Chapter 13: Property and Conveyancing

William Schwartz
CHAPTER 13

Property and Conveyancing

WILLIAM SCHWARTZ*

§13.1. Obsolete restrictions: Enforceability and constitutionality. In 1961, the Massachusetts legislature continued its quest for greater title certainty and marketability by inserting section 30 of chapter 184 and sections 10A-10C of chapter 240 into the General Laws.1 These sections are significant in two respects. First, a proceeding was authorized whereby a landowner may receive a judicial determination that a restriction upon his land is or is not enforceable or that it is only partially enforceable.2 Furthermore, the court is empowered to determine that the restriction is enforceable only by the award of money damages, and that upon the payment thereof, the land will be declared free of the restriction, even if the restriction has not been violated.3 A restriction is enforceable only if it is "of actual and substantial benefit to a person claiming rights of enforcement."4 Even if the restriction actually and substantially benefits the person claiming such rights, it is not specifically enforceable (and only money damages may be awarded) if: (1) changes in circumstances materially reduce the need for the restriction to accomplish its original purpose, or render it obsolete or inequitable to enforce specifically; (2) the party seeking equitable relief has acted in an inequitable manner (laches or lack of clean hands); or (3) the requested equitable remedy is for any other reason inequitable or not in the public interest.5

WILLIAM SCHWARTZ is a Professor of Law at Boston University School of Law. He is the author of Future Interests & Estate Planning (1965) and co-author of Massachusetts Pleading & Practice: Forms & Commentary (1974). Professor Schwartz is also of counsel to the law firm of Swartz & Swartz, Boston.

2 G.L. c. 240, § 10A.
3 Id. § 10C.
4 G.L. c. 184, § 30.
5 Id. In addition, in the case of a common scheme, the restriction will not be specifically enforced if "the land of the person claiming rights of enforcement is for any reason no longer subject to the restriction or the parcel against which rights of enforcement are claimed is not in a group of parcels still subject to the restriction and appropriate for accomplishment of its purposes . . . ." Id. Furthermore, the statute ex-
Although the Judicial Council felt that this procedure is constitutional, others at the time of enactment contended that the statute may be violative of Articles I and X of the Declaration of Rights of the Massachusetts Constitution. While the grounds for declaring land to be free of imposed restrictions are fairly tightly drawn and specifically set forth, the statute is somewhat similar to one held unconstitutional in 1917 in Riverbank Improvement Co. v. Chadwick. That statute permitted a petition to be brought in land court to determine whether equitable restrictions on land were enforceable, and to register title to such land free of restrictions if the court found enforcement "inequitable." The petitioner and others owned land in Boston subject to equitable restrictions prohibiting both the erection of buildings costing less than $15,000 and the use of any buildings for apartment houses or for mercantile purposes. The restrictions were established by the owners in the expectation that the land would be bought for the erection of expensive private residences. However, the construction and extension of means of rapid transit and the general use of the automobile had rendered homes in the suburbs of Boston far more accessible than when petitioner's scheme of restrictions was put in operation. For this and perhaps other reasons, the restricted area explicitly states that equitable enforcement will be denied if the restriction impedes the "reasonable use of land for purposes for which it is most suitable, and would tend to impair the growth of the neighborhood or municipality in a manner inconsistent with the public interest or to contribute to deterioration of properties or to result in decadent or substandard areas or blighted open areas ...." Id.

* The Judicial Council was created by the legislature "for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts." G.L. c. 221, § 34A. The Council reports annually to the governor. Id. § 34B.
* Article I provides in pertinent part: "All men are born free and equal, and have certain natural, essential and unalienable rights; ... that of acquiring, possessing, and protecting property ...." Mass. Const. pt. I, art. I.
* Article X provides in pertinent part:
  Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws .... [B]ut no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people .... And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

Mass. Const. pt. I, art. X.


* 228 Mass. 242, 117 N.E. 244 (1917).

