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Tort Liability - Vendor-Vendee - A Vendor of Real Estate Is Not Liable for Injuries Resulting from a Defect on the Premises Which Existed When the Installment Sales Contract Was Entered Into, Even Though There Was Insufficient Time for the Vendee To Repair It before the Injury - Anderson v. Cosmopolitan National Bank

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The result reached by the Illinois Supreme Court in a recent case, *Anderson v. Cosmopolitan National Bank*,\(^1\) suggests a need to examine more closely the possible personal injury liability of sellers of real estate under installment contracts where the injuries result from defects existing in the real estate at the time the contract is entered into and where the buyer has had only a short period of time in which to repair those defects. The installment contract buyer in *Anderson* argued for an increased responsibility for personal injuries for installment contract sellers and for an exception to the general rule of vendor liability where the buyer has had insufficient time to repair those defects which existed when the contract was entered into.

In *Anderson*, Louise Anderson rented an apartment in a Chicago building on April 1, 1963. Legal title to the building was held by Cosmopolitan National Bank of Chicago as trustee under a land trust. William and Mary Suchier were the beneficiaries of the trust and had full management powers over the property, including control of the selling, renting, and handling thereof. On May 1, 1963, the Suchiers entered into an installment contract with Jessie and Mabel Smith for the sale of the building for $3000. The Smiths put $100 down, with the balance to be paid in monthly installments of $100, and they took immediate possession of the building. Pursuant to the terms of the contract the Smiths were not entitled to a deed until all of the installment payments were made. In addition, certain rights were retained by the Suchiers under the contract, including the right to enter and make repairs if the buyer failed to do so, the right to add to the purchase price the cost of any insurance if the Smiths failed to keep the

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\(^{1}\) 54 Ill. 2d 504, 301 N.E.2d 296 (1973).
premises insured, and the right to retake possession and retain any payments made should the Smiths fail to make one of the installment payments.

Subsequently on May 7, 1963, Louise Anderson’s three-year-old son Robert was severely injured when he fell through a railing from which some slats were missing in the second floor hallway of the building. The Andersons sued both the Smiths and the Suchiers on the theory that they both knew or should have known of the defective condition of the railing, and that by negligently failing to repair it, they breached their respective duties to repair it. It was undisputed that the railing had been in a rotten and decayed condition for a long period of time prior to April 1, 1963. The Andersons alleged that the Smiths were asked to repair the railing, and that they never did repair it. The Suchiers denied actual knowledge of the defect, but it was further alleged that they should have been aware of it since they owned the building and had expressly reserved a right to enter for the purpose of making repairs if the Smiths failed to do so.

The trial court granted the Suchiers’ motion for summary judgment and dismissed them from the case. The court applied the general rule that an ordinary vendor of real property is not liable for personal injuries resulting from defects in the property sustained after a transfer of possession and control. On appeal it was urged by the Andersons that these installment contract sellers, by virtue of their special relationship with the property, were not technically vendors within the general rule but were really more similar to landlords and should, therefore, be held responsible for the injuries sustained. The appellate court found this position to be untenable. However, the court reversed the summary judgment order, basing its ruling on an exception to the general rule of vendors’ non-liability. The court held that a vendor, though out of possession, is responsible for injuries where the vendees (the Smiths in this case) have not had sufficient time to remedy a pre-existing defect. Since the accident occurred only six days after the Smiths took possession, the court said that there was an existing question of fact as to whether six days was sufficient time to correct the defective condition; thus the grant of summary judgment by the trial court was improper.

2. The general rule is stated in RESTATEMENT (SECOND) OF TORTS § 352 (1964); see discussion beginning at p. 672 infra.
4. Id. at 312, 270 N.E.2d at 258. The exception is stated in RESTATEMENT (SECOND) OF TORTS § 353(2) (1964). See discussion beginning at p. 681 infra.
The Illinois Supreme Court reversed, reinstating the summary judgment order. The supreme court agreed with the appellate court that those selling real estate on installment contracts should not be subjected to a different liability than that imposed on other vendors by virtue of the rights retained under the contracts. The court refused, however, to recognize the exception to the general rule that the appellate court had relied on. Furthermore, the court said that, assuming there was such an exception, the appellate court's conclusion would have been erroneous since six days "could not reasonably be found adequate for the simple repairs here involved."\(^5\) Thus, while the Andersons' rights against the Smiths were not affected by the grant of summary judgment in favor of the Suchiers, they were effectively deprived of any substantial recovery, since it was the Suchiers, and not the Smiths, who were in a financial position to fully compensate the Andersons.\(^6\)

