FELT NECESSITIES AND THE COMMON (LAW) TOUCH

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Law review articles rarely represent cries from the heart, especially when every expression of outrage has to be footnoted as to source. Nonetheless, a comment in a previous *Arkansas Law Review* (59 Ark. L. Rev. 738) certainly comes close.

The author, Kathryn Hake, examines Arkansas' approach to the rights of tenants (primarily residential), as embodied in a recent statute, and as developed by court cases, the latter constituting what is generally known as the State's "common law." In his Harvard lectures on the subject, Justice Holmes famously stated that "the life of the law has not been logic; it has been experience. The felt necessities of the time … intuitions of public policy …" Stuff like

that. The comment demonstrates the degree to which the law is made (or at least developed) by judges (and always has been, "original intent" notwithstanding).

Out of the mainstream …

It also serves as a reminder that what we Arkansans may think is the norm in some pretty basic areas of the law is, in fact, very much out of the mainstream. The 2005 statute she references shields landlords from tort liability for injuries caused by "defect or disrepair" of the leased premises. She also cites a 2001 case that denied damages to a child badly injured by a poorly maintained second floor balcony railing, even without the statute.

That result was in fact the basic common law formulation --- that is, pretty much no landlord responsibility for defects. Even though, Justice Holmes noted in an article over a century ago that the rule developed when (a) what was being rented was land and only incidentally buildings, and (b) a renting farmer necessarily knew how to fix tools, roads, roofs and so forth. (As opposed to a 7-11 clerk renting a mobile home.)

Determinedly unexceptional …

The author further describes several widely accepted exceptions to the common law rule, exceptions that Arkansas has declined to adopt --- rendering our laws even harsher.

Her solution would be to (1) have the supreme court work an implied warranty of fitness for habitation into whatever wiggle room the statute possesses; (2) have the court adopt those common law exceptions (which probably would have covered the broken railing case); and (3) have it construe the statute as narrowly as it possibly can (while keeping a straight face).

A skeptical judge …

Interestingly, Justice Holmes probably would have applauded all three efforts, while doubting their ultimate efficacy --- he thought economic life was a zero-sum game and that gains in one area would necessarily be offset by losses in another.

The author's preferred course would be to start all over again and have the legislature adopt rules taken from the Uniform Commercial Code, new home warranties and similar sources to soften the rules.

Devilish details …

A discussion of the details as to what such a system would look like (including exemptions and insurance requirements) would take several more columns. For example, an apartment in the landlord's home is obviously no garden apartment, and litigating roof leaks is unworkable, for landlords as well as tenants.

Ms. Hake's comment is sobering and compelling, even though adoption of her proposals would likely make no difference at all in the way readers of this column manage real estate.

No re-invented wheels …

She is not talking about dry theory or speculation, but is presenting a factual description of what other states do in this area that Arkansas does not.

Nonetheless, any legislative effort should carefully consider those options and balance the interests of both groups, assuming (cautiously) their good faith. Justice Holmes also noted

that “even a dog distinguishes between being stumbled over and being kicked.” Landlord-tenant relations are a lot more complicated than that.

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