4-1-1987

Tenant Remedies for Breach of Habitability: Tort Dimensions Of a Contract Concept

Jim Smith
UGA School of Law, jim@uga.edu

The University of Kansas Law Review

TENANT REMEDIES FOR BREACH OF HABITABILITY: TORT DIMENSIONS OF A CONTRACT CONCEPT

*James Charles Smith**

I. INTRODUCTION

The modern conception of the landlord-tenant relationship is that of a hybrid, with a lease being both a conveyance and a contract. This view has been accepted by the large majority of courts and commentators in recent years,[1] as well as by the Restatement (Second) of the Law of Property[2] and the Uniform Residential Landlord and

---

*Associate Professor of Law, University of Georgia. B.A. 1974, St. Olaf College; J.D. 1977, University of Texas. I am indebted to Professors Tom Eaton and Dick Wellman for many helpful comments on an earlier draft of this article and to Wade Tomlinson for his research assistance.

1. *See, e.g.*, 3A A. CORBIN, CONTRACTS § 686, at 236 (rev. ed. 1960); 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890, at 580-81 (W. Jaeger 3d ed. 1968); Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. REV. 503, 505-12 (1982); Humbach, *The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U.L.Q. 1213 (1983). These authors agree that a lease is both a conveyance and a contract. For general discussion of the conveyance-contract dichotomy, see Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279 (1960); Chase, *The Property-Contract Theme in Landlord and Tenant Law: A Critical Commentary on Schoshinski's American Law of Landlord and Tenant*, 13 RUTGERS L.J. 189 (1982).

2. *See* RESTATEMENT (SECOND) OF PROPERTY § 5.1 (1976). The official comment provides: "[T]he elimination of the doctrine of *caveat emptor* is accompanied by the adoption of the doctrine of dependence of promises . . . ." *Id.* comment b. The introduction to the Restatement, entitled "Historical Perspective," states:

> [The] ascendant property concept undoubtedly fitted the circumstances of fifteenth and sixteenth century England, not because of the logic of the theory, but because in the agrarian economy to which it was applied, it worked. The residue of the property theory is to be found today in much of the substantive law of landlord and tenant, in the independence of covenants, and in the landlord's broad immunities from duty and liability . . . . Extensive covenants, actual or implied, now contain much of the basis of the landlord-tenant relationship . . . . The law of the late twen-

Tenant Act (URLTA).[3] The hybrid concept replaces an earlier model for leases, in which property law, or more precisely the law of conveyances, predominated to define the rights and duties of landlord and tenant. The modern trend is to depart from traditional property rules by treating the lease as a contract which involves a continuing exchange of mutually dependent promises. The goal of protecting tenants has served as the catalyst for the contractualization of the landlord-tenant relationship. The traditional law was widely perceived as extremely pro-landlord, as applied to residential leases, in which the conveyance of an interest in land is a secondary feature in the transaction that is dwarfed by the tenant's expected use of the improvements and ancillary services. One example of the replacement of a conveyancing rule with a contract rule is the duty recently imposed on the landlord by a number of courts to mitigate damages by attempting to relet the premises upon the tenant's abandonment.[4] Under traditional property law, the landlord could allow the premises to remain vacant and recover rent from the abandoning tenant for the remainder of the term.

Despite the widespread intervention of contract law in leases, many courts still recognize that the landlord does convey and the tenant does own an interest in land, so that property rules still have some application under the modern view. Hence, the modern lease is called a hybrid. Accordingly, sometimes contract rules and sometimes property rules will apply to resolve disputes between

---

tieth century contains a still-shifting balance of property and contract concepts, with neither clearly in control . . . .

. . . .

. . . During the nineteenth and twentieth centuries, there have been numerous statutory and common law developments, most of them gradual, which have been concerned with adapting the medieval system to changing conditions in an urban society. The mixture of property and contract concepts tied up in this process of adaptation has produced the subject set forth in this material on Landlord and Tenant.

Id. at 4, 5-6.

3. *See* UNIF. RESIDENTIAL LANDLORD TENANT ACT §§ 1.102-.103 (1972). The comment to § 1.102 states:

[T]he landlord-tenant relationship was viewed as conveyance of a leasehold estate and the covenants of the parties generally independent. These doctrines are inappropriate to modern urban conditions and inexpressive of the vital interests of the parties and the public which the law must protect.

This Act recognizes the modern tendency to treat performance of certain obligations of the parties as interdependent.

4. *E.g.*, Thorne v. Broccoli, 39 Conn. Supp. 289, 478 A.2d 271 (1984) (requiring the landlord to make reasonable efforts to rent the dwelling unit at a fair rental); Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977); Lefrak v. Lambert, 89 Misc. 2d 197, 205, 390 N.Y.S.2d 959, 965 (Civ. Ct. 1976), *modified on other grounds*, 93 Misc. 2d 632, 403 N.Y.S.2d 397 (App. Term. 1978).

landlords and tenants. Which set of rules will apply to any given case will depend on the nature of the dispute. A jurisdiction must decide whether it makes more sense to analyze each particular type of landlord-tenant problem in terms of property law or in terms of contract law. Retaining some property rules is not necessarily pro-landlord in result.[5] For instance, if the tenant asserts a specifically enforceable right to possess the leased premises, the tenant is aided by the recognition that the lease conveys property rights to the tenant.[6]

On its face and as applied, the hybrid contract-property approach to leases ignores tort law. Nonetheless, whether the landlord and tenant are viewed as parties to a contract or parties to a conveyance, it is abundantly clear that tort law does apply to some aspects of their relationship. When a tenant or a third party is injured on the leased property, courts turn to tort law—specifically, to the duties owed to others by the owners and occupiers of land—to determine whether the harm is actionable. Of course, this is not the least bit surprising because personal injury is the historic province of tort law.

Under present law, a residential landlord owes a duty to provide habitable premises to his tenant. Courts have unanimously selected contract law to define the habitability duty,[7] and as a corollary, have rejected the application of the property doctrine of independent covenants to the new duty.[8] In doing so, courts have followed the familiar road of choosing one side of the contract-property conception of leases to shape the law in a discrete area.

This article explores the emergence and use of contract law as a theoretical basis for the duty to provide habitable premises. It examines in detail the topic of tenant remedies for a landlord's failure to provide habitable premises when the harm complained of is the

---

5. *See generally* Humbach, *supra* note 1, at 1223-32. Humbach explains:

> Under the conveyance theory, the tenant's right to possession is enforced as though the tenant has an ordinary property right in the premises . . . . Under this theory, the tenant receives the entire property interest, the right to possession for the entire [term], all at once at the time of the conveyance . . . .
>
> . . . .
>
> . . . Thereafter, the landlord becomes, for purposes of possession, like any other stranger to the title with the same concominant duty to respect the tenant's possession as any other third party.

Id. at 1224-26 (footnotes omitted).

6. *See* Hewitt v. State, 108 Fla. 335, 146 So. 578 (1933); Cooper v. Gordon, 37 N.D. 247, 164 N.W. 21 (1917); Fults v. Munro, 202 N.Y. 34, 95 N.E. 23 (1911).

7. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). *See infra* text accompanying notes 29-37.

8. 428 F.2d at 1082 ("Under contract principles, however, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition." (footnote omitted)).

loss of the use or enjoyment of the premises. Cases in which breach of the habitability duty allegedly causes physical injury to the tenant or to third persons are not within the scope of this article. While there are several recent examples of such cases,[9] they are exceptional in incidence and raise markedly different concerns than the more common situation explored herein where the injury is the mere fact of living in unrepaired premises, unaccompanied by tangible physical injury.

This article advances the premise that the hybrid contract-property model of leases may be appropriate to provide flexible choices for many areas of landlord-tenant law and, perhaps, may be suitable as a general model, but that it has failed as applied to the question of the tenant's remedies for breach of the warranty of habitability. As applied to remedies, the contract-property hybrid is a false dichotomy, or perhaps more accurately, the wrong dichotomy. The proper analysis of tenant remedies when the landlord breaches the habitability duty requires that a line be drawn between the tort duties and the contract duties that the landlord owes to the tenant.[10] That line should be based upon whether the particular habitability duty in question is waivable by the tenant. Such differentiation of tort and contract elements of habitability clarifies remedies by focusing the inquiry on what type of interest is to be protected: a tenant's expectation of habitable premises secured by contract, or a right to habitable premises imposed as a matter of public policy and protected under tort principles. Recognition of a tort action for the second situation permits the fashioning of damage rules that neither overcompensate nor undercompensate for the tenant's injury. One principal benefit of the use of tort remedies lies in the analysis of noneconomic damages—when, for example, the tenant claims mental distress stemming from a habitability failure.