The result in *Anderson* does not represent any substantial change from the previous Illinois position. However, several issues merit greater consideration than the courts in *Anderson* were inclined to give. Accordingly, this comment will first explore the Andersons' contention that the general rule should not have been applied because the Suchiers were not technically vendors, but really landlords. Since the courts' rejection of this contention was based on the conclusion that the factors of possession and control—not the specific relationship between the parties and the real estate—dictate liability, a more in-depth discussion of what constitutes sufficient possession and control to impose tort liability follows. Next, the exception to the general rule that the appellate court supported and the supreme court rejected is considered. Finally, the comment will evaluate whether the imposition of tort liability on installment contract sellers can be justified on policy grounds.

**The General Rule—Is It Applicable?**

As previously indicated, the generally accepted rule is that where a vendor surrenders possession and control of property, he is no longer liable to third persons injured as a result of defects existing on the premises at the time of the transfer.\(^7\) The Illinois courts of late have

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5. 54 Ill. 2d at 508, 301 N.E.2d at 298.
6. This fact was elicited from Mr. Jerome Torshen, Esq., an attorney who represented the Andersons on the appeals, during a telephone conservation with him on February 28, 1974.
7. See note 2 supra.
consistently adhered to the general rule. In *Porter v. Miller* the plaintiff was burned in a fire on property allegedly owned by the defendant. The defendant denied ownership, asserting that he had executed a contract of sale to another, who was given possession. The court granted summary judgment for the defendant, as the purchaser admitted being in exclusive possession and control of the real estate at the time of the accident, and there was no agreement granting the defendant any right to exercise dominion or control over the premises.

Similarly, in *Maisenbach v. Buckner* the plaintiff was injured when he tripped over a fence surrounding a parking area. The court exonerated the former owners who had maintained and repaired the fence during their ownership, because they had surrendered title, possession, and control pursuant to a deed. The court held that since they clearly had no right to control the property after it was sold, there could be no duty to third parties injured in connection with the property after the sale.

The rationale of this general rule is that any negligence attributable to the vendor cannot be said to be the proximate cause of any injuries sustained while the vendor is out of possession and control. The taking of possession by the vendee constitutes an intervening cause breaking the chain of causation. Thus, when the vendor surrenders possession to the vendee, his liability ceases and the vendee's begins.

It was the Andersons' first contention, however, that the Suchiers were not vendors as contemplated by the general rule. In support of this contention they pointed out that the general rule of non-liability is effective only because of the passage of a deed of conveyance, which represents the full agreement between the parties. With the passage of the deed, the vendor finally and completely severs himself from any interest in the property. The Andersons reasoned that the Suchiers should not benefit as vendors under the general rule since they were to convey no deed to the Smiths until all of the installment

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11. 132 Ill. App. 2d at 313, 270 N.E.2d at 258.
12. *Id.*
payments were made, and the Suchiers did retain rights under the contract.

Support for this proposition is sparse. In their brief the Andersons cited a New Jersey case, *Sarnicandro v. Lake Developers, Inc.*, where the plaintiff sued for injuries suffered after a fall on steps leading to the basement of a house, part of which the plaintiff rented from the owners and occupiers. After recognizing the clear difference between a vendor-vendee and a landlord-tenant relationship, the court averred that, with respect to the absolute sale involved in a vendor-vendee relationship, "the vendor divests himself of title and all right of possession or of re-entry for repairs or for any other purposes." The Suchiers did not divest themselves of title, and they did retain a right of re-entry for the purpose of making repairs and were not therefore parties to an absolute sale.

The introduction to an annotation on the subject of the liability of vendors for defective premises appears to lend some support to a technical reading of the term "vendor":

The term "vendor or grantor" is used in this annotation to refer to an owner of land who has entered into a contract for the sale of his land and, *by a deed of conveyance, has divested himself of all title to such land.*

The *Anderson* case was cited in this annotation as supportive of the general rule of non-liability of "divested" vendors. Apparently the authors misinterpreted *Anderson*, for at the time of the accident no deed had been conveyed, and the Suchiers had not divested themselves of all title to the building.

It was the Andersons' second contention that since installment contract sellers are not vendors, the Suchiers should be considered as landlords under the circumstances. As landlords, the Suchiers would be deemed to be in control of the so-called common areas of the building and would be liable for any injuries resulting from a breach of their attendant duty to keep those areas in good repair. In this case the defective railing was clearly situated in a common area, and if the Andersons could establish a landlord-tenant relationship their chances of recovery from the Suchiers would be greatly enhanced.

