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quities.⁵⁰ *Horstmann*, despite its inconsistency in theory and valuation method, has taken the first step toward this goal in ruling that a spouse's potential earning capacity acquired during marriage with the aid of the other spouse's efforts is a marital asset subject to property division upon dissolution.

ROBERT E. PINNELL

LANDLORD'S LIABILITY FOR CONSEQUENTIAL DAMAGES UNDER AN IMPLIED WARRANTY OF HABITABILITY

*Henderson v. W.C. Haas Realty Management, Inc.*¹

On October 10, 1971, a fire ravaged the Monticello Manor apartments in Overland Park, Kansas.² Evidence showed that the fire was started by a defect in the electrical wiring in the inter-ceiling space above a common area in the basement.³ Tenants in the apartment building sued the owners and manager of the building for property damage and personal injury on a theory of implied warranty of habitability.⁴ After a jury verdict for plain-

50. *In re Marriage of Graham*, 574 P.2d 75, 78 (Colo. 1978) (Carrigan, J., dissenting).

1. 561 S.W.2d 382 (Mo. App., D.K.C. 1977).

2. The fire occurred in Kansas, but the case was tried in a Missouri court. By Missouri conflict of laws cases, Kansas law should have been applied. *See Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. En Banc 1969). Therefore, it is possible that this case is not precedent in Missouri, but an argument can be made for the opposite result. It is not clear from the opinion of the court of appeals that Kansas law was applied. While the court does make reference to Kansas law, it looks to several Missouri cases in reaching its decision. Even if this case is not precedent in Missouri, it can serve as a starting point for any consideration of an action for damages from a breach of the implied warranty of habitability between a landlord and tenant because Missouri has adopted such an implied warranty. *See* notes 10 & 11 and accompanying text *infra*.

3. The court held that circumstantial evidence could be used to infer the origin of the fire and the existence of a defect. The evidence showed that, while the cause of the fire was unknown, the fire began in the basement inter-ceiling area. The fire chief testified that, of the water pipes, vent pipes, and electric wires running through this area in the all-electric building, the electric wiring was the most likely to start a fire. The court found this evidence sufficient for the jury to infer that the fire started in the inter-ceiling area and that it was caused by some defect in the electrical wiring. *See* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.03(4)(b)(i) (1977); 35 AM. JUR. 2d *Fires* § 56 (1967).

4. Missouri's cause of action for a breach of an implied warranty of habitability has been limited so far to residential leases. *See* note 12 *infra*. Therefore, this Note will deal only with implied warranties in residential leases.

tiffs, the trial court entered a judgment n.o.v. for defendants.⁵ The appeals court affirmed. The court of appeals recognized that a landlord-tenant warranty of habitability exists in present law.⁶ However, the court held that to recover for consequential damages⁷ due to a breach of this warranty, actual or constructive notice of the defect on the part of the landlord was necessary and that this element was not shown.⁸

Recognition of an implied warranty of habitability in landlord-tenant law is a recent development and is still in a state of judicial transition. The *Henderson* decision is significant because it deals with the issue of the recovery of consequential damages under the implied warranty of habitability. This problem has not been previously discussed by Missouri courts and has been dealt with by only a few other jurisdictions.⁹ Missouri first adopted the theory of implied warranty of habitability in *Smith v. Old Warson Development Co.*,¹⁰ which involved the sale of a new house by the builder-vendor; shortly thereafter Missouri adopted a warranty of habitability between a landlord and tenant in *King v. Moorehead*.¹¹ Ap-

5. The jury awarded three tenants a total of \$30,116 in property damages and awarded one tenant \$2,000 for personal injuries. However, the trial court sustained a motion for judgment notwithstanding the verdicts and entered judgment for the defendants. *Henderson v. W.C. Haas Realty Mgt., Inc.*, 561 S.W.2d 382, 383 (Mo. App., D.K.C. 1977).

6. 561 S.W.2d at 385.

7. The *Henderson* court did not label the damages being sued for in this case as consequential damages. However, it is clear that the recoveries sought here (personal injury and property damages) were of such a nature. See 22 AM. JUR. 2d *Damages* § 56 (1965).

