoring of a wedding dress, funerary services, and nursing care services. One line of cases bearing directly on residential tenancy involves contracts for the sale or repair of homes. In this line of decisions, Louisiana courts have awarded nonpecuniary damages to litigants who successfully allege that the contract for sale or repair was made in order to fulfill the "American Dream" of home ownership, or the home was characterized as the owner's "dream home." Applying these decisions by analogy, in the proper case, a residential tenant may seek nonpecuniary damages for emotional distress resulting from the landlord's breach of his contractual obligations of maintenance. One Louisiana court of appeal has gone so far as to suggest that all residential leases involve nonpecuniary aspects, stating: "A lease for residential purposes includes, as one of its objects, the enjoyment of habitable living quarters, arguably a nonpecuniary interest." The sale and repair line of decisions does not, however, address whether pain and suffering damages resulting from personal injury are awardable on a contract theory. Louisiana's experience with personal injury damages in the products liability setting is instructive here. Under early products liability jurisprudence, a buyer injured by a defective product was entitled to sue for damages in both tort and contract. Later cases upheld contractual awards for

246. Lewis v. Holmes, 34 So. 66, 68 (La. 1903).
249. See, e.g., Heath v. Brandon Homes, Inc., 36,184 (La. App. 2 Cir. 8/14/02); 825 So. 2d 1262; Austin Homes, Inc. v. Thibodeaux, 01-1282 (La. App. 3 Cir. 5/8/02); 821 So. 2d 10; Thomas v. Desire Cmty. Hous. Corp., 98-2097 (La. App. 4 Cir. 7/19/00); 773 So. 2d 755; Mayerhofer v. Three R's Inc., 597 So. 2d 151 (La. App. 3 Cir. 1992); Ditcharo v. Stepanek, 538 So. 2d 309 (La. App. 5 Cir. 1989).
250. However, in at least one case, a Louisiana court has refused to allow a tenant suing on a breach of contract theory to recover mental anguish damages in the absence of physical injury. Gele v. Markey, 379 So. 2d 763, 764-65 (La. App. 4 Cir. 1979).
251. Ganheart v. Exec. House Apartments, 95-1278 (La. App. 4 Cir. 2/15/96); 671 So. 2d 525.
253. See id. at 312. The Louisiana Supreme Court eventually held that a seller's breach of contractual obligations relating to defective products gives rise to tort and contractual damages. Id. at 319 (rehearing).
nonpecuniary losses due to the concurrence of tort and contractual liability in the products liability context.\textsuperscript{254} Under current law, recovery for physical injuries is made solely under the provisions of the Louisiana Products Liability Act (LPLA); recovery for economic loss may only be sought on a contractual theory.\textsuperscript{255} No statutory regime similar to the Louisiana Products Liability Act governs defective premises, and thus concurrence of tort and contract claims is still permitted. Therefore, the pre-LPLA jurisprudence permitting recovery for nonpecuniary losses in contractual actions involving significant tort aspects, such as personal injuries, could readily be applied to the lease context by analogy.

The availability of fault-based defenses to the tenant's claim in contract further muddles the line between contract and tort. The Louisiana Civil Code provides for the reduction of the tenant's recovery in the event that the tenant is injured by a defect that was known to the tenant but the tenant failed to report to the landlord.\textsuperscript{256} However, Louisiana courts have long looked beyond the statutory notice requirement to tort principles to apply comparative fault to a tenant's claim.\textsuperscript{257} In so doing, courts have reduced a tenant's recovery upon a showing that the tenant knew of the defect, that the premises could have been used safely with the exercise of reasonable care, and that the tenant failed to use such reasonable care.\textsuperscript{258} The negligence or fault of the tenant is not an absolute bar to the tenant's recovery, but serves to decrease the tenant's recovery proportionally in relation to the tenant's own fault.\textsuperscript{259} Since 1984, the Louisiana Civil Code has specifically provided for the application of comparative negligence in the contractual realm, through a provision stating, "If the obligee's negligence contributes to the obligor's failure to perform, the damages are reduced in proportion to that negligence."\textsuperscript{260}

\begin{thebibliography}{10}
\bibitem{255} L.A. REV. STAT. ANN. \S 9:2800.52 (2010).
\bibitem{256} L.A.CIV.CODE ANN. art. 2697 (2010).
\bibitem{257} McGinty v. Pesson, 96-850, pp. 7-8 (La. App. 3 Cir. 12/11/96); 685 So. 2d 541, 545.
\bibitem{258} Id.
\bibitem{260} L.A. CIV.CODE ANN. art. 2003.
\end{thebibliography}
for “any action for damages where a person suffers injury, death, or loss,” providing additional legitimacy to the defective premises jurisprudence.261

Finally, the tort and contract aspects of the landlord’s responsibility for the condition of the premises have been conflated in cases involving contractual waivers of landlord liability. Before introduction of the tort reform initiatives that relaxed the landlord’s tort liability to a negligence standard, special statutory protections were enacted to protect landlords from strict liability in tort.262 The relevant legislation provided that if the tenant contractually assumed responsibility for the condition of the premises, the landlord could be held liable only in the event of negligence.263 Although this legislation was initially designed to shield landlords from liability in tort, the Louisiana Supreme Court applied it in an unanticipated manner to contractual liability as well.264 When the landlord’s tort standard of care was reduced to negligence in the 1990s, this special legislation was not repealed, thus preserving it for continued application in the contractual realm. However, the 2005 revisions to the law of lease introduced a scheme governing waivers of contractual liability without repealing or revising the existing legislation.265 As a result, conflicting

261. Id. art. 2323. Some debate exists regarding the proper application of article 2323. The article appears in Title V of Book III of the Civil Code, entitled “Obligations Arising Without Agreement.” The article’s placement would appear to limit its application to the realm of tort. However, the plain language of the article extends its reach to “any action” for damages, presumably including contractual actions. The effect of article 2323 in the redhibition context is currently unsettled. See Aucoin v. S. Quality Homes, LLC, 07-1014, pp. 10-11 & n.12 (La. 2/26/08); 984 So. 2d 685, 693 & n.12 (declining to resolve the debate).