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16. *Id.* at 480, 151 A.2d at 51.
Although such an analogy has generally been discredited, there is a substantial similarity between a landlord's and a vendor's relation with his property where the vendor sells under an executory installment contract:

The landlord has a counterpart in the commercial vendor of today who frequently sells his land through the investment land contract. Such a vendor retains legal title until the final payment; Control is frequently retained by covenants to supervise the condition and the use of the property. The continuing quasi-confidential relation between vendor and vendee under the installment land contract seems substantially similar to the lessor-lessee relation.

The Andersons argued in support of the analogy that collecting payments under an installment contract is similar to collecting rent and that the payments constitute no less economic benefit to the contract seller than rent received by the landlord. In addition, they contended that the position of an installment contract purchaser upon default is no better than that of a tenant when an action is brought under the Forcible Entry and Detainer Act. The appellate court rejected this analogy. To the court the distinction lies in what happens when payments are made, not when they are not made. A tenant is entitled to possession for only a limited period of time when he pays rent. Upon the expiration of his term, he must surrender possession. But a buyer under an installment contract is generally considered to be the beneficial owner of the property while he makes installment payments and the outright owner when all of the payments are eventually made.

Also supporting the analogy was the fact that under the contract the Suchiers retained the right to enter and make repairs on the property if the Smiths failed to do so. However, neither the appellate court nor the supreme court was prepared to say that a right to repair gives rise to a duty to repair. It is evident from the decisions that the duty to repair which is necessary before there can be tort liability is related to possession and control. Regardless of the specific relationship between the Suchiers and the building, sufficient control to

21. 132 Ill. App. 2d at 311, 270 N.E.2d at 256; Brief for Plaintiff, supra note 14, at 10.
23. 132 Ill. App. 2d at 311, 270 N.E.2d at 256.
establish a duty to repair cannot be inferred from a reservation of a right to enter and make repairs.

Thus, the Andersons' first argument that the Suchiers were not vendors was misplaced, since the factors given significance in establishing tort liability under the general rule were possession and control, not whether or not the Suchiers were technically vendors. The Illinois courts have expressed no doubts that regardless of the character of one's interest in the property, liability will depend upon possession and control. In Porter v. Miller it was alleged that a warranty deed was still in escrow when the plaintiff was injured, as the purchase price was neither fully paid nor due. Summary judgment was granted for the defendant-former owner when it was determined that he had no right to possession, dominion, or control over the premises in question. Whatever the relation was between the parties and the premises, the defendant's lack of possession and control was the determining factor.

Similar reasoning was applied in Conway v. Epstein, where the plaintiff-tenant fell down the front stairs of the apartment building where she lived, sustaining injuries. Again, the exact nature of the relation of the defendant to the premises was indeterminate, since the building was in the process of being sold when the accident occurred. Nevertheless, the court granted summary judgment for the sellers, since it was undisputed that the buyers had possession and control of the building at the time of the accident.

It follows that the general rule is not limited to vendors. Any person who is not in possession and control of premises, or some portion thereof, will not be liable for injuries resulting from defects in the premises at the time of any transfer of possession and control.

The Andersons' second argument that an installment contract seller is functionally more similar to a landlord than a vendor is stronger in that a landlord relationship contemplates a greater degree of possession and control. Since the Suchiers were clearly not in possession of the building, their liability would necessarily depend on whether they had exercised a sufficient degree of control over the premises. The courts in Anderson summarily dismissed the contention that the rights retained under the contract, specifically the right to enter and make repairs, were sufficient incidences of control to subject the

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27. See cases cited note 18 supra.
Suchiers to liability. Due to the popularity and usefulness of the installment contract, especially with respect to lower income families, and in light of the result in *Anderson*, consideration should be given to a definition of what acts and circumstances do constitute control sufficient to hold a seller of real property liable for injuries resulting from defects in the property.

**CONTROL AND THE AGREEMENT TO REPAIR—THE ILLINOIS POSITION**

It has long been the generally accepted position in Illinois that one who simply covenants to repair is not liable to a tenant or subtenant for injuries caused by a defect in the premises which was not repaired. The leading case in the area appears to be *Cromwell v. Allen*. The plaintiff in *Cromwell* rented a store building on an oral lease from the defendant, who agreed to, and did, make certain alterations and repairs before the plaintiff was to take possession. Plaintiff claimed that the defendant had agreed to make any repairs necessary after the plaintiff had taken possession, an averment the defendant denied. The plaintiff had already fallen once from some broken steps leading from a platform to the ground in the rear of the building. Although she was not injured, she warned defendant's agent of the poor condition of both the platform and the steps. Subsequently she fell through one of the boards in the platform, injuring herself. Plaintiff was denied recovery, though the court did not determine whether the defendant had agreed to make repairs. It ruled that even if it could be established that the defendant had covenanted to repair, the plaintiff's injuries were necessarily too remote to be recovered as damages for breach of contract.