8. *Henderson v. W.C. Haas Realty Mgt., Inc.*, 561 S.W.2d 382, 388 (Mo. App., D.K.C. 1977).

9. Implied warranty was adopted with residential leases to shift the burden of repair onto the landlord. See *King v. Moorehead*, 495 S.W.2d 65, 71 (Mo. App., D.K.C. 1973). It was only a matter of time until plaintiffs tried to sue for damages to person and property resulting from an unfit condition in a leased apartment as consequential damages from a breach of the implied warranty. Several courts have now been confronted with this problem. See *Dapkunas v. Cagle*, 42 Ill. App. 3d 644, 356 N.E.2d 575 (1976) (avoided the issue by finding that the implied warranty was not applicable); *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744 (Ind. App. 1976) (allowed recovery under warranty because the landlord had actual or constructive notice and adopted a negligence standard for landlords); *Dwyer v. Skyline Apts., Inc.*, 123 N.J. Super. 48, 301 A.2d 463 (1973) (reversed a trial court holding that found the landlord strictly liable).

10. 479 S.W.2d 795 (Mo. En Banc 1972), noted in 38 MO. L. REV. 315 (1973). While there is some difference between this sales relationship and the relationship between landlord and tenant, the court in *King v. Moorehead*, 495 S.W.2d 65 (Mo. App., D.K.C. 1973) (the Missouri decision first adopting an implied warranty of habitability between landlord and tenant), saw an analogy with this warranty when discussing landlord-tenant warranty. The court in *Henderson* used the notice requirement that had been found necessary in vendor-vendee implied warranties of habitability. Also, as stated in *King*, the acceptance of implied warranty with landlord-tenant is premised on deeming the lease analogous to a sale. *Id.* at 71.

11. 495 S.W.2d 65 (Mo. App., D.K.C. 1973), noted in 39 MO. L. REV. 56 (1974).

plication of implied warranty law to residential¹² leases is based on rejecting the applicability of *caveat emptor* and on viewing the lease as creating a contractual relationship between the landlord and tenant.¹³ Contract law can provide broad remedies, including damages, reformation, and rescission.¹⁴ Under prior law, the tenant had recourse only under the doctrine of constructive eviction, which required vacation of the premises.¹⁵ In *Henderson*, the court further expanded contractual¹⁶ remedies to include consequential damages under certain limited conditions.

To determine the nature of this expanded cause of action it is helpful to look at the scope of the warranty. Both *King*¹⁷ and *Henderson*¹⁸ pictured the warranty as containing two parts. The landlord warrants that the dwelling is habitable and fit for living at the inception of the term and that it will remain so during the entire term.¹⁹ The facts of the *Henderson*

12. *King* limited its implied warranty cause of action to residential leases. *Accord*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971). *Contra*, *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969) (action allowed where premises used for commercial offices).

13. Much has been written on the history and development of implied warranty between landlord and tenant. *E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744 (Ind. App. 1976); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App., D.K.C. 1973); *Love, Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 23-31 (1975).

14. *King v. Moorehead*, 495 S.W.2d 65, 75-76 (Mo. App., D.K.C. 1973).

15. *Id.* at 70.

16. There are several Missouri cases which question whether an action brought under implied warranty of habitability for consequential damages is contractual or tortious in nature. With a contract action subsequent notice of breach to the landlord may be necessary, and there is the possibility of disclaimer. *See* note 62 and accompanying text *infra*. The products liability case of *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969), recognized the tort nature of the liability imposed under an implied warranty. Warranty developed as a tort concept, both historically and theoretically. *See Krauskopf, Products Liability*, 32 MO. L. REV. 459, 463 (1967). In *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo. En Banc 1978) (refusing to extend liability in the sale of a house from the builder-vendor to a second purchaser), the Missouri Supreme Court discussed the "confusion" in *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. En Banc 1972) (the Missouri case which adopted an implied warranty between the builder-vendor and the first purchaser), concerning whether the liability of the builder-vendor to the first purchaser was in contract or tort. The court determined that in *Old Warson* the implied warranty was contractual because the plaintiff was suing for mere deterioration or loss of bargain resulting from latent structural defects. The present discussion, in contrast, deals with personal and property damage and at least is arguably a form of tort liability.