265. See LA. CIV. CODE ANN. art. 2699 cmt. (h). Comment (h) attempts to address the competing legislation, stating as follows:

Civil Code Article 2699 (Rev. 2004) deals with the contractual obligations between the parties rather than with the delictual or quasi-delictual obligations that one party may incur vis a vis the other party, or vis a vis third parties. Consequently, Civil Code Article 2699 (Rev. 2004) does not supersede the provisions of R.S. 9:3221 which provides for delictual or quasi-delictual obligations incurred as a result of injury occurring in the leased premises.

Id. However, the accuracy of this comment is highly questionable. R.S. 9:3221 is broadly worded, referencing “injury caused by any defect,” so that it appears to encompass both contract and tort liability. LA. REV. STAT. ANN. § 9:3221 (2010). Relying on this broad language, the Louisiana Supreme Court has applied R.S. 9:3221 to the contractual setting. See Tassin 396 So. 2d at 1264. Moreover, when article 2699 was introduced in 2005, the language “Notwithstanding the provisions of Louisiana Civil Code 2699” was added to R.S.
legislation now prohibits such waivers in cases involving physical injury or defects that "seriously affect health or safety," and yet simultaneously protects landlords under such waivers so long as they do not act negligently.\textsuperscript{266}

In summary, Louisiana's contractual approach to landlord liability for defective premises stands out as unique among the jurisdictions studied here. The contractual approach is at once both different from the tort model and yet infiltrated by tort concepts. In cases involving the recovery of personal injury damages, under both theories of recovery, the definition of actionable "defects" is identical, principles of comparative fault apply, and nonpecuniary losses are compensable. However, because the standard of liability and prescriptive period are so much more favorable to the tenant in contract than in tort, it cannot be said that in Louisiana the two theories are entirely converging. On the other hand, the disparity between the theories has been strongly tempered by the expansion of the contractual protections to include tenants' family members and roommates under the protection of contract.

IV. RECASTING AS CONTORT

Parts II and III of this Article traced the common law's "bifurcated" approach to landlord liability for defective premises and explored the "concurrent" approaches employed in South Africa, Scotland, and Louisiana. This Part now examines the comparative lessons that can be derived from the similarities and differences observed. First, although the common law and civil law regimes studied here employ different frameworks for assessing landlord liability, the approaches are highly consistent. In the jurisdictions studied here, a tort-based action is available both to tenants and tenants' family members and guests who are injured by a landlord's negligence in failing to maintain the premises in a safe condition. And, in the jurisdictions studied here, a contract-based action is available to tenants who wish to repudiate their lease and demand a reduction in their rent, reimbursement for repairs, or other economic relief. Thus, although the gap separating \textit{caveat lessee} from dual liability in contract and in tort was once wide, the common law's recent reformation of landlord-tenant law has done much to bridge the chasm.

\textsuperscript{9} 9:3221, thus evidencing an intent for the revised statute to maintain undisturbed despite the addition of new waiver requirements in the civil code. 2004 La. Acts. 821.

Second, the extension of the contract-based action to consequential losses has been problematic in all jurisdictions. In the United States, the desire to maintain the separation between contract and tort has resulted in an artificial "lopping off" of all consequential damages in contract. And yet, the concurrent approach espoused by the civil law suffers from its own disadvantages. Specifically, contractual privity, coupled with the distinctions between the two theories of recovery, produces inequities between tenants, who are signatories to the lease, and nontenants, who are not parties to the contract. Additionally, categorical rules governing the role of fault in contract exacerbate the disparity between the two causes of action. Finally, the availability of nonpecuniary damages is complicated by the often strict rules governing awards of such damages in contract.

These observations lead to the conclusion that landlord liability for defective premises is best characterized as a hybrid liability consisting of elements of both contract and tort. Recognizing the inherently mixed nature of landlord liability for defective premises, and recasting the landlord's obligation as contort, would eliminate many injustices currently inherent in both the common law's bifurcated approach and the civilian approach of concurrence. Moreover, a conceptually clearer cause of action would emerge.

A. The Notion of Contort

Although the distinction between contract and tort may seem elementary at first blush, it has been observed that "[t]he determination of the borderline between contract and delict is among the most difficult of legal problems."267 Many celebrated works treating tort law at the macro level have explored, as an initial question, the line of demarcation between the two types of liability.268 Numerous grounds for distinction have been advanced—some superficial, others less so. At the most basic level, contract and tort differ in that contract involves the act of human will to be bound by certain legal consequences, whereas tort imposes legal consequences regardless of an actor's will to be bound in such a manner.269 A correlate of this

precept is the closely related notion that obligations in tort are owed by an actor to the world at large, whereas contractual obligations are generally owed only to those in whose favor they have been voluntarily assumed.270

The distinction between contract and tort blurs, however, when an actor breaches a voluntarily assumed contractual duty that is identical or closely related to one otherwise owed to the world at large regardless of the existence of contract.271 These difficult cases arise with such frequency that modern scholars have coined new terms, including the term “contort,” to describe the phenomena.272 The terminology may be academic, but the consequences are not.273 The distinction between obligations arising from tort and those arising from contract are numerous, and significant. Characterizing a claim as arising from either tort or contract can affect the standard of liability, available defenses, and the type and scope of available damages, among many other important substantive and procedural consequences of classification.274 In cases involving contorts, a party often vies for the classification whose attributes most strongly favor his case, or may