The court in *Cromwell* did recognize various situations where the agreement to repair would render a landlord or one in a similar position liable; namely, where the covenant to repair amounts to a covenant to keep the premises in a reasonably safe condition, where circumstances clearly indicated that the damages or injuries sustained were contemplated by the parties when the contract was entered into, or where the duty to repair arises from something outside the confines of the contract. Evidently there must be more than merely a general covenant to repair.

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30. *Id.* at 407.
31. *Id.* at 408.
Alaimo v. DuPont\(^3\) is illustrative of Cromwell's first exception. Alaimo was employed in a warehouse rented from the defendant; he sustained fatal injuries while using a dangerously defective, antiquated freight elevator. The defendant had agreed in the lease to make any necessary repairs on the elevator, reserving therein also a right to enter the premises for that purpose. The court concluded that the reservation of the additional right to enter to repair was evidence that the parties intended the agreement to be a covenant to keep the premises, and especially the elevator, in a reasonably safe condition and that the defendant would be liable if the breach of the covenant to repair was the proximate cause of the accident.\(^3\) The additional right reserved under the lease was the "something more" that Cromwell required before tort liability would be imposed.\(^4\)

Another of the Cromwell exceptions is exemplified by Moldenhauer v. Krynski,\(^3\) where the plaintiff on numerous occasions had asked defendant-landlord to repair some loose tiles in the bathroom and the repairs were never made. The plaintiff was injured when she fell trying to avoid the loose tiles. The defendant had agreed to repair in the oral lease, but had not reserved the right to enter and repair if necessary. However, the court determined that since the defendant had agreed specifically to repair the tiles, the injuries were of the type within the contemplation of the parties when the lease was entered into, and the defendant was held to be liable for his breach.\(^6\)

There is, on the other hand, authority contrary to the Cromwell holding that a mere covenant to repair is not sufficient to impose liability. In Sontag v. O'Hare\(^3\) decedent and her family rented a first floor flat in a building owned by the defendant. There was evidence to support a finding that the defendant had agreed to repair the premises, which included a back porch, stairs, and a rotted and worm-eaten railing. The decedent was fatally injured when the railing broke, and she fell several feet to the ground below. The court said that the defendant would be liable for his breach of the agreement to repair

\(^3\) 4 Ill. App. 2d 85, 123 N.E.2d 583 (1954).
\(^4\) Id. at 92, 123 N.E.2d at 586.
\(^5\) See also Gula v. Gawel, 71 Ill. App. 2d 174, 218 N.E.2d 42 (1966), where it was held that a landlord's retention of a key to plaintiff's apartment for the purpose of making repairs and the fact that the landlord had in fact used the key to enter and repair were sufficient, when coupled with a provision in an oral lease that the landlord would repair and maintain the premises, to give rise to a duty to maintain the premises in a reasonably safe condition.
\(^7\) Id. at 390, 210 N.E.2d at 813; accord, Page v. Ginsberg, 345 Ill. App. 68, 102 N.E.2d 65 (1951).
\(^7\) 73 Ill. App. 432 (1897).
if the breach was the proximate cause of the injury.

This minority position also finds support in the *Restatement (Second) of Torts*:

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, . . . 38

The *Restatement* also makes it clear that liability rests in tort, and not upon a contract. 39 A covenant to repair implies the reservation of a right to enter the premises for the purpose of making repairs, and if the covenant and the reservation are considered together, there is control sufficient to sustain tort liability. The implied right to enter and repair is the "something more" required by *Cromwell* before tort liability will be imposed for breach of an agreement to repair.

The minority position seems to be the better one. When the landlord agrees to repair, often the tenant will rely on that agreement, and forego efforts to remedy any dangerous and defective situations. The reliance is not unreasonable, since generally lower income families are at the mercy of the landlords and have no independent power to bargain for an improved position as tenant.

**CONTROL WITHOUT AN AGREEMENT TO REPAIR**

Where the landlord does not agree in the lease to make repairs, the courts can look to other lease provisions in making their determination as to whether control sufficient to impose tort liability on a landlord has been retained. Apparently in Illinois the mere reservation of a right to enter for the purpose of making repairs will not give rise to a duty that would subject the party reserving the right to tort liability, and in this respect the courts in *Anderson* ruled correctly.