* Acts of 1915, c. 112, §§ 1, 2.
was unavailable for the uses for which these restrictions were de­signed, and by far the larger part of the parcel had not been built upon; the land court thus found, over the objection of neighboring landowners, that it would be "inequitable" to enforce the above restrictions.¹²

As viewed by the Supreme Judicial Court on appeal, the question posed was whether the petitioner, after assessing potential damage to respondent neighbors caused by the non-enforcement of these restric­tions, could constitutionally extinguish the restrictions by payment of damages. The Court found the statute unconstitutional as applied, noting:

It has been found expressly that the enforcement of the restric­tions would "not be injurious to the public interests." That finding must be accepted as final and true. Each of the respondents is to be forced against his will to surrender his right in the nature of an easement in the land of another when it is not "inoperative, il­legal or void" according to the decision of the Land Court. He will be obliged to make surrender of this real estate right and ac­cept money damages in place of it, not because demanded by the public interests, but because a neighbor desires it for his private aims. This is plain from the bald statement of the facts... "[I]t is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses, even though full compensation for the taking be required."¹³

In Blakely v. Gorin,¹⁴ decided during the Survey year, the Court, in a four to two decision, dispelled the constitutional cloud cast by Riverbank. The petitioners sought a declaration that certain restrictions on their land which would have prevented the construction of a hotel were unenforceable. The superior court, finding that a radical change in the neighborhood had occurred since execution of the restrictions, held that the restrictions were obsolete and refused to award money damages to the respondents, owners of nearby lots.¹⁵ This ruling was challenged by the respondents, who alleged that the application of section 30 resulted in an unconstitutional taking of property for pri­vate purposes.¹⁶

The majority on appeal stated that the primary considerations in determining whether the statute has been constitutionally applied are the findings of the lower court. The Court, noting that in Riverbank

---

¹² 228 Mass. at 245, 117 N.E. at 244.
¹³ Id. at 247, 117 N.E. at 245.
¹⁵ Id. at 1128, 313 N.E.2d at 905.
¹⁶ Id. at 1131, 313 N.E.2d at 907.
the validity of the application of the statute\textsuperscript{17} had only been considered with respect to the facts then before the Court,\textsuperscript{18} proceeded to distinguish Riverbank from Blakely. Unlike the land court in Riverbank, the superior court in Blakely had found that enforcement of the restrictions would operate contrary to the public interest.\textsuperscript{19} In light of this finding, the majority held that the statute had been constitutionally applied and that the restrictions could therefore be removed.\textsuperscript{20}

This reasoning failed to satisfy Justices Quirico and Reardon. The dissenters adopted the position that a taking of private property is only justified when supported by a "public purpose."\textsuperscript{21} Justice Quirico stated that "acts which are in the 'public interest' or constitute a 'public benefit' do not without more constitute a 'public purpose.'"\textsuperscript{22} In faulting the majority for having equated the terms "public interest" and "public purpose," the dissenters vigorously challenged the majority's reliance on the "beneficial effect" that removal of the restriction would have on expanding Boston's tax base.\textsuperscript{23} To Justice Quirico, the taking of private property to expand the real estate tax base would not be a taking for a public purpose, even if accomplished by a public body.\textsuperscript{24} In fairness to the majority, it should be pointed out that it relied upon a number of other factors as well to demonstrate the injurious impact enforcement of the restrictions would have on the public interest, including, \textit{inter alia}, drastic changes in the properties and neighborhood and the imposition of public controls which tend to preempt the restriction in a manner contemplated by the statute.\textsuperscript{25}

The impetus for the dissent may well be the fears expressed by the dissenting justices in Moskow v. Boston Redevelopment Authority:\textsuperscript{26}

On the one hand, it is difficult to foresee how any landowner will ever have access to a forum to show that the power of eminent

\textsuperscript{17} G.L. c. 184, § 30 is "substantially" similar to Acts of 1915, c. 112, the statute declared unconstitutional in Riverbank. 1974 Mass. Adv. Sh. at 1136, 313 N.E.2d at 909.