270. See Litvinoff, supra note 14, at 21. There are, of course, limited exceptions to this rule. For example, in both civil and common law jurisdictions, contractual obligations can be assumed for the benefit of third parties, in the form of a third-party beneficiary contract or stipulation pour autrui. See ZWEIGERT & KÖTZ, supra note 9, at 145-50 (referencing BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 328(1) and Code civil [C. civ.] art. 1121 (Fr.)); WILLISTON ON CONTRACTS § 37: 1 (4th ed. 2010) (discussing doctrine of third-party beneficiaries in the United States); ROBERT MERKIN, PRIVITY OF CONTRACT, Preface (2000) (addressing the effect of the Contracts (Rights of Third Parties) Act 1999 on the doctrine of privity in England).

271. Indeed, scholars of the civil and common law tradition alike have long studied the boundary between contract and tort in these difficult cases, with the overwhelming conclusion that the lines of division are illusory, arbitrary, and largely unsatisfactory. See generally WILLIAM LLOYD PROSSER, The Borderland of Tort and Contract, in SELECTED TOPICS ON THE LAW OF TORTS 380 (1954).

272. GILMORE, supra note 14, at 95-98; Litvinoff, supra note 14, at 43. Another term, “uncontract,” has been coined to describe contractual liability that arises in the absence of express agreement. Peter Linzer, Uncontracts: Context, Contorts and the Relational Approach, 1988 ANN. SURV. AM. L. 139, 139-41 (1988). The landlord’s contractual liability for defective premises can, in the usual case, be considered uncontractual in nature, given that the obligation is implied, rather than expressly negotiated.

273. PROSSER, supra note 271, at 422.

274. See Galligan, supra note 98, at 476-81. In addition to the differing consequences discussed here, others include the capacity or discernment required to obligate oneself, the potential for vicarious liability, the availability of specific performance, applicable burdens of proof, and such procedural issues as jurisdiction and venue. See KEETON ET AL., supra note 27, at 665-76; Tony Weir, Complex Liabilities, in INTERNATIONAL ENCYCLOPEDIA, supra note 268, ch. 12, at 11-45; Galligan, supra note 98, at 476-81; Litvinoff, supra note 14, at 7-16; Tunc, supra note 268, at 27.
even seek a combination of attributes by arguing that he should be permitted to sue under both theories.

The problem of whether a litigant should be able to cumulate theories of recovery and thus gain the “best of both worlds” is addressed differently across jurisdictional lines. In France, for example, the doctrine of *non-cumul* operates to require a litigant to bring his claim in contract where a contractual theory of recovery exists, thus barring any claim in tort. In the United States, the approach is less clear. Generally, courts permit litigants to “elect” remedies when an issue of procedural law is at stake. Even when substantive law is at stake, but the claim involves damages to property or pecuniary interests, litigants are generally permitted to choose the theory of recovery. However, claims involving personal injury are, by and large, relegated to tort, while claims involving pure economic loss are generally relegated to contract.

Each of the various approaches to cumulation has its own limitations and pitfalls, in response to which some wider-ranging solutions have been advanced. One proposed solution to the problem of contort is a complete merger or unification of tort and contractual liability. The historical dichotomy of contract versus tort has come to be viewed in some ways as an outdated, formalistic means of understanding law. Also, because the distinctions between contract and tort often vary from jurisdiction to jurisdiction in an apparently arbitrary manner, it is difficult to justify the continuous maintenance of separate categories. This apparently extreme approach has not been well-received, primarily because of the recognition that contract and tort remain fundamentally different in some important respects, particularly with regard to the values that each realm seeks to advance.

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275. For a comprehensive review of approaches taken by numerous jurisdictions in both the common law and civil law traditions, see Loubser, *supra* note 170.
278. *Id.*
279. *Id.* at 666-67.
281. See *id* at 123-25.
283. See Weir, *supra* note 274, ch. 12 at4-5.
economic relationships and to protect the economic expectations of contracting parties, tort law seeks primarily to prevent individuals from causing injury to others and to compensate victims of unlawful harm.286

A less radical approach than the total merger of contract and tort is the unification of the legal regimes that govern their litigation. This approach is favored by scholars who recognize the theoretical distinction between the categories of contract and tort, but still advocate a merging of the rules governing the two theories in order to prevent the anomalous, inefficient, and sometimes unjust outcomes observed in claims involving contorts.287 Several jurisdictions have attempted to close entirely the divide between contract and tort. Czechoslovakia, for example, adopted a uniform regime for tortious and contractual liability in 1950.288 Also in Senegal, contract and tort are treated under a common scheme.289 Most recently, France has begun the process of reforming its law of obligations with an eye toward unifying treatment of contractual and extra-contractual liability.290

In a more limited fashion, the Civil Code of Quebec provides that the same types and extent of damages are recoverable whether liability lies in contract or in tort.291 Additionally, numerous jurisdictions today provide for uniform periods of limitation governing claims in contract and tort.292 A recent example of such unification hails from France, where 2008 reforms unified prescriptive periods for contractual and extra-contractual liability.293 Under the revisions, a general five-year prescriptive period applies to all personal actions, whether based in contract or in tort, while a ten-year period applies to all actions in