In *Jackson v. 919 Corp.* 40 the plaintiff was injured while walking on a public sidewalk when she was struck by glass from a store window that broke as she approached. The lessee of the building was required to keep the premises in repair and immediately replace any plate glass which might become damaged. No right to enter for the

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39. *Id.* at comment c.
purposes of inspection and repair was reserved by the lessor, but he
did reserve the right to remove any objectionable signs or advertising.
The plaintiff's theory was that since the lessor's employees made daily
inspections of the outside front of the building, the lessor-owner re-
tained control over the outer windows, including the one that broke.
The court, in rejecting the plaintiff's contention, noted that since the
reservation of a right to enter and repair by itself would not render
the lessor-owner liable, it naturally followed that the informal inspec-
tions, not involving any entry into the building, could not constitute
control of the premises.\footnote{41}

No Illinois authority was cited for the court's statement that merely
reserving a right to enter and repair would be insufficient control,\footnote{42}
yet it would appear that this position has been adopted in Illinois as
a result of \textit{Jackson}. Rather than examining the singular element of
the reservation of the right to enter and repair, the courts have looked
at the totality of the acts and circumstances in each case in determin-
ing whether there is control.

As an example, in \textit{Breazeale v. Chicago Title and Trust Co.}\footnote{43} the
fact that the landlord's employee vacuumed a leased apartment weekly
was held not to be such control that would carry with it a duty to
replace the shabby carpet, and the plaintiff-tenant was denied recovery
from the landlord after she had tripped on the carpet, sustaining in-
juries. Previously, the plaintiff had complained that the living room
carpet was shabby and that it had a hole in it and was assured by
the landlord that new carpets were ordered and would be installed
shortly. The plaintiff's complaint went more to the appearance of the
carpet and not particularly to any element of risk involved therein.
Thus, the court implied that the weekly vacuuming was a ministerial
duty and did not create a legal duty to keep the premises safe. The
result seems harsh, though, as it is reasonable to assume that an old
and shabby carpet is implicitly dangerous, especially when the condi-
tion is called to the landlord's attention.

There also appeared to be substantial indicia of possession and con-
control in \textit{Drewick v. Republic Steel Corp.},\footnote{44} but the court refused to
find control. In \textit{Drewick} the plaintiff was struck by a window which
fell or was blown from a building, part of which was occupied by the

\footnote{41} Id. at 526, 101 N.E.2d at 597.
\footnote{42} The court relied on an Oregon case, Nash v. Goritson, 174 Ore. 368, 149 P.2d
325 (1944), distinguishing the leading case in the area, Appel v. Muller, 262 N.Y. 278,
186 N.E. 785 (1933); see also discussion beginning at p. 680 infra.
\footnote{43} 293 Ill. App. 269, 12 N.E.2d 217 (1938).
\footnote{44} 97 Ill. App. 2d 187, 240 N.E.2d 524 (1967).
lessee corporation. Under the lease the lessee had agreed generally to repair, but the defendant-lessee agreed to repair any damage to the premises occasioned by its own acts. Nothing in the evidence indicated that the defect which resulted in the plaintiff's injury was caused by the lessor. Aside from this lease provision, the plaintiff asserted that additional factors necessarily carried an implication of the lessor's possession and control. The plaintiff pointed to the fact that the president of both the lessor and lessee corporations was one and the same person, the fact that he maintained his office in the portion of the building from which the window fell, and the fact that he had papers in his desk pertaining to the defendant-lessee's business. The court succinctly stated that, even considered together, those facts were not sufficient to impose liability.45

In contrast sufficient control was established in Patterson v. Stern,46 where the plaintiff fell through a guardrail on the outside wall of a part of a building leased to the plaintiff's employer by the defendant. Although the lessee had agreed to keep the leased premises in good repair, the defendant-lessee reserved both the right to enter the leased premises in order to repair, and the right to alter the building by making several improvements, including some in the area where the guardrail was located. Under these circumstances the plaintiff was allowed to recover, since the lessor was said to be responsible for the area in question.