\textsuperscript{19} Id. at 1137, 313 N.E.2d at 910.

\textsuperscript{20} Id. Without deciding the point, the majority opinion also suggested that the statute may not entail a "taking" in a constitutional sense. In this view, the statute could be viewed merely as altering the remedies by which such restrictions may be enforced, and no one has a constitutional right, in all cases, to the remedy of specific performance. Id. at 1132, 313 N.E.2d at 907. In making these assertions, however, the Court did not specifically come to grips with the procedure for removal of a restriction authorized by the statute. A restriction may be removed, at the request of the owner of the servient land, even before it has been breached.

\textsuperscript{21} Id. at 1152, 313 N.E.2d at 918 (dissenting opinion).

\textsuperscript{22} Id. at 1156, 313 N.E.2d at 920 (dissenting opinion).

\textsuperscript{23} Id. at 1156-57, 313 N.E.2d at 920-21 (dissenting opinion).

\textsuperscript{24} Id. at 1156, 313 N.E.2d at 920 (dissenting opinion).

\textsuperscript{25} Id. at 1141-42, 313 N.E.2d at 912-13.

\textsuperscript{26} 349 Mass. 553, 210 N.E.2d 699 (1965).
domain is being exercised for a private purpose by a public authority vested with that power. On the other hand, it is not difficult to conceive of situations wherein economically powerful private interests, shielded by the opinion of the majority and working behind the facade of a public authority which has the power of eminent domain, will be enabled to become the real beneficiaries of the exercise of that power in contravention of Article X of the Declaration of Rights of the Constitution of the Commonwealth. 27

To Justice Quirico, section 30 may allow these “fears” to become a terrible reality. Under the obsolete restrictions statute, it is not even necessary to work “behind the facade of a public authority” to accomplish the taking. To some, the terms “public interest” and “public purpose” or “public use” may be synonymous or present at most slight semantic differences. To others, there is a vital distinction, upon which one’s constitutional right to hold and own property may hinge. In any event, one may well question the wisdom and propriety (in both a constitutional and non-constitutional sense) of delegating the “taking” power to the judicial branch, as distinguished from granting it to a public authority, especially when the delegation is accomplished through the route of the broad statutory standard of the public interest.

§13.2. Covenants running with the land: Non-competition covenants. It is a well-known fact of commercial life that many business investors are concerned about insulating their investments from the adverse effects of competition. The problem is a particularly poignant one for the purchaser or lessee of space in a shopping center who wants to be the exclusive distributor of certain products or services there. One obvious device for attaining this end would be the insertion in the deed or lease of a covenant restraining the grantor or lessor (and his heirs, successors, and assigns) from engaging in competing activities. Unfortunately, however, the Supreme Judicial Court has placed a number of barriers in the path of the full and efficacious use of this tool.

In the early case of Norcross v. James,1 one K had conveyed to one F a quarry of six acres in Longmeadow bounded by land of K. The deed contained a covenant by K to the effect that “I ... for myself, my heirs, executors, and administrators covenant with ... [F], his heirs and assigns . . . , that I will not open or work, or allow any person or persons to open or work, any quarry on my farm or premises in ... Longmeadow.”2 N and another acquired F’s quarry. J and

27 Id. at 574-75, 210 N.E.2d at 712 (dissenting opinion).

§13.2. 1 140 Mass. 188, 2 N.E. 946 (1885).