287. See Keeton et al., supra note 27, at 655; Litvinoff, supra note 14, at 48; Loubser, supra note 170, at 114-18.
288. See Tunc, supra note 268, at 12-14, 29.
289. See id. at 29.
291. Civil Code of Québec, S.Q. 1991, c. 64, arts. 1457, 1458, 2922 (Can.).
292. See Janke, supra note 235, at 657-64 (detailing the uniform prescriptive periods of the Republic of Seychelles, the Czech Republic, Quebec, Iraq, Kazakhstan, the Netherlands, Russia, Scotland, South Africa, and Switzerland, among other jurisdictions).
compensation of bodily injury, again regardless of the source of liability.\textsuperscript{294} France's act of abandoning all distinctions between contract and tort in the context of prescription has been heralded as a "step towards European harmonization.\textsuperscript{295}

The sweeping approach of unification is the exception rather than the rule, however. More commonly, contorts are addressed on a case-by-case basis. Either legislation or jurisprudence will create a scheme for a specific problem in contort to downplay the friction resulting from its location at the seam of these two separate spheres of the law.\textsuperscript{296} For example, in the realm of legal malpractice, where the claim of an aggrieved client is tied both to the contractual relationship of the parties and the attorney's failure to exercise due care, American courts have adopted uniform rules that do not depend on doctrinal classification to govern problematic issues such as the appropriate statute of limitations and the timing of accrual.\textsuperscript{297} Following this national trend, Louisiana has adopted a statutory prescriptive period for legal malpractice actions that is entirely divorced from the general limitations periods applicable to tort and contract claims.\textsuperscript{298} A similar unified scheme has been adopted for medical malpractice actions.\textsuperscript{299} In some jurisdictions products liability is similarly treated in order to reduce the friction between contract and tort.\textsuperscript{300} The distinction between contract and tort is also frequently set aside in harmonization efforts, such as the European directive of 1985 on product liability, which provides solutions in general terms and avoids references to contract or tort.\textsuperscript{301} Such ad hoc unification of the regimes applicable to

\begin{itemize}
\item \textsuperscript{294} CODE CIVIL [C. civ.] arts. 2224, 2226 (Fr.).
\item \textsuperscript{295} Moréteau, supra note 293, at 266.
\item \textsuperscript{296} See Tom Hadden, Contract, Tort and Crime: The Forms of Legal Thought, 87 L. Q. REV. 240, 269-70 (1971); Tunc, supra note 268, at 22, 25-29. Sometimes, the particular scheme that is fashioned consists of a blend of contract and tort principles; in other cases, the chosen scheme reflects a preference for one regime over another. See Galligan, supra note 98, at 502. Thus, for example, in England and the United States, medical malpractice is often treated as tort even though the patient and the doctor may enjoy a contractual relationship. See PS. Atiyah, Medical Malpractice and the Contract/Tort Boundary, 49 LAW & CONTEMP. PROBS. 287, 287 (1986).
\item \textsuperscript{297} See Jonathan M. Albano, Contorts: Patrolling the Borderland of Contract and Tort in Legal Malpractice Actions, 22 B.C. L. REV. 545 (1981).
\item \textsuperscript{298} L.A. REV. STAT. ANN. § 9:5605 (2010); see Galligan, supra note 98, at 477-78 (noting that accounting malpractice is treated similarly in Louisiana).
\item \textsuperscript{299} L.A. REV. STAT. ANN. § 9:5628; see Litvinoff, supra note 14, at 34-35 (noting that the shortened prescriptive period (one to three years) is consistent with contract, but statutory caps are consistent with contract).
\item \textsuperscript{300} See, e.g., L.A. REV. STAT. ANN. § 9:2800.51 to .60; CODE CIVIL [C. civ.] arts. 1386-1 to -18 (Fr.).
\item \textsuperscript{301} Moréteau, supra note 284, at 67.
\end{itemize}
individual contorts may be the most direct, efficient, and politically viable solution to the overlap of contract and tort. As is the case for legal malpractice, medical malpractice, and products liability, the term “contort” properly characterizes landlord liability for defective premises due to its placement at the intersection of contract and tort. An expedient remedy for the difficulties inherent in the landlord’s dual and overlapping obligations, then, is unification of the two disparate regimes.

B. Landlord Liability as Contort

In many ways, contract is a poor home for the landlord’s liability for defective premises, even where tenants seek traditional contractual relief, such as damages for economic loss in the form of rent abatement and reimbursement for repairs. The contract model is even less appropriate when a landlord’s breach of the obligation of habitability results in personal injury or property damage to the tenant. The regulatory nature of this implied, often mandatory obligation gives it a tort-like character, as does its tie to the tenant’s physical comfort and safety.

Whenever the law implies contractual obligations in a regulatory manner to protect one party from the abuses of another regardless of, or even in spite of, the implied will of the parties, the line between contract and tort blurs. This is the case with the residential landlord’s obligation to maintain the premises. Although the parties intend to voluntarily bind themselves to the contract of lease, it cannot be credibly asserted that the implied warranty of habitability parallels the subjective intention of the landlord. Rather, the law implies the warranty of habitability in order to regulate the landlord’s behavior—not in order to fulfill the parties’ subjective intent. This is particularly true in the United States, where the implied warranty of habitability

302. See Smith, supra note 38, at 516-18 (“The warranty concept might legitimately have been applied to latent defects in existence when the lease was entered into (or possession transferred), but could not apply to a duty to maintain the premises arising thereafter. The term ‘warranty’ signifies a person’s representation of a state of facts that exist at the time the representation is made, and clearly is not synonymous with a promise that a person will do something in the future . . . .”).