17. 495 S.W.2d at 75.

18. 561 S.W.2d at 387.

case, as well as the holding and the discussion of the court, fall within the first part of the warranty—that the dwelling is fit at the beginning of the lease. Consequently, this Note will concern itself primarily with the elements of a cause of action brought under the first portion of the warranty. There are separate considerations for whether the same elements also apply to a suit brought on the second part of the warranty—that the dwelling remain fit for the remainder of the term. These considerations are discussed later in this Note.²⁰

The first element necessary to recovery for a breach of the first portion of the warranty is the existence of a defect. The *King* court defined a defect as any material breach of an applicable housing code.²¹ The *Henderson* court instead defined a defect as a condition rendering the premises uninhabitable for residential purposes.²² Apparently the *Henderson* standard should be used exclusively in actions for consequential damages.²³

Henderson further implied that any defect in existence at the time of the lease must be latent for the award of consequential damages which arise from the defect.²⁴ The court quoted from both *Mease v. Fox*²⁵ and *Old Town Development Co. v. Langford*²⁶ to the effect that the landlord

20. See text accompanying notes 63-71 *infra*.

21. 495 S.W.2d at 75. The court listed the following as factors affecting materiality of a breach: the nature of the deficiency or defect, its effect on the life, health, or safety of the tenants, the length of time it has persisted, and the age of the structure. *Id.* at 76.

22. 561 S.W.2d at 387. This standard is similar to the "constructive eviction test" where substantial interference with possession or enjoyment is required. See *Yaffe v. American Fixture, Inc.*, 345 S.W.2d 195, 197 (Mo. 1961). Both of these standards are widely used and one authority has stated that each has an advantage for the tenant. The housing code is a more certain standard, while the reasonably fit standard provides more protection for the tenant. See *Love, supra* note 13, at 101.

23. This conclusion is based on the assumption that *King* applies to tenants who withhold rent and *Henderson* applies to actions for consequential damages. Another possible conclusion is that the *Henderson* court used the uninhabitable definition because it thought this was the definition that Kansas would use. See note 2 *supra*. *But cf.* *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974) (adopting a warranty based at least in part on a housing code).

24. The same latency requirement may not apply to defects which arise during the course of the leasehold. See text accompanying notes 65-67 *infra*. The defect is also not necessarily latent in an action such as that contemplated in *King v. Moorehead*, 495 S.W.2d 65 (Mo. App., D.K.C. 1973), where knowledge of the defect would seem to be always present when the defect is used as a basis for withholding rent.

25. 200 N.W.2d 791, 796 (Iowa 1972) (adopting an implied warranty of habitability for residential leases in Iowa where the landlord did not repair various housing code violations of which he had been notified).

26. 349 N.E.2d 744, 774 (Ind. App. 1976) (holding in a 51 page opinion that a builder-lessee was liable for damages from a fire caused by a wooden joist being too close to a furnace flue vent, under both negligence theory and implied warranty of habitability theory).

warrants against *latent* defects at the time of the lease. Missouri courts have defined latent defect in a landlord-tenant situation as meaning one which the tenant could not discover on a reasonably careful inspection.²⁷ Limiting the landlord's warranty in this way could preclude relief for a tenant who has knowledge of the defect but has no real alternative to taking the defective housing and does not have the funds necessary to correct the defect himself. Still, this limiting requirement is consistent with implied warranty under the UCC²⁸ and with traditional tort law governing lawsuits arising out of the landlord-tenant relationship.²⁹

Another necessary element for recovery is the landlord's prior notice or knowledge of the defect.³⁰ The *Henderson* court derived this requirement from two sources. First, it pointed out (with possibly suspect authority) that implied warranty cases involving the sale of new houses have imposed this requirement.³¹ Second, the court cited *Old Town* in which this notice requirement was seen as permeating discussions of the nature of a breach of an implied warranty of habitability.³² *Old Town* recognized that this requirement of notice reflected a continued unwillingness to adopt strict liability for the landlord.³³

27. *Logsdon v. Central Dev. Ass'n*, 223 Mo. App. 499, 508, 123 S.W.2d 631, 636 (K.C. 1938). *Accord*, *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 454, 251 A.2d 268, 273 (1969). For a similar Missouri holding in a products liability case, *see* *Edwards v. Springfield Coca-Cola Bottling Co.*, 495 S.W.2d 489, 497 (Mo. App., D. Spr. 1973).