2 Id.
another became the owners of K's surrounding land and began to quarry stone on that land. N sought to enjoin this activity. The Supreme Judicial Court dismissed the bill. Justice Holmes, speaking for the Court, held that the covenant did not meet the "touch and concern" test, i.e., that before a covenant could run with the land so as to be enforceable by an assignee of the original grantee against the original grantee, it must be demonstrated that the covenant "touch or concern" or "extend to the support of" the thing conveyed.3

In addition, Justice Holmes referred to the covenant against competition as being a "new and unusual incident" which should not be enforced:

Again, this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly,—an easement not to be competed with,—and in that interest alone a right to prohibit an owner from exercising the usual incidents of property.4

In 1967 in Shell Oil Co. v. Ouellette,5 the Court had the opportunity to reconsider Norcross. It acknowledged that the doctrine of that case had been the subject of substantial adverse comment,6 and further conceded that other jurisdictions have rejected the Norcross view of non-competition covenants.7 In addition, the Court recognized the cogency and persuasiveness of the position advanced by one of the amici curiae that it is not "unreasonable to approve covenants ... which protect ... [business] investments—very large in most instances—against competition close by," in circumstances where the covenant would not constitute an unreasonable restraint of trade.8

---

3 Id. at 192, 2 N.E. at 948.

The covenant under consideration ... falls outside the limits of this rule.... In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products.

Id.

4 Id.


8 352 Mass. at 730, 227 N.E.2d at 512.
Nevertheless, the Court then proceeded to refuse to overrule the *Norcross* rule, retrospectively or prospectively, since parties may have reasonably relied upon the viability of this doctrine.\(^9\)

It is true that the fact of reliance by the bar should be given considerable weight where a rule affecting real estate is involved. It would appear, however, that the reliance factor becomes relevant only to the extent that parties have actually relied on a given rule to their detriment. As applied in the context of non-competition covenants, it would seem necessary for those desiring retention of the *Norcross* doctrine to show that they actually relied upon the belief that the covenant was not enforceable at the time a critical course of conduct was pursued.\(^10\)

With respect to the original grantor or lessor who has explicitly covenanted on behalf of himself, his heirs, successors and assigns (which covenant runs in favor of the grantee or lessee, and his heirs, successors and assigns), one has considerable difficulty in assuming that he reasonably thought that the covenant was not enforceable against himself by a successor to the original grantee or lessee. The grantor or lessor's own choice of language should preclude him from asserting that the reliance in such circumstances was justified. As far as successors in interest to the original grantor or lessor are concerned, it should be necessary for them to prove that their decision to subsequently acquire an interest in the nearby locus was affected by their or their counsel's belief that *Norcross* was still law. Conceivably, this standard might require them to show that they either would not

---

\(^9\) Id. at 731, 227 N.E.2d at 512-13. The Court has, however, progressed considerably from Justice Holmes' earlier, somewhat absolutist, condemnation of non-competition covenants in *Norcross* as being an "easement of monopoly." 140 Mass. at 192, 2 N.E. at 948. Reasonable restraints on trade are generally sustained. See A. Stickells, Legal Control of Business Practice § 4, at 12-16 (1965). In determining whether a given restraint is reasonable, the Court will weigh such factors as: (1) whether the covenant is broader than is necessary for the protection of the promises; (2) the effect of the covenant upon the promisor; and (3) the effect upon the public. See Levin, Non-Competition Covenants in New England, 39 B.U.L. Rev. 482 (1959); Note, Lessors' Covenants Restricting Competition: Drafting Problems, 63 Harv. L. Rev. 1400 (1950); Note, Restrictive Covenants in Shopping Center Leases, 34 N.Y.U.L. Rev. 940 (1959); Annots., 97 A.L.R.2d 4 (1964); 45 A.L.R.2d 77 (1945); 90 A.L.R. 1449 (1934). The rules pertaining to restraints on trade should not prove to be insuperable barriers to the enforceability of non-competition covenants whose operative scope is restricted to a definite time and area. See A. Stickells, supra.