II. ABANDONMENT OF LANDLORD "NO-DUTY" RULES

Prior to the 1960s, caveat emptor reigned supreme in the American law of landlord-tenant, with the result that the landlord had virtually no legal responsibility for the condition of the leased premises. "No-duty" rules protected the landlord, whether the plaintiff's cause of action sounded in contract, based upon an im-

---

9. The trend of the cases has been to allow recovery for personal injuries. *See, e.g.*, Becker v. IRM Corp., 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980); Rivera v. Solfon Home Repairs & Improvements Co., 294 Pa. Super. 41, 439 A.2d 739 (1982). *But see* Auburn v. Amoco Oil Co., 106 Ill. App. 3d 60, 435 N.E.2d 780 (1982); Zimmerman v. Moore, 441 N.E.2d 690 (Ind. Ct. App. 1982).

10. *See infra* text accompanying notes 178-202.

plied covenant to repair some part of the premises, or in tort, based on a duty to prevent harm to others by taking reasonable care of the premises. The past two decades have witnessed extraordinary ferment in the law applied to residential leases, which has been so drastic and rapid that it has earned the label "revolution."[11] Both the contract and the tort no-duty rules have fallen.

A. Rise of the Warranty of Habitability

Under the traditional principles of the common law, the landlord generally had no duty to repair or maintain the premises either at the outset of the term, if there was a defect in the premises when the parties made their lease,[12] or thereafter, if a defect arose after the tenant took possession.[13] Indeed, if the premises became in need of repair during the lease term, it was the tenant's duty to make repairs, unless the problem could be traced to a casualty that was not the tenant's fault. If the tenant failed to perform his repair duties, the landlord's remedies were governed by the law of waste.[14]

This doctrine can be called a contractual "no-duty" rule because it rested upon the assumed intentions of the parties. Accordingly, its application could be altered by contract. If the tenant desired that the landlord take some responsibility for repairs, and the parties reached agreement on that point, then the tenant obtained an express covenant by the landlord to repair, which courts would enforce in accordance with its terms.[15] If, on the other hand, the lease was

---

11. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 6 (1979); Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984).

12. *E.g.*, Uniroyal, Inc. v. Hood, 588 F.2d 454 (5th Cir. 1979); Anderson Drive-in Theatre v. Kirkpatrick, 123 Ind. App. 388, 110 N.E.2d 506 (1953); Gehrke v. General Theatre Corp., 207 Neb. 301, 298 N.W.2d 773 (1980). This rule is an application of *caveat emptor*, premised upon the tenant's ability to inspect the property to determine its suitability prior to the execution of a lease. An exception existed when the landlord failed to disclose to the tenant a latent defect of which the landlord had knowledge. *See, e.g.*, Taylor v. Leedy & Co., 412 So. 2d 763 (Ala. 1982); Service Oil Co. v. White, 218 Kan. 87, 542 P.2d 652 (1975).

13. *E.g.*, Yuan Kane Ing v. Levy, 26 Ill. App. 3d 889, 326 N.E.2d 51 (1975); Cooley v. Bettigole, 1 Mass. App. Ct. 515, 301 N.E.2d 872 (1973); Ball v. Day, 57 Or. App. 384, 644 P.2d 649 (1982).

14. *E.g.*, Wright v. Vickaryous, 598 P.2d 490 (Alaska 1979) (tenant's duty to exercise ordinary care in the use of leased premises, not to cause any material and permanent injury thereto over and above the ordinary wear and tear; tenant liability to landlord for damages resulting from tenant's wrongful acts or failure to exercise such care); Verlinden v. Godberson, 238 Iowa 161, 25 N.W.2d 347 (1946) (landlord has action of forcible entry and detainer to remedy tenant's commission of waste); Cluff v. Culmer, 556 P.2d 498 (Utah 1976) (tenant's implied covenant not to commit waste).

15. *E.g.*, Moldenhauer v. Krynski, 62 Ill. App. 2d 382, 210 N.E.2d 809 (1965) (express

silent on the issue of landlord repairs, it was presumed that the "no-duty" rule reflected the parties' intent and, thus, their bargain. This presumption may have made a good deal of sense when it arose in preindustrial England because the normal lease was for the long-term rental of agricultural land.

Javins v. First National Realty Corp.,[16] decided in 1970, sounded the death knell for the contract "no-duty" rule. The new doctrine announced by *Javins*, called an implied warranty of habitability, places a repair obligation on the landlord. The theory used by the *Javins* court was that the landlord warranted that the premises were habitable at the outset of the term and would remain so during the period of the tenant's occupancy. Judge Skelly Wright, writing for the District of Columbia Circuit, stated:

> [A] warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units . . . .
>
> . . . [B]y signing the lease the landlord has undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law.[17]

By the end of the 1970s, no less than 31 states had followed the *Javins* lead, either by judicial decision or by statute.[18] To date, only seven jurisdictions can be considered as still adhering generally to the common law "no-duty" rule for residential leases.[19]

---

covenant to make specific repairs); Lealiou v. Quatsoe, 15 Wis. 2d 128, 112 N.W.2d 193 (1961) (express written covenant overlapping with statutory duty to repair); *see also* Rossiter v. Moore, 59 Wash. 2d 722, 370 P.2d 250 (1962) (validating oral agreement to repair).

16. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

17. *Id.* at 1072-73, 1081.

18. *See* Cunningham, *supra* note 11, at 7-9 (listing 31 jurisdictions that in the late 1970s had a judicial or statutory warranty of habitability).

19. Thirty-nine states presently have statutes requiring that residential landlords supply habitable dwelling units. ALASKA STAT. § 34.03.100 (1985); ARIZ. REV. STAT. ANN. § 33-1324 (Supp. 1986); CAL. CIV. CODE §§ 1941, 1941.1 (West 1985); CONN. GEN. STAT. § 47a-7 (1985); DEL. CODE ANN. tit. 25, § 5303 (1975); FLA. STAT. § 83.51 (1985); GA. CODE § 44-7-13 (1982); HAW. REV. STAT. § 521.42 (1976 & Supp. 1984); IDAHO CODE § 6-320 (1979); IOWA CODE § 562A.15 (1985); KAN. STAT. ANN. § 58-2553 (1983); KY. REV. STAT. ANN. § 383.595 (Michie/Bobbs-Merrill Supp. 1986); LA. CIV. CODE ANN. arts. 2692, 2693, 2695, 2717 (West 1952); ME. REV. STAT. ANN. tit. 14, § 6021 (1980 & Supp. 1986); MD. REAL PROP. CODE ANN. § 8-211 (1981 & Supp. 1986); MASS. GEN. LAWS. ANN. ch. 111, §§ 127A, 127L, ch. 239, § 8A (West 1983 & Supp. 1986); MICH. COMP. LAWS § 554.139 (1981); MINN. STAT. § 504.18 (1982); MO. ANN. STAT. §§ 441.500, 441.510 (Vernon 1986); MONT. CODE ANN. § 70-24-303 (1985); NEB. REV. STAT. § 76-1419 (1981); NEV. REV. STAT. § 118A.290 (1979); N.J. STAT. ANN. § 2A:42-88 (West Supp. 1986); N.M. STAT. ANN. § 47-8-20 (1982); N.Y. MULT. DWELL. LAW §§ 301, 302(1)(b) (McKinney 1974 & Supp. 1987); N.Y. MULT. RESID. LAW §§ 305, 305-a (McKinney 1952 & Supp. 1987); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1987) (generally applicable warranty of habitability); N.Y. REAL PROP. ACTS. §§ 755, 770 (McKinney 1979 &

B. Landlord's New Liability in Tort

The tort no-duty rule, which treated the tenant and not the landlord as the landowner, fit hand in glove with the traditional contractual allocation of repair responsibility between the parties to the lease. If a dangerous condition on the premises caused personal injury to the tenant or a third party, tort law generally insulated the landlord from liability with a "no-duty" rule.[20] Limited exceptions

---

Supp. 1987); N.C. GEN. STAT. § 42-42 (1984); N.D. CENT. CODE § 47-16-13.1 (1978); OHIO REV. CODE ANN. § 5321.04 (Baldwin 1980); OKLA. STAT. ANN. tit. 41, § 118 (West 1986); OR. REV. STAT. § 91.770 (1985); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977); R.I. GEN. LAWS §§ 34-18-16, 45-24.3-6 (1980 & Supp. 1984); S.D. CODIFIED LAWS ANN. § 43-32-9 (1983); TENN. CODE ANN. § 66-28-304 (1982); TEX. PROP. CODE ANN. § 92.052 (Vernon 1984); VA. CODE § 55-248.13 (1981); WASH. REV. CODE ANN. § 59.18.060 (Supp. 1987); W. VA. CODE § 37-6-30 (1985); WIS. STAT. § 704.07 (1980). Subsequent to *Javins*, the District of Columbia housing regulations were amended to include a warranty of habitability. D.C. Hous. Regs. § 2902 (1980). For a description and analysis of the different types of habitability statutes, see Cunningham, *supra* note 11, at 6-9, 23-74.