28. RSMo § 400.2-316(3)(b) (1969) (U.C.C.) provides: "[W]hen the buyer before entering into the contract has examined the goods . . . as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him. . . ."

29. *See* text accompanying note 57 *infra*.

30. *Henderson v. W.C. Haas Realty Mgt., Inc.*, 561 S.W.2d 382, 387 (Mo. App., D.K.C. 1977). The court says the landlord can have either notice or knowledge of the defect; it often appears the court is using the terms interchangeably. This case involved circumstantial evidence pointing to a fire caused by wiring concealed by the walls and ceiling. The court did not find such notice or knowledge present, stating "[T]here is no evidence in this case of any notice of any kind of the defective condition of the wiring in the basement common area. . . ." *Id.* at 388.

31. *Id.* at 387. The court cited, among others, the case of *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. En Banc 1972). In this case the Missouri Supreme Court affirmed the St. Louis District Court of Appeals in finding such a warranty by a new home developer. They added to the appeals court rationale, in what may have been dicta, a requirement of notice of the defect on the part of the developer. Subsequently, in *Crowder v. Vandendeale*, 564 S.W.2d 879, 882 n.5 (Mo. En Banc 1978), the Missouri Supreme Court quoted and apparently relied upon a passage from the appeals court opinion in *Old Warson* which indicated that there was not a requirement of notice.

32. *See* *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744, 774 (Ind. App. 1976).

33. *University of Missouri School of Law Scholarship Repository* 1979. Published by the University of Missouri School of Law. This document has been suggested that similar liability should apply to the landlord at least when he is in the business of leasing. The argument is based on

The landlord's knowledge can be either actual or constructive.³⁴ Actual knowledge can either be of the defect itself or of circumstances from which the defect may be inferred.³⁵ A builder-lessor has notice if a reasonable inspection would have disclosed the defect.³⁶ Language quoted by the *Henderson* court goes further and suggests that a builder-landlord is "presumed to have knowledge of any latent defects in the original construction of the building."³⁷ The court in *Old Town* stated that some jurisdictions also presume constructive notice from the landlord's prior possession of the premises.³⁸ The *Henderson* court implicitly rejected this analysis. *Old Town* also suggested that constructive notice can evolve from a landlord's right to inspect which is concomitant with the implied duty to repair, the second part of the landlord's implied warranty.³⁹ No authority has been found suggesting that an implied warranty of habitability involves a duty of inspection for the landlord prior to each leasing. Absent such authority, it must be assumed that such a duty has not been created.

The *Henderson* court seems to expand a tenant's rights when it states that recovery for consequential damages will be allowed when there is damage arising from a latent defect, in existence at the time of the lease, of which the landlord has actual or constructive notice or knowledge. However, a comparison of this remedy with the landlord's already existing liability in tort is necessary in order to determine when the landlord's exposure to liability will be increased.

The general common law rule has been that the landlord is not liable to the tenant in tort. The lease was viewed as a conveyance of land with

an analogy with products liability. The landlord is pictured as selling a shelter for a specified period of time. It is argued that the landlord has a greater ability to inspect and repair the premises than does the average urban dweller. Also, emphasis is placed on the landlord's superior position to bear and distribute the risk. See Love, *supra* note 13; Note, *Landlord and Tenant—Products Liability—Landlord's Implied Warranty of Habitability Does Not Give Rise To Strict Tort Liability For Tenant's Personal Injuries*, 5 SETON HALL L. REV. 409 (1974); Note, *Products Liability at the Threshold of the Landlord-Lessor*, 21 HASTINGS L.J. 458 (1970).