303. Indeed, in the United States, when cases involving personal injuries and property damage resulting from breaches of the warranty of habitability began winding their way through the courts, several commentators remarked on the difficulties involved and proposed solutions. See, e.g., Browder, supra note 25, at 99; Michael J. Davis & Phillip E. DeLaTorre, A Fresh Look at Premises Liability as Affected by the Warranty of Habitability, 59 WASH. L. REV. 141 (1984); Love, supra note 18, at 112-58.

304. See Tunc, supra note 268, at 25.
was implemented as a device to protect residential tenants—consumers with little bargaining power who are perceived to be in need of and deserving of protection.\textsuperscript{305} The fact that the warranty does not validate an implied understanding between landlords and tenants, but mandates minimum housing standards as a form of consumer protection, smacks not of contract, but of tort.

The existence of an implied contractual term is, of course, not enough to push the landlord’s obligation to maintain the premises from the contractual realm completely into the realm of tort. Implied terms, or \textit{suppletive} terms, as they are known in the civil law, abound in the realm of contract. Nor is the protective nature of the warranty of habitability and its civil law cousins determinative. The very terms “warranty” and “guaranty,” which are frequently employed in strictly contractual relations, derive from a term that means “protection” (the German \textit{gewähren}).\textsuperscript{306} But the landlord’s obligation to maintain the premises has evolved into more than a mere suppletive term of contract. The law heavily restricts the parties’ ability to waive the implied obligations of the landlord relating to the condition of the premises in Louisiana, Scotland, and the common law jurisdictions of the United States. These restrictions on contractual waivers serve a regulatory function in that they are predicated on the belief that tenants lack sufficient bargaining power to protect themselves contractually and thus ought to be protected by the state.\textsuperscript{307} In South Africa, the constitutional right to adequate housing serves a similar function.\textsuperscript{308}

The hybrid nature of landlord liability for defective premises does not stem only from the fact that the contractual obligation has its source in tort-like consumer protection regulation. Landlord liability

\begin{enumerate}
\item\textsuperscript{305} In fact, the implied warranty of habitability was first imported into American law specifically to create a right in the tenant to withhold rent or to avoid the lease completely in the event the housing was shown to be substandard. See Smith, supra note 38, at 506. As discussed above in Part II, \textit{infra}, these remedies were not available under the common law, as a direct result of the doctrine of independent covenants, even when the landlord specifically assumed a contractual obligation to maintain the premises in good repair.
\item\textsuperscript{308} The South African Committee on Economic, Social, and Cultural rights has noted: “Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well.” \textit{Mpane v. Sithole} 2007 (6) SA 578 (W) at 593 (internal quotation marks omitted).
\end{enumerate}
landlord's responsibility is underscored by the United States' experience with its initial adoption. Adoption of a contract model permitted American courts to construe the obligations of the landlord and the tenant as mutually dependent, which provided a mechanism by which an aggrieved tenant could either repudiate the lease, suspend payment of rent, or demand specific performance. These traditional contract remedies were viewed as indispensable to achieve the socially desirable goal of tenant protection and safety.

In addition, the tort obligations of landlords in all of the studied jurisdictions indirectly tie back to this contractual responsibility. In both the civil law and the common law, tort liability for defective premises is predicated upon control—the ability to take action to prevent unreasonable risks of harm. In the lease context, the landlord's contractual duty relating to the condition of the premises maintains the requisite control to justify imposition of tort liability. In the United States particularly, widespread recognition of the implied warranty of habitability caused tort immunities for landlords to give way entirely to a new requirement of reasonable care. Thus, the very existence of the contractual obligation, which provides the requisite control, gives rise to the obligation in tort.

C. Benefits of Recasting as Contort

Recasting landlord liability for defective premises as a single, hybrid liability in contort touches upon every aspect of an injured party's claim, from the initial question of who can sue, to the determination of the existence and extent of the landlord's liability, to the ultimate determination of damages. This Part explores the impact that recasting would have on premises liability law in the American common law as well as in civilian jurisdictions.

309. See Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir. 1970); Smith, supra note 38, at 505-34.
310. See Smith, supra note 38, at 515.
311. See discussion supra Parts II.A., III.A.
312. See Davis & DeLaTorre, supra note 303, at 154-60. The element of "control" has become a factor in the question of whether the landlord has exercised reasonable care. Id. at 157.
1. Breaking the Confines of Privity

The most cogent ground for recasting landlord liability for defective premises as contort is the fact that continued demarcation between contract and tort theories of liability results in disparate treatment for tenants, who are signatories to the lease and protected by contract, and nontenants, who are nonsignatories to the lease and thus protected only in tort. Lawmakers in jurisdictions where separate tort and contract remedies lie should consider whether it makes sense to provide varying levels of protection to the tenant, family members, and guests.

In many contexts, providing a signatory to a contract with greater protection than that afforded to the world at large is justified. Contracting parties voluntarily subject themselves to obligations that, although similar to obligations owed to the general public, are unique. In the context of residential lease, however, the imposition of different schemes of liability in contract versus tort becomes difficult to defend. The landlord, aware that the premises are let for the purpose of a dwelling, expects the premises to be occupied by not only the tenant but also the tenant’s family and occasionally even guests. In some circumstances, the landlord may even derive economic benefit from the tenant’s family members. In dual-earner households, a nonsignatory commonly contributes to the payment of rent. There is little justification, then, for the provision of unique contract-based remedies for personal injury to a signatory tenant. The human element underscores the lack of theoretical legitimacy. That is, in many cases an untenantable condition can pose a greater risk to a tenant’s family members, especially small children, than to the adult signatory.