In the course of its decision in *Shell Oil Co. v. Ouellette*, the Court indicated that what it itself called the "restrictive" view of *Norcross* had not been adopted even in Massachusetts with respect to leasehold estates. 352 Mass. at 729, 227 N.E.2d at 512. See *Sheff v. Candy Box, Inc.*, 274 Mass. 402, 406-07, 174 N.E. 466, 468 (1931). Yet, it is interesting to note that others have previously questioned the extent to which *Norcross* has been repudiated in the leasehold area. See W. Schwartz, Lease Drafting in Massachusetts § 4.5, at 105 (1961).

have acquired the interest or would have paid less for it. The approach suggested would make reliance a triable issue. It must be conceded, however, that this approach generally has not been used by courts.\(^{11}\)

Furthermore, even if reliance is presumed or could have been demonstrated, it is submitted that if the *Norcross* rule is undesirable, the Court could have pursued an alternative approach to overrule the doctrine. A new rule for the future could have been announced, without applying it to any case (including *Shell Oil*) whose facts occurred prior to the date of this decision. With somewhat greater frequency than ever before, courts are engaging in the process of prospective overruling.\(^{12}\) In fact, this approach was considered in *Shell Oil*.\(^{13}\) The Court rejected this course of decision, stating: "We can consider whether to [overrule *Norcross*] when there is before us a case arising upon a covenant made in the future. In the meantime, application of the pertinent legal principles may have been affected by legislation."\(^{14}\)

The Court's reluctance to prospectively overrule *Norcross* may be explicable on a number of grounds. This avenue of decision may be an application of the "Declaratory Theory of Law" enunciated by Blackstone, who stated that the duty of the court is not to "pronounce a new law, but to maintain and expound the old one."\(^{15}\) It must be recognized that the "Declaratory Theory of Law" plays an important symbolic role in our society.\(^{16}\) The ability of the courts to secure respect for and obedience to their decisions may be predicated, at least partially, on their image of being bound by fixed rules and not creating their own rules. Another rationale for a court's reluctance to engage extensively in prospective overruling is the institutional consideration that prospective overruling may destroy the incentive of parties to take an appeal.\(^{17}\)

Indeed, the recognition of even a substantial possibility of such limitation will tend to deter counsel from advancing contentions involving novelty or ingenuity and will lead them to focus on

---

\(^{11}\) For a discussion of the possible rationale for this reluctance, see P. Mishkin & C. Morris, supra note 10, at 295-96.


\(^{13}\) 352 Mass. at 731 n.9, 227 N.E.2d at 513 n.8.

\(^{14}\) Id.

\(^{15}\) 1 W. Blackstone, Commentaries 69 (1769).


\(^{17}\) von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409, 426-27 (1924).
other aspects of their cases. Under such circumstances, issues involving renovation of unsound or outmoded legal doctrines will either not be presented for judicial decision or—what may be even more troublesome—if reached by the courts, may be decided upon inadequate argument and consideration.\textsuperscript{18}

During this Survey year, the question of whether \textit{Norcross} should be overruled was again presented to the Court in \textit{Gulf Oil Corp. v. Fall River Housing Authority}.\textsuperscript{19} In 1957, the city of Fall River, acting through its city council, and the Fall River Housing Authority approved a redevelopment plan for an area of the city. The plan divided the relevant area into two zones, General Commercial A and General Commercial B. These two zones were separated by a boulevard. A 1964 amendment to the plan specifying permitted uses in the two sections included, \textit{inter alia}, the following provision: "Hotel or motel use or restaurant, or gasoline service station use shall not be permitted in parcels designated General Commercial (B) if previously approved for a General Commercial (A) parcel."\textsuperscript{20}

Although plaintiff Gulf Oil Corporation, the owner of property in General Commercial A, did not receive title directly from the authority, all deeds in its chain of title (which related back to a conveyance from the authority) provided that each conveyance was subject to all covenants and restrictions in the "Contract for Disposition of Land for Private Redevelopment" between the authority and the first grantee (in Gulf's chain of title) from the authority. That contract contained covenants restricting land uses to those permitted by the plan and provided that such covenants were enforceable by the grantor, grantee, their successors in title and the owners of land or any interest in land anywhere in the "project area" which was subject to the restrictions of the plan. In 1966, the authority issued a certificate of completion and approval to Gulf's predecessor in title approving the use of its land as a hotel, motel, gasoline service station and/or restaurant. Subsequently, Gulf leased the land to plaintiff Souza who opened a service station on the site in 1968.