34. *Henderson v. W.C. Haas Realty Mgt., Inc.*, 561 S.W.2d 382, 387 (Mo. App., D.K.C. 1977).

35. *Holmes v. Doe Run Lead Co.*, 223 S.W. 772, 779 (St. L. Mo. App. 1920). *Accord*, *Farmers Mut. Royalty Syn. v. Isaacks*, 138 S.W.2d 228, 231 (Tex. App. 1940). See also 66 C.J.S. *Notice* § 7 (1950).

36. This conclusion is reached by analogy to *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. En Banc 1972), where the builder-vendor was held to have such notice. This conclusion is also the holding in *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744 (Ind. App. 1976).

37. 561 S.W.2d at 387. It is questionable whether the court meant this passage to be read in such broad terms. As such it imposes strict liability and is inconsistent with *Old Warson*.

38. 349 N.E.2d at 775.

39. *Id.* at 775. For a discussion of the second part of the implied warranty of habitability, see text accompanying notes 63-71 *infra*.

caveat emptor applying.⁴⁰ Missouri courts have recognized five exceptions to this harsh rule. Liability may be imposed when the premises are leased for public use,⁴¹ when hidden defects exist at the time of the lease and are known to the landlord,⁴² when areas are retained by the landlord for common use,⁴³ when the landlord makes repairs negligently,⁴⁴ or when a covenant to repair exists along with some other indication of the landlord's control.⁴⁵

At least two courts have held that adopting an implied warranty is inconsistent with a continuation of such tort immunity.⁴⁶ They took the position that adopting an implied warranty discarded *caveat emptor*, the legal foundation and justification for the landlord's immunity in tort.⁴⁷ The *Henderson* court gave no indication that it considered this possible implication of adopting implied warranty. Assuming, therefore, that Missouri still follows the general rule of landlord tort immunity with its exceptions, the limited recovery *Henderson* acknowledged in contract potentially increases the situations where the landlord will be liable. The *Henderson* court dealt particularly with the part of the implied warranty that concerns defects existing at the time of the lease,⁴⁸ and which required both that the defect be latent and that the landlord have actual or constructive knowledge of such a latent defect. Such a cause of action appears very similar to liability based on the hidden defect exception to tort immunity.⁴⁹ A comparison of these two actions indicates that the landlord's liability may not have been significantly expanded.

40. See 52 C.J.S. *Landlord and Tenant* § 417(3)(a) (1968).

41. See *Noel v. Buchholz*, 411 S.W.2d 155 (Mo. 1967); *Warner v. Fry*, 360 Mo. 496, 228 S.W.2d 729 (1950).

42. See *Reckert v. Roco Petroleum Corp.*, 411 S.W.2d 199 (Mo. 1966); *Hampton v. Loper*, 402 S.W.2d 825 (Spr. Mo. App. 1966); *Flournoy v. Kuhn*, 378 S.W.2d 264 (St. L. Mo. App. 1964).

43. See *Fitzpatrick v. Ford*, 372 S.W.2d 844 (Mo. 1963); *Woods v. Gould*, 515 S.W.2d 592 (K.C. Mo. App. 1968).

44. See *Fitzpatrick v. Ford*, 372 S.W.2d 844 (Mo. 1963); *Stewart v. Zuellig*, 336 S.W.2d 399 (Mo. 1960).

45. *Lemm v. Gould*, 425 S.W.2d 190 (Mo. 1968); *Tucker v. Taksel*, 345 S.W.2d 385 (St. L. Mo. App. 1961).

46. *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744 (Ind. App. 1976); *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528 (1973). Landlord's tort immunity has also been denied in California but on the basis of statutory construction rather than the adoption of implied warranty. *Brennan v. Cockrell Inv., Inc.*, 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (1973).

47. *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744, 760 (Ind. App. 1976); *Sargent v. Ross*, 113 N.H. 388, 397, 308 A.2d 528, 534 (1973).