Recognizing landlord liability for defective premises as a hybrid liability allows for extension of the same, single cause of action to all parties. The civilian experience illustrates that mere recognition of concurrent liability in contract (for signatories) and tort (for all injured parties) does not go far enough to alleviate disparity in classes of plaintiffs. Although the signatory’s tort suit is identical to the one available to third parties, the tenant enjoys a unique contractual claim.

313. See Litvinoff, supra note 14, at 8.
314. See id.
315. PALMER, supra note 122, § 3-17.
316. This is certainly the case in Scotland, where children often suffer from asthma as a result of damp conditions in the leased premises. See supra text accompanying notes 208-210.
that is unavailable to others.317 Recasting landlord liability for defective premises as contort provides a sound theoretical basis for reducing disparity between the claims of tenants and third parties. Thus far, only Louisiana has taken a step to close the divide, by relaxing the requirement of privity in an ad hoc fashion to provide a contractual theory of recovery to all persons who “reside in the premises in accordance with the lease,” be they family members or roommates.318

2. Increasing the Role of Fault in Determinations of Liability

Recognizing that the landlord’s obligation for the condition of the premises lies in both contract and tort also has the distinct advantage of freeing landlord liability for defective premises from what are essentially arbitrary rules governing “fault” in contract. The role of fault in contract law is a subject of heated debate both in common law and civilian jurisdictions, though the issues presented vary from one tradition to the other.319 Ultimately, the international trend is one of wider recognition of the role of contractual fault of both contractual obligors (here landlords) and obligees (here tenants). Recasting as contort places landlord liability for defective premises squarely ahead of this trend.

In the common law, a perceived categorical rule of contract is liability without fault.320 The notion that contractual liability must be strict liability is largely a common law phenomenon; indeed, in many civilian and mixed jurisdictions, the notion of fault pervades the realm of contract.321 In the civil law, a distinction is drawn between a contract of means (in France, obligation de moyens) and a contract of result

317. This is the current scenario in the American product liability law context, in which a buyer injured by a defective product may bring either a strict liability tort cause of action in addition to or in lieu of a contractual breach of warranty claim. See 1 DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 4.1 (3d ed. 2000).

318. LA. CIV. CODE ANN. art. 2698 (2010).


320. See Ben-Shahar & Porat, supra note 98, at 1341; Galligan, supra note 98, at 463; Kreitner, supra note 98, at 1533-35; Posner, supra note 98, at 1436.

321. Richard A. Posner, Let Us Never Blame a Contract Breaker, 107 MICH. L. REV. 1349, 1351 & n.8 (2009); WALTER VAN GERVEN ET AL., TORT LAW 33 (2000) ("It was also held, among other controversial distinctions, that contractual duties guarantee a particular outcome, while duties in tort only bind one to take reasonable care... Nowadays it is well established in all legal systems that contracts also lead frequently to duties to take care—often implied, whereas in the area of tort law liability not based on conduct—and generally triggered by the occurrence of a given event—becomes increasingly frequent.")
In the former, a party is liable only if he is shown to be at fault; whereas in the latter, a party is strictly liable for his failure to achieve a required result. \(3^{22}\) In the common law, contractual "warranties" are generally thought of as akin to contracts of result, and thus strict in nature. As seen above, in the mixed jurisdictions, it appears as though the obligation to maintain the premises may be viewed as either an obligation of means or one of result.

Analysis of the American approach to landlord liability reveals that attitudes about the role of fault in contract law drove the preference for a tort model of premises liability. As discussed above, a contingent of American courts and commentators favored a negligence standard over a strict liability standard for landlords, and thus, the tort model seemed to be the only fit. \(3^{24}\) A historical review of the "rule" of strict liability in contract reveals the fundamental flaw of this approach. When, in the late nineteenth century, contract law became centered around freedom of will, the rule of strict liability came to embody the notion that contracting parties are free to impose absolute obligations on one another. \(3^{25}\) Thus, the very theory that contractual obligations arise solely from will drove the imposition of strict liability in contract. \(3^{26}\) Insofar as landlord liability for defective premises involves nonwaivable obligations imposed by law, it falls outside of the historical rationale for imposing strict contractual liability.

Recasting as contort will allow jurisdictions to determine the appropriate standard of liability as a matter of policy as opposed to a matter of classification. It is not the aim of this Article to express a preference for a fault-based standard of liability over a strict liability standard, or to suggest that comparative analysis necessarily reveals the superiority of a particular approach. Rather, the responsibility that a particular jurisdiction chooses to impose upon residential landlords should reflect local concerns regarding housing and human rights issues which, as noted in the Introduction above, appear to have long foreclosed comparative research in the arena of property law. \(3^{27}\) These issues are inherently tied to local culture, "the one feature of a legal system that cannot be borrowed, transplanted, or received." \(3^{28}\) More

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322. Nicholas, supra note 306, at 952.
323. Id.
324. See discussion supra Part II.B.
325. Kreitmer, supra note 98, at 1535-36.
326. Id.
327. See supra text accompanying notes 8-13.
328. Palmer, supra note 134, at 537.
salient from a comparative view would be the failure of any jurisdiction to reanalyze the propriety of a standard of care that may have been utilized for hundreds of years in light of contemporary housing concerns. Unlike American jurisdictions, which have recently engaged in a comprehensive policy debate regarding the appropriate standard of care for landlords, the mixed jurisdictions studied here appear not to have reassessed the social propriety of the chosen standard of liability in a meaningful way in recent years.