Courts in nineteen jurisdictions have recognized a common law implied warranty of habitability. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. App. 1976), *vacated*, 369 N.E.2d 404 (Ind. 1977) (*but see* Zimmerman v. Moore, 441 N.E.2d 690 (Ind. Ct. App. 1982) (refusing to extend implied warranty of habitability to rental of single-family, used dwelling)); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Detling v. Edelbrock, 671 S.W.2d 265 (Mo. 1984); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Tonetti v. Penati, 48 A.D.2d 25, 367 N.Y.S.2d 804 (1975); Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979); Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978); Birkenhead v. Coombs, 143 Vt. 167, 465 A.2d 244 (1983); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973); Teller v. McCoy, 162 W. Va. 367, 253 S.E.2d 114 (1978); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (*but see* Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970) (arguably overruling *Pines sub silentio*)). Of these jurisdictions, only four—Illinois, Indiana, New Hampshire, and Vermont—have no statutory habitability duty. Jurisdictions have differed as to whether statutory and common-law rights will coexist. *See, e.g.*, TEX. PROP. CODE ANN. § 92.061 (Vernon Supp. 1986) (making statute the exclusive remedy "in lieu of existing common law," effectively overruling *Kamarath*).

Alabama, Arkansas, Colorado, Mississippi, South Carolina, Utah, and Wyoming still adhere to the common-law position that the landlord has no repair obligations in the absence of an agreement to the contrary. Martin v. Springdale Stores, Inc., 354 So. 2d 1144 (Ala. Civ. App.), *cert. denied*, 354 So. 2d 1146 (Ala. 1978); Hurst v. Feild, 281 Ark. 106, 661 S.W.2d 393 (1983); Blackwell v. Del Bosco, 191 Colo. 334, 558 P.2d 563 (1976); Cappaert v. Junker, 413 So. 2d 378 (Miss. 1982); Paxton v. Hinkle, 282 S.C. 273, 318 S.E.2d 123 (S.C. Ct. App. 1984); Hall v. Warren, 632 P.2d 848, 851 (Utah 1981) (refusing to address habitability in tenant personal injury action due to abbreviated briefing of issue). Wyoming has no case law authority on point and accordingly the common-law rule is assumed to be presently operative.

20. *See, e.g.*, Anderson v. Hamilton Gardens, Inc., 4 Conn. Cir. Ct. 255, 229 A.2d 705, *cert. denied*, 154 Conn. 719, 222 A.2d 809 (1966); Cuthbert v. Stempin, 78 Ill. App. 3d 562,

to the tort no-duty rule had developed, however, to cover three situations: (1) when the landlord, but not the tenant, knew of a latent defect;[21] (2) when the defect was in a common area shared by more than one tenant;[22] and (3) when the landlord negligently attempted to repair the premises.[23]

Change in the tort "no-duty" rule occurred during the same time period that the warranty of habitability was being embraced, but on a less drastic and widespread scale.[24] Several jurisdictions abrogated the rule wholesale and imposed a duty of reasonable care on the landlord to safeguard against defects on the premises that could cause personal injury. The New Hampshire Supreme Court's 1973 decision in *Sargent v. Ross*[25] is the paramount example.[26] Other jurisdictions, while retaining the "no-duty" rule in name, have made incremental changes in their law by expanding the scope of the ex-

---

396 N.E. 2d 1197 (1979); Roan v. Bruckner, 180 Neb. 399, 143 N.W.2d 108 (1966); Marston v. Andler, 80 N.H. 564, 122 A. 329 (1923); Williams v. Riley, 56 N.C. App. 427, 289 S.E.2d 102 (1982) (applying South Carolina law). *See generally* Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 48-78 (1975).

21. *E.g.*, Hall v. Cohner, 134 Ga. App. 586, 215 S.E.2d 340 (1975); Smith v. Green, 358 Mass. 76, 260 N.E.2d 656 (1970); Hines v. Wilcox, 96 Tenn. 148, 33 S.W. 914 (1896); *cf.* RESTATEMENT (SECOND) OF TORTS § 358 (1965) (liability when landlord knows or should know of latent defect if tenant does not know or have reason to know of the condition).

22. *E.g.*, Sollars v. Blayney, 31 Ill. App. 2d 341, 176 N.E.2d 477 (1961); Anderson v. Marston, 161 Me. 378, 213 A.2d 48 (1965); Geesing v. Pendergrass, 417 P.2d 322 (Okla. 1966).

23. *E.g.*, Hayes v. United States, 475 F. Supp. 681 (D. Mont. 1979) (applying the negligent repair rule, but finding no liability because the tenant knew of the defect); Jordan v. Savage, 88 Ill. App. 2d 251, 232 N.E.2d 580 (1967); Berger v. Stoner, 357 Mass. 659, 259 N.E.2d 774 (1970) (approving negligent repair rule, but finding no liability under the facts); *see also* Towers Tenant Ass'n v. Towers Ltd. Partnership, 563 F. Supp. 566 (D.D.C. 1983) (landlord is liable to tenants not choosing to purchase conversion condominium units but completing their term when the negligent renovation and repair of units results in injury).

24. For a discussion of the new tort liabilities of landlords for personal injuries, see Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99 (1982). Professor Browder analyzes the impact of the habitability duties on the tort standards.

25. 113 N.H. 388, 308 A.2d 528 (1973). "[W]e today discard the rule of 'caveat lessee' and the doctrine of landlord nonliability in tort to which it gave birth . . . . Henceforth, landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm." *Id.* at 397, 308 A.2d at 534.

26. Other jurisdictions have followed *Sargent*, recognizing that the landlord has a general tort duty of reasonable care. Brennan v. Cockrell Invs., Inc., 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (1973); Stephens v. Stearns, 106 Idaho 249, 678 P.2d 41 (1984); Young v. Garwacki, 380 Mass. 162, 402 N.E.2d 1045 (1980) (personal injuries of guest); Jordan v. Goddard, 14 Mass. App. 723, 442 N.E.2d 1162 (1982) (applying *Garwacki* retroactively to tenant's personal injuries); Pagelsdorf v. Safeco Ins. Co., 91 Wis. 2d 734, 284 N.W.2d 55 (1979); *see* Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. App. 1976) (adopting *Sargent* language), *superseded*, 267 Ind. 176, 369 N.E.2d 404 (1977) (settlement of parties); *cf.* Presson v. Mountain States Properties, 18 Ariz. App. 176, 501 P.2d 17 (1972) (pre-*Sargent* decision; landlord has a duty of reasonable care under the circumstances).

ceptions to the doctrine.[27] Some courts in this group have expanded the exceptions to the point where they have swallowed up the "no-duty" rule, retaining only its hollow shell.[28]

III. BASIS FOR HABITABILITY: TORT DISGUISED AS CONTRACT

A. Development of Contractual Formulation

The expressed theory underlying judicial recognition of the implied warranty of habitability sounded in contract. Traditional landlord-tenant rules were perceived by many as extremely pro-landlord because of the property, or conveyancing, background of landlord-tenant law. That view may be debated as a matter of English legal history,[29] but nonetheless, that diagnosis of the evil predominated. The cure prescribed by the courts, starting with *Javins*, was the infusion of contract law into the landlord-tenant relationship. Rather than view the landlord-tenant relationship as a mere conveyance, permitting the landlord to exit from the scene after conveying possessory rights to the tenant, the modern lease was seen as a continuous exchange of values—rent is exchanged for the leased premises in a certain condition of repair and for a package of

---

27. *See* Levine v. Katz, 407 F.2d 303 (D.C. Cir. 1968) (landlord has a tort duty to maintain premises he controls, which includes common areas used by tenants); Wilson v. Wilson, 382 So. 2d 773 (Fla. Dist. Ct. App. 1980) (liability for failure to disclose latent defect when landlord has constructive knowledge of defect); Bartlett v. Taylor, 351 Mo. 1060, 174 S.W.2d 844 (1943) (landlord liable for negligent repairs made voluntarily, even if the repairs did not add to the danger or give a deceptive appearance of safety).