48. See text accompanying note 19 *supra*.

49. See note 42 and accompanying text *supra*. If an action fits the common use exception (see note 43 and accompanying text *supra*) it might be pleaded as such because there is then no need to prove that the defect was latent. The RESTATEMENT (SECOND) OF TORTS § 360 (1965), which is recognized as Missouri law in *Rawson v. Ellerbrake*, 428 S.W.2d 14, 15, 16 (St. L. Mo. App. 1967), states in comment (b) that the tenant's knowledge is important only to prove con-

In *Reckert v. Roco Petroleum Corp.*⁵⁰ the Missouri Court of Appeals outlined the elements of the hidden defect exception.⁵¹ The first of the court's four requirements is the existence of a dangerous condition with unreasonable risk at the time of the lease.⁵² Such a condition is similar to the defect necessary under the first part of the implied warranty. A defect under implied warranty of habitability is either a material breach of a housing code provision or an unreasonably unfit condition.⁵³ A defect might exist which is not a dangerous condition posing an unreasonable risk, but it is unlikely that such a defect would cause personal injury or property damage. Conversely, any leased property with a dangerous condition with unreasonable risk is not reasonably fit.

The court's second requirement is that at the time of the lease the defect is known to the landlord.⁵⁴ This requisite is satisfied by knowledge of facts from which he ought to have known that a defect exists.⁵⁵ This tort requirement seems similar to implied warranty's demand of actual or constructive notice on the part of the landlord.⁵⁶

The third tort requirement is that the defect must "not [be] known to the tenant and not discoverable by the tenant in the exercise of ordinary care."⁵⁷ This too is requisite in the need to prove a latent defect as an element of an implied warranty action.

tributory fault on his part. It would seem that the same reasoning could be applied to the tort exception based on negligent repairs. See note 44 and accompanying text *supra*. There must be a negligent repair, but it would seem the tenant's knowledge would be important for contributory fault. However, comment (d) of the RESTATEMENT (SECOND) OF TORTS § 362 (1965) (which has not been adopted in Missouri) says the tenant cannot recover if he knew or was in a position such that he should have known of the negligent repair. The public use exception (see note 41 and accompanying text *supra*) need not be considered as a possible alternative to an implied warranty action as it would not be appropriate to use this exception to make the landlord liable for injury in residential leased premises as such premises are not open to the public. For a discussion of the covenant to repair tort exception, see text accompanying notes 67-71 *infra*.

50. 411 S.W.2d 199 (Mo. 1966).

51. The court stated:

This general rule [of landlord immunity] is subject to an exception where at the time the lease is executed there is a dangerous condition of the premises involving unreasonable risk of physical harm to persons on the premises, which is known to the landlord and not known to the tenant and not discoverable by the tenant in the exercise of ordinary care. In such case there is a duty on the landlord to disclose to the tenant the existence of the dangerous condition. . . .

Id. at 205.

52. *Id.* at 205.

53. See text accompanying notes 21 & 22 *supra*.

54. *Reckert v. Roco Petroleum Corp.*, 411 S.W.2d 199, 205 (Mo. 1966).

55. *Id.* at 205.

56. The implied warranty liability could be more onerous if the landlord were under an affirmative duty to inspect the premises prior to leasing them. See text accompanying note 39 *supra*.

57. *Reckert v. Roco Petroleum Corp.*, 411 S.W.2d 199, 205 (Mo. 1966).

The fourth requirement in *Reckert* is that the landlord has a duty only to disclose the defect.⁵⁸ It is at least arguable that such disclosure is no longer sufficient to prevent the landlord's liability for consequential damages under the first part of an implied warranty of habitability. Disclosure precludes liability under the hidden defect exception because the exception was originally based on the concept of fraudulent concealment on the part of the landlord.⁵⁹ If the tenant knew of the defect there was no fraud. This reasoning is inappropriate with implied warranty because the warranty is not based on fraud. Without such a base, it seems unfair to allow the landlord to escape liability by merely pointing out any latent defects of which he is aware. The argument can be made that when the landlord tells the tenant about a defect prior to leasing, the defect is no longer latent and a necessary element for consequential damages from a breach of an implied warranty does not exist. This position can be justified by arguing that when the tenant uses leased premises knowing about a defect, any injury proximately results from his action rather than from a breach of the warranty.⁶⁰ Hence, mere disclosure prior to leasing could vitiate the breach. *Henderson* gave no clear indication whether the landlord now has a duty to do more than disclose the defect to the tenant at the time the lease is made.⁶¹

By the above analysis, it seems that when the defect existed at the time of the lease there is significant substantive similarity between bringing an action under breach of implied warranty of habitability and bringing it under the hidden defect exception to tort immunity. The two possible major differences, whether a landlord has a duty under implied warranty to inspect prior to leasing and whether the landlord must do more than disclose the defect under implied warranty, must await clarification by the courts.