Thus, in Illinois where there is no agreement that the landlord is to repair the premises, there must be something in addition to a reservation of the right to enter and repair in order to establish sufficient control, and that something will be determined by the circumstances of the particular case. Contrast the Illinois view with the position the New York courts have taken. In Appel v. Muller47 the court said that the landlord, by merely reserving the right to enter the premises to make any necessary repairs in the lease,

had never parted so completely with possession and control that he divested himself from performing his duty of care toward travelers upon the street. He continued under the duty to keep his building in a safe condition; he reserved the power to perform this duty; he was liable.48

One basis for holding such a landlord liable is that the reason for

45. Id. at 196, 240 N.E.2d at 529.
46. 88 Ill. App. 2d 399, 232 N.E.2d 7 (1967).
47. 262 N.Y. 278, 186 N.E. 785 (1933).
48. Id. at 283, 186 N.E. at 787.
protecting him against a lessee's negligence, *i.e.*, his inability to gain access to the premises to make the necessary repairs, is lacking.\(^{49}\)

The holding in *Appel* was limited to make lessors liable only to *third persons outside* the premises, *e.g.*, pedestrians. This distinguishing fact has been adhered to when *Appel* has been followed,\(^{50}\) although it might be argued that if one had control with respect to pedestrians, he should also have had control with respect to possessors.\(^{51}\)

*Appel*, however, has not always been followed. The court in *People v. Scott\(^{52}\)* refused to permit a finding of control sufficient to hold a landlord liable where the reservation of a right of entry to make repairs was not coupled with a concomitant covenant to repair. However, *Scott* is distinguishable from *Appel* since it was a criminal case, and the court would not strive to find control in order to attach criminal responsibility.\(^{53}\)

Admittedly the difference between these cases and *Anderson* is that the issue in these cases was whether a *landlord* or a *lessor* had retained sufficient control over his premises to subject him to liability, and in *Anderson* the Suchiers were not the landlords of the building but were contract sellers. But as long as the emphasis is to be on possession and control, and not on the relationship of the person to the property, the principles just enunciated should be applicable in a case like *Anderson*. Under such principles, however, even if the *Anderson* case had been decided in New York, the Andersons probably would not have been able to sustain an argument that the Suchiers retained sufficient control over the building to render them liable in tort, since the Andersons were tenants, not members of the general public. However, they might have received a more thorough explanation of the elements of possession and control from the New York courts.

**AN EXCEPTION TO THE GENERAL RULE**

Both the supreme court and the appellate court in *Anderson* noted a well-recognized exception to the general rule of vendors' non-lia-

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\(^{50}\) See *King v. Lenko Realty*, 22 Misc. 2d 376, 191 N.Y.S.2d 98 (Sup. Ct. 1959), where the reservation of a right to enter the premises and repair was found to vest the owner with sufficient control to render him liable to a member of the public; *McCabe v. Century Theatres Inc.*, 25 App. Div. 2d 154, 268 N.Y.S.2d 48 (1966).

\(^{51}\) See *Comment, Torts—Liability of a Landlord for Injuries to Persons on the Premises—Effect of Repairs Made Under Such Covenant Subject to an Injury Caused by Defect Repaired*, 48 Mich. L. Rev. 689, 697 (1950); but see *Rayonier v. United States*, 225 F.2d 642 (9th Cir. 1955).


\(^{53}\) *Id.* at 291, 258 N.E.2d at 210, 309 N.Y.S.2d at 924.
bility, supported by the Restatement. Under the exception a vendor will remain liable in tort even after a transfer of possession and control when he consciously deceives his vendee by concealing or failing to disclose a dangerous condition known to him but not reasonably expected to be known to the vendee. Liability continues until the vendee has discovered the defect and has had a reasonable amount of time to remedy it. Although this concealed defect exception was not applicable in Anderson, it serves as a useful basis for explaining the divergence of opinion between the supreme court and the appellate court with regard to recognizing another exception to the general rule.

Having rejected the Andersons' contentions that the Suchiers were not technically vendors, but were more akin to landlords, and having held that in any event the Suchiers had not exercised a sufficient degree of possession and control to impose tort liability, the appellate court offered a second exception to the general rule of non-liability for vendors. This exception, supported by the Restatement, would hold a vendor who is out of possession and control liable even when a vendee takes possession with knowledge of the defect, if sufficient time has not elapsed by the time of the accident to allow the vendee to repair the defect. Furthermore, the protection extends to any person to whom the vendee has leased or sold. Since the Andersons rented their apartment from the vendees (the Smiths), they could assert this exception.

To the appellate court there was an existing question of fact as to whether six days was a reasonable amount of time for the Smiths, as vendees, to correct the defect, and such a factual issue could only be resolved by the jury. In so holding, the court relied on a New York case, Farragher v. New York, a wrongful death action on behalf of a fireman who died fighting a fire because the premises lacked an automatic sprinkler system required by law. The evidence indicated that it would have taken about ninety days to install a proper sprinkler system, and that the vendee had taken title to the premises less than ninety days before the accident. Thus, the vendee in Farragher
could not possibly have remedied the defect by the time the accident occurred, and, accordingly, the vendor was held to be liable.