28. *See* Bailey v. Zlotnick, 149 F.2d 505 (D.C. Cir. 1945) (landlord who has no duty to repair is liable for negligent repairs made by independent contractor hired by landlord); Shirkey v. Crain & Assocs. Management Co., 129 Ariz. 128, 629 P.2d 95 (1981) (landlord duty to make reasonable inspection to discover latent defect); Fitzgerald v. 667 Hotel Corp., 103 Misc. 2d 80, 426 N.Y.S.2d 368 (Sup. Ct. 1980) (landlord's right of entry to make repairs constitutes control of premises subjecting landlord to tort liability).

29. *See* Humbach, *supra* note 1, at 1213-23. In Humbach's view, the common-law conception of the landlord-tenant relationship results naturally from the interplay between the basic law of property and of contract. Landlord-tenant law consists of two intertwined legal relationships: privity of contract, based on contract, and privity of estate, based on ownership. The dual relationship exists not out of necessity, for the rights and duties arising out of privity of estate could be founded and enforced on a purely contractual basis; but rather, because the modern law of contract did not exist when, in the fifteenth century, the need arose to reformulate the conceptualization of legal rights and duties existing between landlords and tenants. The logical basis was the feudal relation of landlord and tenant. With the development of contract law with routinely enforceable promises, contract theory served not only as a supplementary basis for the enforcement of the rights and duties incident to privity of estate, but it also provided a framework for the creation and enforcement of other obligations and expectations. The addition of contract law upon the existing skeleton of property law evolved into the dual relationship of which landlord-tenant law is composed.

services that make the premises livable. Language from the *Javins* opinion is typical of this judicial approach:

> Some courts have realized that certain of the old rules of property law governing leases are inappropriate for today's transactions. In order to reach results more in accord with the legitimate expectations of the parties and the standards of the community, courts have been gradually introducing more modern precepts of contract law in interpreting leases . . . .
>
> In our judgment the trend toward treating leases as contracts is wise and well considered. Our holding is this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract.
>
> . . . .
>
> . . . Contract principles established in other areas of the law provide a more rational framework for the apportionment of landlord-tenant responsibilities; they strongly suggest that a warranty of habitability be implied into all contracts for urban dwellings.[30]

Some courts, rather than boldly departing from the tradition that emphasized the conveyancing aspects of leases and the tenant's ownership of property or an estate, referred to the modern residential lease as a hybrid, having the dual character of a conveyance and a contract.[31] Such courts, however, stressed that the duty to provide habitable premises was an implied "covenant" or "warranty," thereby arriving at the same conclusion as the courts, like *Javins*, that said a lease is now just a contract.

When addressing the issue of remedies, all courts, whether or not they referred to the lease as a hybrid, applied contract remedies when a breach of the warranty of habitability was shown.[32] Most of the energies of the courts in the early cases were spent on changing the "no-duty" rule and creating substantive rights. Much of what those courts, such as *Javins*, said about the selection of remedies can be viewed as dicta. Like much of modern lawmaking, the pattern of development in these cases was first to identify the tenant's right to habitable premises and define its scope, leaving for later case-law development the specific questions of what remedies will be available to enforce the newly-found tenant right.[33] By and large, however,

---

30. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-75, 1080 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

31. *E.g.*, King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

32. *See, e.g.*, *Javins*, 428 F.2d at 1073 (breach of implied warranty of habitability gives rise to usual remedies for breach of contract); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202 (1984); Teller v. McCoy, 162 W. Va. 367, 253 S.E.2d 114 (1978) (specific performance excepted by statute).

33. This process of first recognizing rights, then developing remedies to secure those rights, appears quite logical to the modern lawyer. Nonetheless, it stands diametrically opposed to the common-law tradition. Under the English writ system, judicial recognition of

the later cases have failed to come up with any fresh ideas on the issue of remedies.[34] Instead, the statements of the early courts that all contract remedies generally apply were parrotted in subsequent appellate opinions.

Why did the courts choose to make habitability a creature of contract? To justify the new duty, courts drew upon developing concepts in the law of sales and product liability. In *Javins*, Judge Wright's use in 1970 of sales precedents is especially significant.[35] By the 1960s widespread reform of the law of sales was well under way and lead to the promulgation of the Uniform Commercial Code.[36] Consumer protection against defective products was also an emerging field, as reflected and encouraged by Prosser's Citadel articles.[37] Reform of landlord-tenant law in the direction of tenant protection was seen as a parallel to the developments in sales and product liability law.

My purpose is not to analyze the similarities and differences between residential leases and sales of goods to consumers and question

---

asserted property rights depended solely upon the scope of each of the writs. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 335-58, 361 (4th ed. 1948). For example, to determine whether a finder of lost chattels had a property interest therein, courts first asked whether trover lie against a third party who interfered with the finder's possession of the chattel. If trover lie, a consequence of that procedural decision was that the finder had a property right of some sort; if trover did not lie, the finder had no property. *See* Armory v. Delamirie, 1 Strange 505, 93 Eng. Rep. 664 (K. B. 1722).

34. *See infra* text accompanying notes 47-102.

35. Judge Wright explained:

> Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality . . . . Thus without any special agreement a merchant will be held to warrant that his goods are fit for the ordinary purposes for which such goods are used and that they are at least of reasonably average quality . . . .
>
> . . . .
>
> . . . In a lease contract, a tenant seeks to purchase from his landlord shelter for a specified period of time. The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his building. Moreover, the tenant must rely upon the skill and *bona fides* of his landlord at least as much as a car buyer must rely upon the car manufacturer.

Javins, 428 F.2d at 1075, 1079.

36. *See* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 270-301 (1973); Danzig, *A Comment on the Jurisprudence of the UCC*, 27 STAN. L. REV. 621 (1975); Mentachikoff, *The Uniform Commercial Code: An Experiment in Democracy in Drafting*, 36 A.B.A.J. 419 (1950); Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967).

37. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960) [hereinafter Prosser, *The Assault*]; Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

whether on policy grounds seller liability for goods was properly transplanted to lessors of dwelling units. That has already been done.[38] Rather, the point here is that use of the analogy between the two resulted in the incorporation of the then-prevalent sales and product liability vocabulary into landlord-tenant law. The landlord's new duty was called an "implied warranty," which was assumed to be contractual. This characterization required a severe wrenching of the term "warranty," a term whose meaning in the sales and products areas was already cloudy at best.[39] The warranty concept might legitimately have been applied to latent defects in existence when the lease was entered into (or possession transferred), but could not apply to a duty to maintain the premises arising thereafter. The term "warranty" signifies a person's representation of a state of facts that exist at the time the representation is made, and clearly is not synonymous with a promise that a person will do something in the future. Prosser criticized the use of warranty in the law of product liability, calling it a "freak hybrid born of the illicit intercourse of tort and contract."[40] His criticism was substantially heeded in that area of law, as evidenced by the strict liability approach of section 402A of the Restatement (Second) of Torts.[41] Nevertheless, the warranty concept has remained the basis for the landlord's habitability duty despite its even poorer fit here than in the area of products liability.