There may be one further difference in bringing such a cause of action in contract rather than in tort. By analogy to the UCC the courts may determine that the landlord gains the defenses of disclaimer and lack of subsequent notice if the action is brought in contract.⁶²

There is also a second part of the implied warranty of habitability:⁶³ a warranty that the apartment will remain fit for the entire period of the lease. The court points out that this warranty necessarily involves an im-

58. *Id.* at 205.

59. *Logsdon v. Central Dev. Ass'n*, 233 Mo. App. 499, 506-07, 123 S.W.2d 631, 636 (K.C. 1938), *overruled*, *Bartlett v. Taylor*, 351 Mo. 1060, 174 S.W.2d 844 (1943).

60. See RSMO § 400.2-316, comment 8 (1969) (U.C.C.).

61. Landlord's liability might still exist even after such disclosure due to the implied duty to repair under the second part of the implied warranty of habitability. See text accompanying notes 63-71 *infra*.

62. See RSMO §§ 400.2-316, 2-607(3)(a) (1969) (U.C.C.).

63. See text accompanying note 19 *supra*.

plied duty to repair.⁶⁴ If it is assumed that the holding in *Henderson* applies to this portion of the implied warranty then the defect must be latent⁶⁵ and the landlord must have notice or knowledge of it. However, it seems unlikely that the requirement of latency is part of an implied duty to repair. First, the court's two statements of the warranty in *Henderson* mention "latent" only in terms of the condition of the premises upon letting.⁶⁶ Second, including the latency requirement would allow the landlord only to give notice to the tenant rather than to repair the defect. Third, the requirement ignores that the landlord typically has a greater ability to make repairs and that it is the landlord's property being improved.

If latency of the defect is not necessary to collect consequential damages for a breach of the duty to repair under an implied warranty of habitability, there are several forms which such a cause of action could take. The courts could require only the existence of a defect and reasonable notice to the landlord.⁶⁷ The courts could choose to pattern the action after the Missouri tort immunity exception that imposes liability when there is a breach of a covenant to repair; this exception requires both knowledge on the part of the landlord and some further indication of continued control over the premises.⁶⁸ The only advantage that an implied warranty action would have is that there would not need to be an express covenant as is required in the tort exception, because the implied warranty would serve this function. As an alternative, a Missouri court could use the implied warranty as an opportunity to broaden this exception to be in line with the *Restatement*⁶⁹ and a growing number of courts⁷⁰ by allowing

64. *Henderson v. W.C. Haas Realty Mgt., Inc.*, 561 S.W.2d 382, 387 (Mo. App., D.K.C. 1977).

65. This assumption is based on the fact that the court in *Henderson* first found that the defect was latent. 561 S.W.2d at 387.

66. *Henderson v. W.C. Haas Realty Mgt., Inc.*, 561 S.W.2d 382, 387 (Mo. App., D.K.C. 1977). Also, the fact situation in *Henderson* does not involve a defect which arose after the lease.

67. This is the *Henderson* holding without the latency requirement which arguably should not exist for this branch of the warranty. See text following note 66 *supra*.

68. See note 45 and accompanying text *supra*.

69. RESTATEMENT (SECOND) OF TORTS § 357 (1965) provides:

A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if

(a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and

(b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and

(c) the lessor fails to exercise reasonable care to perform his contract.

70. See *Moldenhauer v. Krynski*, 62 Ill. App. 2d 382, 210 N.E.2d 809 (1965); *Williams v. Davis*, 188 Kan. 835, 302 P.2d 41 (1961); *Zuroski v. Estate of*