Even those jurisdictions that recognize the role of fault in the landlord’s obligation to maintain the premises struggle with the question of how comparative fault principles may reduce the claim of an aggrieved party. Among the jurisdictions studied here, only Louisiana broadly authorizes the use of comparative fault principles in contractual claims. Other jurisdictions have yet to apply comparative fault to the contractual realm, although this has recently been an issue of much interest and debate. Some agreement appears to be emerging that even if the use of comparative fault is not appropriate in all contractual claims, its use is appropriate when the contractual claim concurs with a similar or identical claim in tort. Moreover, the use of comparative fault may be particularly relevant where, as here, the contractual obligations of the parties are imposed by law rather than freely bargained. The use of comparative fault has been described as “unpersuasive in so far as it tends to undermine the contractual allocation of risks between the parties.”

329. See LA. CIV. CODE ANN. art. 2003 (2010); Litvinoff, supra note 132, § 5.35.
331. See SA Law Commission, supra note 169, § 4.112; Porat, supra note 330 (citing LAW COMM’N, CONTRIBUTORY NEGLIGENCE AS A DEFENCE IN CONTRACT para. 1.4 (1993) (“Over the years, the CFD [comparative fault defense] has spread into the contract law of many countries (such as Canada, the United Kingdom, and Israel), albeit primarily in cases where a party breached a contractual duty of reasonable care as in cases of concurrent tort or contract liability.”)). Some American Courts have shown a willingness to apply comparative fault principles to cases involving breach of implied contractual warranties. Id. at 1397 n.4. Also, under the American Uniform Comparative Fault Act, “fault” is broadly construed to include breach of warranty, which straddles the line between contract and tort. UNIF. COMPARATIVE FAULT ACT § 1 & cmt., 12 U.L.A. 125 (1977).
332. See SA Law Commission, supra note 169, § 4.117.
Furthermore, such a defense would incentivize compliance with contractual obligations as well as the mitigation of damages resulting from breach. Incentivizing the cooperation of contracting parties is of paramount importance where, as in a contract for residential lease, the parties enter into an ongoing and continuous relationship rather than a one-shot deal.

The application of comparative fault principles to contractual claims may take place slowly and, in some jurisdictions, on a very limited basis. And yet, comparative fault principles could be applied to claims involving landlord liability for defective premises on an ad hoc basis regardless of the speed at which the trend toward comparative fault in contract evolves in a given jurisdiction. Recasting as contort provides the necessary freedom for such ad hoc treatment, which is desirable given the relative agreement on the utility of comparative fault for claims located at the contract-tort divide.

In those jurisdictions employing a contract model, the landlord's defense of assumption of the risk can completely bar the plaintiff's claim. As indicated in the foregoing discussion of South Africa, Scotland, and Louisiana, the assumption of the risk defense rarely succeeds because landlords usually cannot show that a tenant clearly assented to the risk of harm. Even if such proof were available, an assumption of the risk defense does not make sense in the context of the landlord-tenant relationship. A relative disparity in bargaining power exists between residential landlord and tenant—a disparity that is recognized both by the implied nature of the obligation to repair and the nonwaivability of that obligation. Does a tenant ever have the requisite bargaining power to "assume" the risk freely by taking the premises subject to the existence of a defect? One Scottish tribunal observed that the assumption of the risk defense is predicated on the view that the tenant who discovers a dangerous defect should "repudiate the lease and go to live elsewhere." This rationale loses force in light of the fact that superior housing may be nonexistent, scarce, or otherwise unattainable. The more appropriate measure of a tenant's fault is not an alleged assumption of risk, but instead the

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334. Id.
tenant's comparative negligence in failing to identify or avoid an unsafe defect in the leased premises.

3. Removing Artificial Obstacles to Remedies

Finally, recasting the landlord's liability for the condition of the premises as contort provides injured parties with a full range of damages incurred, without concern for the theory of liability pled or proven. Currently, categorical rules governing damages awards in contract stand in the way of a tenant's recovery for personal injury damages as well as other consequential losses, such as those for personal property damage and "pure" nonpecuniary loss. Given that the landlord's obligation with respect to the premises is described in all jurisdictions in terms of physical safety, not only physical injuries but also mental pain and suffering attributable to threats to health and safety are well within the contemplation of the parties. Classification of a plaintiff's cause of action as falling within the ambit of contract rather than tort should not hinder such awards.

The distinction between contract and tort with regard to damages is often highlighted in the realm of nonpecuniary loss. As a general rule in all jurisdictions studied here, a plaintiff may not recover nonpecuniary losses resulting from breach of contract. Because contract law focuses primarily on protecting the economic concerns of the contracting parties, it follows that the protection provided by the law should be limited to economic or financial losses. A number of jurisdictions recognize exceptions to this general rule, and a growing international trend favors recognition of nonpecuniary losses wherever they occur. This is the approach espoused by the Principles of European Contract Law and utilized in France and Quebec. Many jurisdictions have not gone so far, however, in liberating their approach to nonpecuniary loss as a general matter.

337. Galligan, supra note 98, at 466-71.
338. See Williston, supra note 97, § 64:7.
340. Id.
341. PRINCIPLES OF EUROPEAN CONTRACT LAW art. 9:501(2)(a) (Ole Lando & Hugh Beale eds., 2000).
343. Civil Code of Quebec, S.Q. 1991, c. 64, art. 1458 (Can.) ("[H]e is liable for any bodily, moral or material injury he causes to the other contracting party."); Palmer, supra note 200, at 213-14.
In South Africa the rule against nonpecuniary damages for breach of contract remains strict and gives way to few exceptions.\(^{344}\) Thus tenants may not recover contractual damages for physical pain and suffering.\(^ {345}\) Additionally, in the United States, tenant claims for personal injuries have been entirely relegated to tort.\(^{346}\) This result seems especially bizarre in the United States, where the Restatement (Second) of Contracts provides an explicit exception for breaches of contract involving bodily harm.\(^ {347}\) The question also arises whether it is sensible to restrict the landlord's obligation to the tort realm, effectively stripping it of its place in contract, merely because a plaintiff pursues nonpecuniary damages. In both South Africa and the United States, this approach has resulted in unintended consequences. In South Africa, the tenant's inability to recover nonpecuniary losses in contract deprives the contractual cause of action of much of its utility, with the result that most tenant claims are brought in tort rather than on the contract.\(^ {348}\) In the United States, several jurisdictions have gone too far by entirely foreclosing the possibility of recovery of any consequential losses in contract.\(^ {349}\) Also, the relegation of personal injury claims to tort by American jurisdictions has resulted in the anomalous phenomenon that vengeful landlords may evict tenants who have filed personal injury lawsuits, but not tenants who have filed claims for repairs or rent abatement.\(^ {350}\)