Why should one care about the labels selected by courts to describe the new set of landlord obligations to repair the premises? Etymologists tell us that words commonly do change meaning over time, picking up new nuances and usages. So what if the habitability idea had been named after a vegetable—say, a potato? The concern here, however, is not merely linguistic neatness or aesthetics. If it were, perhaps we could devote some care to those matters, but we should not overwork ourselves on such questions of form. The problem transcends nomenclature because "warranty" and "contract" labels carry much other baggage with them. This article principally considers one vice of the terminology: the effect of these labels on the remedies that are available for a breach of the warranty of habitability. There are, in addition, other problems presented by the

---

38. *See* Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 30-34 (1976); *see generally* Note, *The Landlord as a Retailer? Strict Products Liability and the Landlord-Tenant Relationship in California*: Becker v. IRM Corporation, 21 CAL. W.L. REV. 524 (1985) (discussing *Becker* court's reasoning in analogizing landlords to manufacturers and retailers).

39. *See* Prosser, *The Assault, supra* note 37, at 1124-34.

40. *Id.* at 1126.

41. RESTATEMENT (SECOND) OF TORTS § 402A (1964).

contractual nature of the habitability duty. Statutes of limitations often set different periods of time for contract actions than for other causes of action. Privity questions may be presented when the original tenant or landlord has transferred all or part of their interest in the leased premises.[42] For example, given that habitability is a covenant in the original lease, can a sublessee sue the original lessor for a breach of habitability?

Another problem area involves disclaimers or waivers. Ordinarily, of course, contract rights depend upon the mutual intent of the parties. Thus, implied contract terms can be modified or waived if that intent is sufficiently manifested. If the habitability duty were waivable under ordinary contract principles, landlords would routinely obtain waivers by using a standardized provision in their lease forms. Naturally, this prospect was seen as unappealing by proponents of the habitability duty who believed that in actual practice the duty should mean something. The court in *Javins* made the implied warranty of habitability nonwaivable,[43] and the weight of subsequent authorities, both case and statutory law, have followed this lead.[44] The Restatement (Second) of Property, however, permits waiver if it is not unconscionable,[45] borrowing the unconscionability

---

42. Under standard property law, a sublessee has neither privity of contract nor privity of estate with the original lessor and, as a consequence, cannot enforce duties arising under the original lease. No cases discussing privity in the context of habitability have been found. Other cases suggest that a sublessee would not be permitted to enforce the lessor's habitability duties under the original lease. *See* Rittenberg v. Donohoe Constr. Co., 426 A.2d 338, 342 (D.C. 1981); Employees Consumer Org., Inc. v. Gorman's, Inc., 395 S.W.2d 162, 166 (Mo. 1965) (sublessee cannot enforce lessor's covenant to rebuild upon fire). *But see* Marchese v. Standard Realty & Dev. Co., 74 Cal. App. 3d 142, 141 Cal. Rptr. 370 (1977) (original lessor's express approval of sublessee makes sublessee a third party beneficiary of original implied covenant of quiet enjoyment).

43. 428 F.2d 1071, 1081-82 (D.C. Cir.) ("The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor."), *cert. denied*, 400 U.S. 925 (1970).

44. George Washington Univ. v. Weintraub, 458 A.2d 43 (D.C. 1983); Berman & Sons, Inc. v. Jefferson, 379 Mass. 196, 396 N.E.2d 981 (1979); Fair v. Negley, 257 Pa. Super. 50, 390 A.2d 240 (1978); *see generally* Dutenhaver, *Non-Waiver of Implied Warranty of Habitability in Residential Leases*, 10 LOY. U. CHI. L.J. 41 (1978).

45. The Restatement provides:

> The parties to a lease may agree to increase or decrease what would otherwise be the obligations of the landlord with respect to the condition of the leased property and may agree to expand or contract what would otherwise be the remedies available to the tenant for the breach of those obligations, and those agreements are valid and binding on the parties to the lease unless they are unenforceable in whole or in part because they are unconscionable or significantly against public policy.

RESTATEMENT (SECOND) OF PROPERTY § 5.6 (1976). *Contra*, UNIF. RESIDENTIAL LANDLORD TENANT ACT § 1.403(a)(1) (1972) (prohibits provisions waiving the rights and remedies contained in the Act).

doctrine from the Uniform Commercial Code.[46] Confusion in many jurisdictions over the waiver issue still lingers, and this confusion stems directly from the contractual formulation of the habitability doctrine.

B. Effect on Remedies

Present case law, the Restatement (Second) of Property, and statutes based upon the URLTA are strongly committed to the contractual basis of the landlord's habitability duty, both for defining the contours of the substantive right and for tenant remedies. This contractual orientation has dramatically shaped the evolving case law on remedies.

1. Damages

The problem of how to measure the damage to a tenant caused by a breach of the duty of habitability has plagued the courts. Three different measures of damage have been used: (1) fair rental value as repaired less fair rental value in the unrepaired condition;[47] (2) agreed rent less fair rental value in the unrepaired condition;[48] and (3) percentage reduction in fair rental value.[49]

---

46. U.C.C. § 2-302 (1978) (general unconscionability section for Article 2). The interplay between several sections of the Uniform Commercial Code must be considered to determine when disclaimers of implied warranties under U.C.C. § 2-316 are valid. *See* Ford Motor Co. v. Moulton, 511 S.W.2d 690 (Tenn. 1974) (disclaimer that complies with U.C.C. § 2-316 cannot violate U.C.C. § 2-719(3) unconscionability provision applying to limitation or exclusion of consequential damages), *cert. denied*, 419 U.S. 870 (1974); Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 TEX. L. REV. 60 (1974).

47. Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Glasoe v. Trinkle, 107 Ill. 2d 1, 479 N.E.2d 915 (1985); Roeder v. Nolan, 321 N.W.2d 1 (Iowa 1982); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202 (1984); Teller v. McCoy, 162 W. Va. 367, 253 S.E.2d 114 (1978).

48. Wellborn v. Society for Propagation of Faith, 411 N.E.2d 1267 (Ind. Ct. App. 1980); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied*, 444 U.S. 992 (1979); Bay Park One Co. v. Crosby, 109 Misc. 2d 47, 442 N.Y.S.2d 837 (App. Term 1981); Lane v. Kelley, 57 Or. App. 197, 643 P.2d 1375, *cert. denied*, 293 Or. 394, 650 P.2d 927 (1982); Beausang v. Bernotas, 296 Pa. Super. 335, 442 A.2d 796 (1982); Fair v. Negley, 257 Pa. Super. 50, 390 A.2d 240 (1978); Beasley v. Freedman, 256 Pa. Super. 208, 389 A.2d 1087 (1978); Birkenhead v. Coombs, 143 Vt. 167, 465 A.2d 244 (1983).

49. Cazares v. Ortiz, 109 Cal. App. 3d Supp. 23, 168 Cal. Rptr. 108 (1980); Winchester Management Corp. v. Staten, 361 A.2d 187 (D.C. 1976); McKenna v. Begin, 5 Mass. App. Ct. 304, 362 N.E.2d 548 (1977); Housing Auth. v. Scott, 137 N.J. Super. 110, 348 A.2d 195 (1975); Timber Ridge Town House v. Dietz, 133 N.J. Super. 577, 338 A.2d 21 (1975);

Which measure a jurisdiction has selected can be evaluated in terms of its commitment to the contractual theory of habitability. The first measure on its face gives the tenant the benefit of his bargain, in theory putting him in the same economic position he would have been in had the landlord performed his habitability duty. This measure of damages is the normal contract damage rule,[50] and such damages are perfectly compensatory. After collecting such damages, the tenant is no better or worse off than had performance been given, ignoring litigation costs and possible consequential damages. A jurisdiction that is truly committed to the use of contract remedies for breach of the duty of habitability should adopt this measure.

Some jurisdictions have rejected the pure benefit-of-the-bargain approach in favor of the second or third measure of damages. This rejection might represent an implicit questioning of the contractual nature of the duty of habitability, but another explanation is also possible—the goal of fashioning damage rules that are administratively workable. Use of the first measure requires expert testimony or other proof of two different fair rental values. Presumably, real estate appraisers could testify as to these values based upon their compilations of data concerning comparable rental properties. As a practical matter, however, the sums involved in a typical residential landlord-tenant dispute would seldom justify the cost of obtaining such information and introducing it into court as evidence.[51] Therefore, although a comparison of fair rental values

---

Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (1970); Whitehall Hotel v. Gaynor, 121 Misc. 2d 736, 470 N.Y.S.2d 286 (Civ. Ct. 1983); Leris Realty Corp. v. Robbins, 95 Misc. 2d 712, 408 N.Y.S. 2d 166 (Civ. Ct. 1978); Goldner v. Doknovitch, 88 Misc. 2d 88, 388 N.Y.S.2d 504 (App. Term 1976); Whitehouse Estates, Inc. v. Thomson, 87 Misc. 2d 813, 386 N.Y.S.2d 733 (Civ. Ct. 1976); Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (N.Y. City. Ct. 1971); Gilbert v. District Court, 67 Or. App. 148, 676 P.2d 917 (1984); Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 486 Pa. 272, 405 A.2d 897 (1979).