The origins of this "reasonable time to repair" exception favored by Farragher are traceable to early New York case law. In Pharm v. Lituchy, the vendee was not notified of a defective ceiling in the plaintiff's apartment when the premises were conveyed to him by the defendant. One day after the conveyance the ceiling collapsed, injuring the plaintiff. The court found against the defendant-vendor since there clearly had not been a reasonable opportunity for the vendee to remedy the defect. The fact that the defect in the ceiling was concealed from the vendee by the vendor played no part in the court's conclusion; it said that there was no reason to consider the concealed defect exception to the general rule of vendors' non-liability.

In subsequent cases twelve days, thirty-two days, nine months, and four years were held to have been sufficient time for the vendee to repair the defects in the absence of concealment. In any case the determination of what is a reasonable length of time must be made according to the circumstances of the particular case, including consideration of such factors as the amount of time elapsed, the nature of the condition, and the use made of the land by the vendee.

The Illinois Supreme Court was not convinced that this exception should be adopted. It asserted that the reasonable time to repair exception had not found acceptance outside New York, and it refused to apply the exception generally to exculpate vendees in situations such as the one in Anderson. Farragher was distinguished on the ground that special circumstances were involved in that case, i.e., that it would have been impossible to make the required installation in the amount of time the vendee had been in possession, whereas in Anderson it could not be shown to be impossible to fix the railing within six days. Even if the court had recognized the exception, it would have disagreed with the conclusion of the appellate court based

also interesting to note that the accident occurred within ninety days from the date when the contract was entered into. Id.

63. Id. at 13, 27 N.E.2d at 81.
68. RESTATEMENT (SECOND) OF TORTS § 353, comment g (1964).
69. 54 Ill. 2d at 508, 301 N.E.2d at 298.
thereon, since the supreme court found that as a matter of law six days would have been sufficient time for the vendees to make the necessary repairs.\textsuperscript{70} In other words before a vendor will be held liable there must be no way for the vendee to remedy the defect in the period of time between the taking of possession and the accident.

The weaknesses and the inconsistencies of the supreme court majority's opinion were ably pointed out by the two dissenters, Justices Goldenhersh and Kluczynski.\textsuperscript{71} They reasoned that the effect of the reasonable time to repair exception would not be to exonerate the vendee completely, but merely to allow the factual issues to be decided on the evidence and by the trier of fact.\textsuperscript{72} Moreover, there is a basic inconsistency in accepting the concealed defect exception and rejecting the reasonable time to repair exception:

The same rationale which imposes liability upon one who sells property with a concealed, defective, dangerous condition until discovery, and until there has been an opportunity to repair, compels the conclusion that a vendor who sells property with a visibly dangerous defect should be held liable until a reasonably sufficient time has elapsed to permit the vendee to repair it. The only difference between the two situations is that in the case of the concealed defect the reasonable period of time commences to run from discovery, and in the case of the patently dangerous defect, from the time of relinquishment of the right to possession and control. In either instance, whether there has been a reasonable opportunity to repair is a question of fact.\textsuperscript{73}

The logic of this reasoning is undeniable, and if a similar situation arises in the future, the court would do well to draw on this language.

Especially displeasing to the dissent was the majority's ruling as a matter of law that six days was a reasonable opportunity to make the "simple repairs" on the railing. There was no evidence in the record to support the conclusion that the repairs were simple. The rotten condition of the railing might easily have been so extensive as to require reconstruction, and not merely replacement of a rail.\textsuperscript{74}

\textbf{POLICY CONSIDERATIONS}

Underlying the basic issues in the \textit{Anderson} case is the question of whether there are valid policy reasons for holding the Suchiers liable in tort as vendors under an installment contract for the sale of

\begin{itemize}
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} \textit{Id.} at 509-11, 301 N.E.2d at 299-300 (dissenting opinion).
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} \textit{Id.}
\item \textsuperscript{74} \textit{Id.}
\end{itemize}
real estate. On behalf of the vendors it can be said that to hold them liable in tort might be a restriction on the Illinois policy favoring the free alienability of land. Any trend toward holding installment contract sellers responsible for personal injuries sustained after they have given up possession of the premises and retained some degree of control therein may deprive many people of their only available method for purchasing real estate. Sellers would be more reluctant to dispose of their property in light of an increased risk that they might be subjected to tort liability. Nevertheless, the concealed defect exception has established the propriety of holding a vendor liable subsequent to a transfer of possession and control.