Defendant Mt. Hope Development Corp. owned land in the General Commercial B zone. It bought the lot directly from the authority and its contract of purchase and deed contained substantially the same restrictions as on Gulf's land. Mt. Hope's lot was located across from Gulf's service station, but on the other side of the boulevard separating the two zones. Subsequent to the approval and opening of the service station on Gulf's lot, Mt. Hope constructed a service station on its land. Gulf and Souza sought to enjoin such use on the

\textsuperscript{18} Mishkin, supra note 12, at 61.
\textsuperscript{20} Id. at 16, 306 N.E.2d at 259.
grounds that it was violative of the plans and the restrictions.\textsuperscript{21}

After concluding that the use was violative of the covenant and did not come within the scope of any exception thereto, the Court was confronted with the defense contention that plaintiffs could not enforce the covenant because it did not run with the land under the Court's holding in \textit{Norcross v. James}. The plaintiffs argued that if the Court determined that \textit{Norcross} was applicable, the restrictive rule of that case should be overruled.\textsuperscript{22}

The Court was able to avoid reaching that question by holding that the restriction was not a covenant against competition within the meaning of \textit{Norcross}. Justice Reardon, speaking for a unanimous court, stated that the determination of whether a covenant against competition runs with the land is basically dependent upon the intention of the grantor.\textsuperscript{23} In both \textit{Norcross} and \textit{Shell Oil} the exclusive purpose of the restrictive covenant was the elimination of competition.\textsuperscript{24} \textit{Gulf Oil}, however, involved a covenant inserted by the Fall River Housing Authority pursuant to its statutory power. This restriction was not intended to control competition and consequently benefit any particular landowner, but rather was designed to generally improve the area.\textsuperscript{25} This conclusion was evidenced by the fact that the location, and not the number, of service stations was limited. In light of the positive contribution that the restriction would have upon the aesthetics, environment and traffic flow of the area, the Court concluded that "the restriction is primarily directed at planning goals which directly affect the actual physical enjoyment of the plaintiffs' property and therefore 'touches and concerns' the land and is enforceable."\textsuperscript{26}

Although the result in \textit{Gulf Oil} is correct, the Court's failure to seize the opportunity to overrule \textit{Norcross v. James} is regrettable. Furthermore, the Court's approach does introduce uncertainty and conjecture into the area since it establishes "intention" as the criteria for determining the nature of the covenant.\textsuperscript{27}

§13.3. Landlord and tenant: Strict tort liability. Landlord and tenant law has for too long been enmeshed in a morass of artificial, archaic, and anachronistic rules. A series of recent cases offers society the bright hope that this wasteland of mechanistic legal rules is about to be reclaimed in the public interest. In \textit{Mounsey v. Ellard},\textsuperscript{1} the Su-

\footnotesize{\textsuperscript{21} Id. at 16-17, 306 N.E.2d at 259.\
\textsuperscript{22} Id. at 17-18, 306 N.E.2d at 259-60.\
\textsuperscript{23} Id. at 22, 306 N.E.2d at 262.\
\textsuperscript{24} Id.\
\textsuperscript{25} Id.\
\textsuperscript{26} Id. at 23, 306 N.E.2d at 262-63.\
\textsuperscript{27} See text at note 23 supra.\