50. A. FARNSWORTH, CONTRACTS § 12.1, at 812-13 (1982). The benefit of the bargain is based not on the injured party's subjective hopes at the time he made the contract, but on the actual value that the contract would have had to him had it been performed. This amount is deemed to be the value of the expectation interest. *Id.*

51. On this basis a number of courts have permitted tenants to prove damages through the testimony of nonexperts. For example, the court in Birkenhead v. Coombs, 143 Vt. 167, 465 A.2d 244 (1983), stated:

> [I]n residential lease disputes involving a breach of the implied warranty of habitability, public policy militates against requiring expert testimony: "Useful expert testimony is unlikely to be readily available as the the 'worth' of the defects . . . , and even if it were available, the imposition upon indigent tenants of the financial burden of supplying expert witnesses would seriously diminish the effectiveness of the relief" . . . .

may be the best measure in theory, the practical difficulties of application to the normal case may lead courts to select other measures. This may be true even if the court ordinarily is committed to treating the duty of habitability as a contract doctrine.

The second measure of damages for breach of the duty of habitability—the agreed rent less the fair rental value of the unrepaired premises is simpler to apply, but not dramatically so. The agreed rent is a given; to ascertain it, one need only examine the terms of the lease. Thus, the only remaining item to be proven by the tenant to establish damages is the fair rental value of the premises in their uninhabitable condition. Although initially it might seem that this cuts the evidentiary work in half, this usually is not so. If appraisers or other expert witnesses are necessary, the incremental cost of asking them to express an opinion on a second fair rental value may be low. Moreover, one must question whether there is a market for unrepaired rental units, for the inquiry into fair rental value of the unrepaired premises is meaningful only if such a market can be identified.

How far this second measure of damages departs from the contract norm of the benefit of the bargain depends upon what assumptions are made about the residential rental market. Some courts that employ this measure may assume that the agreed rent is equal to the fair rental value of the repaired habitable dwelling unit.[52] In many cases this assumption will be correct, in which event this measure produces the same result as the pure benefit-of-the-bargain approach. However, the assumption fails in two instances. First, the

---

Id. at 173, 465 A.2d at 247 (quoting McKenna v. Begin, 5 Mass. App. Ct. 304, 311, 362 N.E.2d 548, 553 (1977)). *See also* Cazares v. Ortiz, 109 Cal. App. 3d Supp. 23, 168 Cal. Rptr. 143 (1977); Glasoe v. Trinkle, 107 Ill. 2d 1, 479 N.E.2d 915 (1985); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (1970) (use of expert testimony would not add to accuracy or certainty of damages); Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied*, 444 U.S. 992 (1979) (both landlord and tenant, being intimately familiar with the condition of the premises both before and after any breach, are competent to testify as to diminution in value occasioned by the breach); *see generally* Abbott, *supra* note 38, at 23.

52. Glasoe v. Trimble, 107 Ill. 2d 1, 479 N.E.2d 915 (1985); Darmetko v. Boston Hous. Auth., 378 Mass. 758, 393 N.E.2d 395 (1979); Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied*, 444 U.S. 992 (1979); 111 East 88th Partners v. Simon, 106 Misc. 2d 693, 434 N.Y.S.2d 886 (Civ. Ct. 1980) (agreed rent is competent evidence of fair market value of premises as warranted unless evidence is produced to show otherwise); Gilbert v. District Court, 67 Or. App. 148, 676 P.2d 917 (1984); Lane v. Kelly, 57 Or. App. 197, 643 P.2d 1375 (1982); L & M Inv. Co. v. Morrison, 44 Or. App. 309, 605 P.2d 1347 (1980) (absent express agreement to contrary, rental agreement showing agreed monthly rental is presumed to establish reasonable rental for premises in habitable condition, thus estopping landlord from contending otherwise). *Contra*, Cazares v. Ortiz, 109 Cal. App. 3d Supp. 23, 168 Cal. Rptr. 108 (1977).

agreed rent may not be equal to the fair rental value at the time the lease is made if either the landlord or the tenant obtained an advantageous lease. Such a bargain may result when one party has superior knowledge of market conditions or greater negotiation skills. Second, a divergence occurs whenever rental values increase or decrease between the time the lease is signed and the breach. In either event, this damage measure does not perfectly compensate the tenant for the benefit of his bargain—it either overcompensates or undercompensates him.

The third measure of damages computes the tenant's loss by applying some percentage to the agreed rent. This percentage-reduction-in-value test may be formulated in one of two ways. First, the court may simply determine what percentage of the landlord's promises, en toto, have been performed? If the landlord's breach of the duty of habitability affects 75 percent of the premises and the monthly rent is $400, then the damages are $300 per month. Conceivably, this test might require one to make a detailed determination of the number of rooms or square feet of the premises that are rendered uninhabitable by a given defect.[53] In practice, however, this measure seems designed to permit a fact finder simply to pick a number for the percentage; in other words, to make a "gut level" evaluation of how much value the tenant has lost without the need for resort to evidence of fair rental values or of precisely how many rooms or square feet are affected by the breach.[54]

A variant of this third measure uses the ratio of the fair rental value of the unrepaired premises to the fair rental value of the

---

53. *See* Whitehall Hotel v. Gaynor, 121 Misc. 2d 736, 470 N.Y.S.2d 286 (Civ. Ct. 1983) (delayed installation of major fixtures and appliances in bathrooms and kitchens rendered the units substantially uninhabitable, justifying in some cases 100% abatement of rent); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Timber Ridge Town House v. Dietz, 133 N.J. Super. 577, 338 A.2d 21 (1975); Academy Spires, Inc. v. Brown, 11 N.J. Super. 477, 268 A.2d 556 (1970); Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (Cir. Ct. 1973).

54. The opinion in McKenna v. Begin, 5 Mass. App. Ct. 304, 362 N.E.2d 548 (1977), illustrates how a test that sounds technical and precise can hide substantial approximation. Therein, the court stated that a percentage reduction factor, representing a percentage diminution of the total use, is assigned to each major violation or defect on the premises. Then, the percentages are summed to arrive at the total percentage reduction. That reduction in the weekly rent becomes the assessed damages. After describing these steps, however, the court hedges by saying that this is an uncertain process and an approximation is permissable if the evidence shows the amount to be "just and reasonable." *Id.* at 311, 362 N.E.2d at 553. *See also* Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 48 Pa. 272, 405 A.2d 897 (1979); Timber Ridge Town House v. Dietz, 133 N.J. Super. 577, 338 A.2d 21 (1975). *But see* Goldner v. Doknovitch, 88 Misc. 2d 88, 388 N.Y.S.2d 504 (App. Term 1976) (damages cannot be ascertained by mere guesswork).

habitable unit as the percentage applied to the agreed rent.[55] It is difficult to see why this measure should ever be used. It has all the evidentiary handicaps of the pure benefit-of-the-bargain approach, as both fair rental values must be determined. Yet it is perfectly compensatory only when the agreed rent equals the fair rental value of the habitable premises at the time of breach. Nevertheless, the Restatement has adopted this measure for its rental abatement rule,[56] which defines the tenant's damage rights prior to termination of the lease. A comment to the Restatement indicates that this rule is intended "to preserve the parties' original bargain in so far as possible."[57] The Restatement examples do not elucidate what this cryptic statement may mean. Clearly, the parties did not originally bargain for this percentage measure of damages; if they did, the issue would be one of the validity of a liquidated damages provision. Are the Restatement authors suggesting that as part of the original bargain, the parties implicitly agreed that the fair rental value and agreed rent would remain equal throughout the term? Obviously, such a bargain in fact is unlikely.