On the other hand, there appear to be basic inequities in the economic realities of the real estate installment sales contract. Due to the frequently poor financial position of the buyer and his general inability to obtain other types of financing, his power to bargain with the seller for improved conditions under the contract is virtually nonexistent. For example, under an installment contract the buyer has no equity of redemption: if he defaults on one payment he can be evicted, and the seller is allowed to retain all payments previously made under the contract as liquidated damages.

The courts, however, often struggle to find ways to protect the defaulting vendee and continue the contract. Thus, forfeiture provisions may be struck down when their application would shock the conscience. Similarly, waiver of the forfeiture provision might be found where a vendor accepts payments made after a notice of forfeiture.

Recent legislation has also attempted to improve the position of a buyer under an installment contract. Contract buyers now have a limited equity of redemption when the court determines that the total unpaid amount of the contract is less than 75% of the original purchase price.

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75. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 129 (1962) [hereinafter cited as CRIBBET].
76. ILL. REV. STAT. ch. 57, § 2 (1973).
77. See generally CRIBBET, supra note 75, at 128-30.
78. Id. at 129.
80. Zeta Bldg. Corp. v. Garst, 408 Ill. 519, 97 N.E.2d 331 (1951). The court in Garst also distinguished between notice of an intent to declare a forfeiture and declaration of a forfeiture. Since the contract involved called for the giving of notice of an intent to declare a forfeiture, a declaration of a forfeiture by the sellers without having given such notice was insufficient to forfeit the contract. Id. at 523, 97 N.E.2d at 333.
81. ILL. REV. STAT. ch. 57, § 13 (1973). See also Bernard, Legal Aspects of the 1961 Mortgages and Redemption Law Legislation in Illinois, 43 CHI. BAR RECORD 229, 245 (1962), which points out that the applicable percentage is the percentage of
In any event the vendor should not be permitted to shift responsibility by merely selling his property, especially in light of statutes which require that property owners who furnish housing to others furnish safe and decent housing. Congress has declared it to be the national policy of the United States to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings.\textsuperscript{82} that are injurious to the health, safety, and morals of the citizens of the Nation.\textsuperscript{82}

The State of Illinois has also recognized the need for repair and maintenance of housing facilities, providing that:

No person, being the owner, occupant or lessee of any building or other structure which is so occupied or so situated as to endanger persons or property, shall permit such building or structure by reason of faulty construction, age, lack of proper repair, or any other cause.\textsuperscript{83} to become liable to cause injury or damage by collapsing or otherwise.\textsuperscript{83}

The imposition of tort liability upon parties in the position of the Suchiers would be in furtherance of federal and state goals to provide safe and decent housing for all.

CONCLUSION

The significance of \textit{Anderson} lies in its failure to justify adequately the conclusions eventually reached by the court. With the substantial use of the installment contract with respect to real estate sales, the issue of control is vital, and it deserved closer discussion than it received. Perhaps the willingness of the courts of New York to find sufficient control upon which to base tort liability in some circumstances when a landlord merely reserves in the lease the right to enter the premises for the purpose of making any repairs foreshadows a change in the position of the Illinois courts in the near future.

In addition, the supreme court decision exonerated vendors of real property containing a dangerous, defective condition without a fair determination of whether real responsibility had in fact been shifted from the Suchiers to the Smiths within the six-day period between the taking of possession of the building by the Smiths and the accident.


\textsuperscript{83} ILL. REV. STAT. ch. 127½ § 9 (1973).
To hold as a matter of law that six days was a reasonable length of time in which to make the necessary repairs, without substantial evidence as to the extent of the defect, completely undermines the role of a jury in a civil case.

The supreme court's refusal to recognize the reasonable time to repair exception is unfortunate. The responsibility for defective housing should be placed where it may be exercised. The vendee of housing containing a concealed defect is not held responsible until he knows about, and can physically correct, that defect. He cannot have the responsibility for repairing that of which he is unaware. Likewise, a vendee who is aware of a defect when the contract is entered into cannot exercise responsibility when he cannot reasonably repair the defect because he lacks adequate time.

Acceptance and application of the reasonable time to repair exception, in addition to being consistent with acceptance of the established concealed defect exception, would give plaintiffs like the Andersons the opportunity to have the jury, not the judges, decide a question of fact vital to their case. Recognition of the exception would also be a small step toward a more logical allocation among vendors and vendees of responsibility for personal injuries resulting from defective housing. That small step should be taken in Illinois.

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