preme Judicial Court relieved the law of land possessors of the albatross of the blurred and slippery distinctions involving the interrelated categories of licensees and invitees and substituted in its place a common law duty of reasonable care to lawful entrants, with reasonable care merely being modified according to the circumstances of each case. *Pridgen v. Boston Housing Authority*, decided during the Survey year, extended the reach of *Mounsey* to impose a duty on the possessor to helpless trespassers. In *Boston Housing Authority v. Hemingway*, the Court recognized the existence of a landlord’s implied warranty of habitability in a suit involving constructive eviction as a defense to a failure to pay rent. In *DiMarzo v. S. & P. Realty Corp.*, decided during this Survey year, the Court took the next logical and just step of announcing a willingness to reconsider the rules of tort liability of lessors under a tenancy at will and to possibly extend the duty of care owed by the landlord to strict liability. The latter point had been left unanswered in *Hemingway*. The Court refrained from actually resolving these questions because the evidence warranted a finding of negligence based upon the failure of the landlord to comply with an agreement to make repairs when notified of a defect by his tenant, a now well-recognized exception to the common law immunity rules.

At common law, the landlord was virtually immune from tort liability for injuries caused by defects in the leased premises. For nearly the last century, this immunity has been shattered, and the landlord has become primarily responsible for the safe condition of his premises. The major inroads on the lessor’s immunity include the following circumstances: (1) concealed dangerous conditions known to lessor; (2) conditions dangerous to those outside the premises; (3) premises leased for admission of public; (4) lessor’s covenant to repair; (5) negligence in making repairs; (6) portions of premises retained in lessor’s control; (7) statutes—frequently extended to multiple dwelling—requiring lessors to keep premises in good repair.

Dean Pound aptly noted that the spawning of exceptions to a general rule is the social syndrome that marks the demise of the rule. It is

---

9 See id.
submitted that the general common law no-duty rule previously operative in this area has been “swallowed up” by the numerous exceptions which have been engrafted on it. As a minimum, a landlord ought to owe his tenants a duty to exercise reasonable care in the circumstances of the case. This rule seems to be the mandate of Mounsey v. Ellard. In addition, as DiMarzo implies, the landlord’s implied warranty of habitability, recognized in Hemingway, may also sound in tort.

There is authority that there is an implied warranty that the premises and furnishings are fit when furnished premises are let for immediate occupancy for a short term; hence, the lessor is liable in contract as well as tort if the premises are unfit at the date of commencement of the lease. The Supreme Judicial Court held in 1967 that this implied warranty exists in a lease of furnished premises for a period of nine months. The warranty theory has been justified by the presumption that “[a]n important part of what the [tenant] pays for is the opportunity to enjoy [a dwelling] without delay, and without the expense of preparing it for use.” The possible extension of tort liability concepts announced in DiMarzo, coupled with the recognition of an implied warranty of habitability in Hemingway, casts doubts about the necessity of a “furnishings” requirement.

Accelerated momentum in this area of the law will no doubt be furnished by a 1973 amendment to section 14 of chapter 186 of the General Laws. Section 14 now specifically affords a tenant a civil remedy for actual and consequential damages (which could conceivably include personal injuries) if the landlord directly or indirectly interferes with the quiet enjoyment of the premises. Although the landlord’s interference with “quiet enjoyment” would probably be manifested in an actual or constructive eviction, the landlord may well be held strictly liable if an eviction has taken place.

---

11 1973 Mass. Adv. Sh. at 885, 297 N.E.2d at 51. Such a result also seems to be mandated by G.L. c. 186, § 19 where the tenant has given the landlord written notice of an unsafe condition. With respect to common areas, no notice would appear to be required. See also G.L. c. 186, § 15E, which precludes an owner from raising as a defense that a defect existed at the time the lease was executed, with respect to common areas, where the dangerous condition is violative of a municipal building code.


14 See 4A "PIADD" (Personal Injury, Actions, Defenses, Damages), Landlord and Tenant, § 1.10 (1967).


be construed as evincing a strong social policy in favor of strict liability and provide a source of a new rule of law even where an eviction has not occurred.¹⁹