One court[58] has implicitly adopted the Restatement test in order to prevent the tenant from having a damage claim that exceeds the amount of rent due under the lease. The apparent rationale is that under certain circumstances the landlord would in effect pay the tenant to stay in the premises. Why this is objectionable is not addressed. If rising rental values give the tenant an extremely advantageous lease, why shouldn't the tenant be fully compensated upon the landlord's breach even if the damage award exceeds the rent? In the sale of goods, there certainly is no rule that limits benefit-of-the-bargain damages to the purchase price for an item.

One basic assumption about the bargaining process that is inherent in contract theory generally underlies all three damage awards for breach of the duty of habitability. The basis of the bargain between landlord and tenant is that the premises are to be habitable throughout the term of the lease. Although this may be true for

---

55. *See* Cazares v. Ortiz, 109 Cal. App. 3d Supp. 23, 32, 168 Cal. Rptr. 108, 112-13 (1980) (rejecting the Restatement approach as "mind boggling" and necessitating "expert testimony").

56. RESTATEMENT (SECOND) OF PROPERTY § 11.1 (1976).

57. The comment states in full:

> *Measure of abatement—preserving the original bargain.* So long as the facts of the relationship do not vary too far from those originally contemplated by the parties, it is desirable to preserve their original bargain in so far as possible. This is the effect of the proportional rule stated in this section.

RESTATEMENT (SECOND) OF PROPERTY § 11.1 comment c (1976).

58. *See* McKenna v. Begin, 5 Mass. App. Ct. 304, 310-11, 362 N.E.2d 548, 552-53 (1977). The court fails to cite the Restatement.

middle-class and upper-class rental housing, this premise fails for the typical lease of slum housing.[59] There, patent defects in the premises are present when the lease is made, and the agreed rent reflects the tenant's expectation that he will live in dilapidated housing. Such tenants cannot afford habitable housing and must live in substandard housing at a lower rent. For this type of case, the pure benefit-of-the-bargain measure results in significant damage awards to tenants for bargains that were not in fact made. If this is justifiable, it must be for policy reasons wholly apart from the contract ideal of compensating for economic harm caused by a breach of promise.[60] It should be noted that the second damage measure—agreed rent less fair rental value in unrepaired condition—results in no damages if faithfully applied to the prototypical slum lease described above. This suggests another motivation of the courts that have adopted this measure: an unstated movement away from the contract theory of the duty of habitability as applied to slum leases. With this measure, damage awards that approximate the parties' bargain can be given when the parties in fact expected the premises to be habitable, but damages based upon a fictional bargain in the slum housing context are eliminated. On this issue, the third measure—the proportionate reduction of the agreed rent—in effect splits the middle, producing results that lie between those stemming from the other two measures. The tenant will always receive some damages if a breach of habitability is established, but in contrast to the pure benefit-of-the-bargain measure, the damages are reduced because the base for calculation is the low agreed rent for the slum lease.

2. Termination

There is widespread agreement among the courts that termination of the lease is a proper remedy for breach of the warranty of habitability. Termination extinguishes the tenant's obligation to pay rent and the tenant's right to possession as of the date of termination. To invoke the termination remedy the Restatement[61] and most courts[62] require that the tenant notify the landlord of his election to terminate while the premises are uninhabitable.

---

59. *See generally* Abbott, *supra* note 38; Meyers, *The Covenant of Habitability and The American Law Institute*, 27 STAN. L. REV. 879 (1975).

60. *See infra* text accompanying notes 180-90.

61. RESTATEMENT (SECOND) OF PROPERTY § 10.1 (1976).

62. Glasco v. Trinkle, 107 Ill. 2d 1, 479 N.E.2d 915 (1985); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 486 Pa. 272, 405 A.2d 897 (1979); Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202 (1984); Teller v. McCoy, 162 W.Va. 367, 253 S.E.2d 114 (1978); *cf.* George Washington Univ. v. Weintraub, 458 A.2d 43 (D.C. 1983) (actual notice not required if landlord in exercise of

Termination is not necessarily inconsistent with the tenant remedy of damages. The two remedies can be coupled together when damages are claimed from the time of breach to the date of termination.[63]

One issue that is largely unsettled is how the right to terminate for breach of habitability relates to the constructive eviction doctrine. A few jurisdictions have considered the question in a cursory manner, reaching different conclusions.[64] There are at least three possible resolutions. First, constructive eviction might not apply at all to the issue of habitability. This result would follow from the view that contract law alone defines habitability. Decisions adopting the duty of habitability generally embrace contract law, rejecting traditional landlord-tenant law. That rejection has been primarily used to eradicate the ancient rule that lease covenants are independent. Under that rule, a breach by one party of a lease covenant does not excuse performance of lease covenants by the other party. A broad rejection of traditional landlord-tenant law, however, could also include disavowal of constructive eviction.[65] In that case, contract law would provide the sole basis for the right to terminate, and it would appear that the contract doctrine of substantial performance is the justification for termination. The landlord has not substantially performed if the breach of the warranty of habitability is a material breach of the lease. Ordinarily, a breach of the warranty of habitability will be material. Indeed, most jurisdictions define habitability in terms of material or substantial impairment of the premises. Therefore, in those jurisdictions if the tenant is able to prove any breach of habitability it will be a substantial breach justifying termination.

---

reasonable care should have been aware of the defective condition); Freeman v. G.T.S. Corp., 363 So. 2d 1247 (La. Ct. App. 1978) (oral notice satisfies requirement that tenant notify landlord of defective premises); Berman & Sons, Inc. v. Jefferson, 379 Mass. 196, 396 N.E.2d 981 (1979) (notice requirement is not to assure the landlord a reasonable time to repair, but rather is designed to minimize the time the landlord is in breach and hence to mitigate the permissible period of abatement of rent).

63. Mease v. Fox, 200 N.W.2d 791 (Iowa 1972) (if tenant who vacates has an advantageous lease, he is entitled to recover from landlord the benefit of his bargain, that is, the value of the lease for the unexpired period); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

64. *Compare* King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973) (tending to reject constructive eviction *and* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970) (tending to reject constructive eviction), *with* Teller v. McCoy, 162 W. Va. 367, 253 S.E.2d 114 (1978) (tending to apply constructive eviction) *and* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969) (tending to apply constructive eviction).

65. *See King* 495 S.W.2d at 76 (constructive eviction, which requires that tenant abandon premises within reasonable time, is "based upon a fiction which the implied warranty remedy discards" in favor of recognizing that the modern lease is a bilateral contract).

A second possible relationship of constructive eviction to habitability lies at the other end of the spectrum. Termination for breach of habitability might be available only pursuant to the constructive eviction doctrine. In other words, the tenant can terminate when the landlord's failure to perform his habitability duties has constructively evicted the tenant. New Jersey[66] and Pennsylvania[67] have adopted this approach. There are ample precedents for this use of constructive eviction. For almost a century, breaches of express covenants to repair have been remedied under the rubric of constructive eviction.[68]

Use of constructive eviction in this fashion probably should result in the same substantiality requirement as contract law would impose under the substantial performance doctrine.[69] One element of constructive eviction is substantial interference by the landlord with the tenant's right to possession and enjoyment of the premises. Constructive eviction, however, may impose other hurdles for the tenant that are not present under substantial performance. First, traditionally the constructive eviction doctrine has required that the tenant vacate the premises within a reasonable time after the landlord's breach becomes evident.[70] Failure by the tenant to vacate in a timely manner constitutes a waiver of the right to rely on con-

---

66. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). The court stated:

> It is eminently fair and just to charge a landlord with the duty of warranting that a building or part thereof rented for residential purposes is fit for that purpose at the inception of the term and will remain so during the entire term. Of course, ancillary to such understanding it must be implied that he has further agreed to repair damage to vital facilities caused by ordinary wear and tear during said term . . . . Failure to so maintain the property would constitute a constructive eviction . . . .
>
> . . . .
>
> Our courts have on a case by case basis held various lease covenants and covenants to pay rent as dependent and, under the guise of a constructive eviction have considered breach of the former as giving the right to the tenant to remove from the premises and terminate his obligation to pay rent.
>
> It is of little comfort to a tenant in these days of housing shortage to accord him the right, upon constructive eviction, to vacate the premises and end his obligation to pay rent. Rather he should be accorded the alternative remedy of terminating the cause of the constructive eviction where as here the cause is the failure to make reasonable repairs.