In contrast to South Africa, in Louisiana and Scotland, damages for emotional distress are awarded for breach of the landlord's contractual obligation as an exception to the general rule against nonpecuniary losses. Scotland has jurisprudentially allowed recovery of general damages for pain and suffering related to personal injury in contracts involving sales of defective goods as well as leases of defective premises, though in neither case has the rationale for this exception been fully explored. Recognizing the hybrid nature of the

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344. Palmer, supra note 200, at 213.
345. See discussion supra Part III.B.1.
346. See discussion supra Part II.B.
347. Restatement (Second) of Contracts § 353 (1982) ("Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."). This rule has been adopted in most U.S. jurisdictions. See Williston, supra note 97, § 64:7 & n.21. Note, however, that the original Restatement's formulation of the rule required not only bodily injury but also "wanton or reckless breach." Restatement (First) of Contracts § 341 (1932).
348. See discussion supra Part III.A.
349. See discussion supra Part II.B.
350. See discussion supra Part II.B.
landlord’s obligation for the condition of the premises provides a wanting theoretical justification for the exception. In Louisiana, where nonpecuniary damages for mental suffering are authorized by the Civil Code, and where “pure” emotional distress damages are awarded in appropriate cases, courts appear reluctant to award pain and suffering damages on a contract theory. At one time in Louisiana’s legal history the tenant’s actions against the landlord in tort and contract were very similar, making irrelevant a specific award of nonpecuniary damages on the contract as opposed to in tort. Now that tort reforms have reduced the standard of care in tort to negligence, it is clear that tenants are more protected by strict liability in contract, and therefore awards of pain and suffering damages under a contract theory are more valuable. Recasting landlord liability for defective premises as contort could assist to reverse the jurisprudential trend against contractual awards for personal injury losses.

Moreover, nonpecuniary awards for breach of the landlord’s repair obligation are not only conceptually attractive, they are socially desirable. Nonpecuniary damages, particularly those awarded for emotional distress and inconvenience in the absence of physical injury, can serve a vital deterrent function closely linked to the social policy of tenant protection by providing the landlord with an economic incentive for keeping the premises in good repair.351 If nonpecuniary losses are generally awarded only when a tenant is physically injured, the deterrent function is lost for those defects that pose a serious risk to human health and safety, but that by luck or chance do not in fact physically injure the tenant, the tenant’s family, or guests.

V. CONCLUSION

This Article has had a dual aim: to contribute to the comparative examination of tenancy law in a modest fashion, and in so doing, to provide a critical appraisal of the American approach to landlord liability for defective premises. The very adoption of the implied warranty of habitability in the common law represents a closing of the once vast gulf between the civil law and common law approaches to residential tenancy.352 Moreover, comparative analysis reveals that the United States has not been alone in its struggle to characterize landlord liability as contract- or tort-based. Thus, the civil law and common

351. See Smith, supra note 38, at 548-49.
352. The prior difference in approach was once described as “a difference that goes to the root of fundamental conceptions.” Cohn, supra note 10, at 399.
law approaches to the landlord’s obligation to maintain the premises have converged both at the macro and the micro levels. Although the “bifurcated” American approach suffers from some conceptual anomalies, the “concurrent” approach utilized by South Africa, Scotland, and Louisiana is also unsatisfactory. Recasting landlord liability for the condition of the premises as a single, hybrid cause of action addresses both conceptual and practical incongruities rife within the American common law as well as within these mixed jurisdictions.

Providentially, the framework for dealing with the special nature of landlord liability for defective premises is largely already in place. Each jurisdiction studied here except Louisiana has implemented a special statutory scheme to govern aspects of residential tenancy. The United States’ Uniform Residential Landlord and Tenant Act and related landlord-tenant statutes, Scotland’s Housing Act, and South Africa’s Rental Housing Act could each be amended with relative ease to alter the existing scheme for landlord liability for defective premises. Even in Louisiana, where a special statutory regime for rental housing does not yet exist, ad hoc statutory enactments dealing with contorts are not entirely foreign. Each jurisdiction must utilize its own framework to develop a single, unified cause of action designed to address landlord liability for defective premises. Although each jurisdiction will begin at a unique starting point, all should adapt existing law with a view toward a collective end: eliminating the distinction between contract and tort, which has led to anomalous, inefficient, and unjust effects in this area of the law.

Although the distinction between contract and tort remains theoretically and academically sound, the formal categories of law shaped by tradition and by accident tend to obscure the social problems with which the law deals. Formalistic divisions between contract and tort occasionally must give way to permit creative solutions to specific social ills. Now that residential landlords are more stringently regulated by the state, the contract of residential lease finds itself at the precarious boundary between contract and tort. Recognizing the landlord’s obligation for the condition of the premises as contort is the first step toward designing the creative solutions


needed to appropriately balance the rights of residential landlords and their tenants.