Id. at 144-45, 265 A.2d at 534-35 (citations omitted).

67. *See* Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 486 Pa. 272, 405 A.2d 897 (1979).

68. *See* 1 AMERICAN LAW OF PROPERTY § 3.51, at 281-82 (1952); Glendon, *supra* note 1, at 512-14; Love, *supra* note 20, at 34-37.

69. A. FARNSWORTH, CONTRACTS § 8.12 at 590-96 (1982) (if one party's performance is a constructive condition of the other party's duty to perform, only substantial performance is required of the first party before he can recover under the contract).

70. 1 AMERICAN LAW OF PROPERTY § 3.51, at 282 (1952).

structive eviction. This abandonment requirement has tended to be enforced rigidly, regardless of the tenant's actual intent to waive his claim. If constructive eviction is rejected and substantial performance is used for habitability cases, waiver by the tenant is still possible—obviously, waiver rules are a viable part of contract law. Nevertheless, it would seem that a finding of waiver will be less likely if substantial performance rather than constructive eviction is used. Waiver under contract law would be a question of fact, adjudicated on a case by case basis. Under traditional constructive eviction law, waiver occurs automatically, as a matter of law, after the passage of a reasonable time following breach of the covenant.

Both the contract doctrine of substantial performance and constructive eviction require abandonment by the tenant in order to terminate the lease. However, there may be a difference between the two doctrines in the timing of the requirement of abandonment. For constructive eviction, it is fairly well settled that abandonment is a prerequisite to the tenant's assertion that the lease has terminated. In other words, abandonment is a precondition to making the election to terminate. Under contract law, there seems to be no reason why the tenant could not prospectively terminate the lease by notifying the landlord, while the tenant is still in possession and a breach of the warranty of habitability exists, that the lease is terminated as of a specified date in the future. Because the tenant must make plans to "cover" by relocating to new premises, the value of being able to use such a notice is obvious.

A third possible relationship between habitability and constructive eviction is that both continue on parallel tracks. Constructive eviction is not replaced by the contract remedy of substantial performance, and either remains available at the election of the tenant.[71]

---

71. Language in Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969), suggests this possibility:

> To alleviate the tenant's burden, the courts broadened the scope of the long-recognized implied covenant of quiet enjoyment (apparently designed originally to protect the tenant against ouster by a title superior to that of his lessor) to include the right of the tenant to have the beneficial enjoyment and use of the premises for the agreed term. It was but a short step then to the rule that when the landlord or someone acting for him or by virtue of a right acquired through him causes a substantial interference with that enjoyment and use, the tenant may claim a constructive eviction. In our view, therefore, at the present time whenever a tenant's right to vacate leased premises comes into existence because he is deprived of their beneficial enjoyment and use on account of acts chargeable to the landlord, it is immaterial whether the right is expressed in terms of breach of a covenant of quiet enjoyment, or material failure of consideration, or material breach of an implied warranty against latent defects.

Id. at 460-61, 251 A.2d at 276-77.

Here, in most cases either doctrine will justify termination by the tenant for breach of habitability. As indicated above, in some jurisdictions substantial performance may give the tenant broader termination rights because of the abandonment requirement for constructive eviction.

3. Specific Performance

No reported cases have reached a holding on the question of whether the tenant has the right to specific performance of the duty to provide habitable housing.[72] Under contract law specific performance is generally considered to be extraordinary relief that is available only when legal remedies are shown to be inadequate. A strict application of the contract theory of habitability would condition specific performance, or injunctive relief, upon some such showing. The Pennsylvania Supreme Court followed this route in *Pugh v. Holmes*,[73] stating that specific performance would be available as an equitable remedy only in "unique situations." This limitation is quite similar to the Uniform Commercial Code rule, which permits specific performance "where the goods are unique or in other proper circumstances."[74]

In departure from the normal contract law limitations, there is some authority for broader use of specific performance. In a footnote in the *Javins* opinion, the District of Columbia Circuit stated: "In extending all contract remedies for breach to the parties to a lease, we include an action for specific performance of the landlord's implied warranty of habitability."[75] This language suggests that specific performance will generally be available, but perhaps could be read to mean only that specific performance is to be granted subject to the normal contract rules for that type of relief. The URLTA expressly authorizes injunctive relief for "any noncompliance" with

---

72. Dicta in a number of decisions support a tenant right to specific performance of the habitability obligation. *E.g.*, South Austin Realty Ass'n v. Sombright, 47 Ill. App. 3d 89, 361 N.E.2d 795 (1977) (reversing trial court's summary dismissal of tenant's counterclaim seeking equitable relief of specific performance); Bartley v. Walentos, 78 A.D.2d 310, 434 N.Y.S.2d 379 (1980) (refusing injunctive relief, but indicating that it may sometimes be required to restrain continuation of breach of warranty of habitability); Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 486 Pa. 272, 405 A.2d 897 (1979) (specific performance is available as an equitable remedy, limited to unique situations); *cf.* L & M Inv. Co. v. Morrison, 44 Or. App. 309, 605 P.2d 1347 (1980) (vacating trial court order that landlord bring the premises into compliance with the City of Portland Housing Code because such code was not part of Oregon statutory habitability requirement).

73. 486 Pa. 272, 295, 405 A.2d 897, 908 (1979).

74. U.C.C. § 2-716 (1978).

75. 428 F.2d 1071, 1082 n.61 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

the landlord's statutory warranty of habitability.[76] The Restatement does not take any position on when injunctive relief is appropriate.

Analytical confusion can result when the traditional rules for specific performance are applied to the habitability duty. Contract law has long treated a breach of a contract to sell real property differently than breaches of other contracts, including contracts to sell personal property. English common law considered each tract of land to be unique with the result that specific performance was freely dispensed for contracts for the sale of realty.[77] American courts have generally applied this principle as a per se rule, despite the fact that today many interests in land can readily be perceived as fungible.[78] At early common law, a lease was treated as personalty,[79] so unquestionably any promise made by a lessor in connection with a lease would not fall under the special realty rule for specific performance. Presently, of course, leases are treated as real property for many purposes, and almost all courts would specifically enforce a promise by a lessor to make a lease.[80] In so doing, courts stress the conveyancing character of the lease transaction and view such a promise as equivalent to a promise to sell an interest in real property.

A categorization problem arises when applying the realty-

---

76. "Except as provided in this Act, the tenant may recover actual damages and obtain injunctive relief for any noncompliance by the landlord with the rental agreement or Section 2.104 [setting forth statutory habitability obligations] . . . ." UNIF. RESIDENTIAL LANDLORD TENANT ACT § 4.101(b) (1972); *see also* ARIZ. REV. STAT. ANN. § 33-1361(B) (1974); IDAHO CODE § 6-320 (1979) (authorizing action for specific performance when landlord fails to provide essential services or maintains premises in manner adversely affecting health and safety of tenant); MICH. COMP. LAWS ANN. § 125.536(1) (West 1986) (authorizing injunctive relief when defective condition constitutes continuing interference with tenant's use and occupancy); MINN. STAT. ANN. § 566.25(a) (West 1986) (empowering appropriate court to require lessor to remedy defective conditions); MONT. CODE ANN. § 70-24-406(b)(2) (1985) (sanctions injunctive relief for any material noncompliance with rental agreement or statutory warranty of habitability); NEV. REV. STAT. § 118 A.350(c) (1977); N.M. STAT. ANN. § 47-8-27(B) (1978); OR. REV. STAT. § 91.800(2) (1985); S.D. CODIFIED LAWS ANN. § 43-32-6 (1983); TEX. PROP. CODE ANN. § 92.056(b)(1) (Vernon 1984) (tenant may obtain judicial order directing landlord to take reasonable action to repair or remedy habitability defect).

77. 3 AMERICAN LAW OF PROPERTY § 11.68, at 173 (1952) (contract to convey land or any interest therein is specifically enforceable by purchaser or vendor); A. FARNSWORTH, CONTRACTS § 12.6, at 829 (1982).

78. For a recent rejection of the traditional rule, as applied to the sale of condominiums, see Centex Homes Corp. v. Boag, 128 N.J. Super. 385, 320 A.2d 194 (1974).

79. 1 AMERICAN LAW OF PROPERTY §§ 3.1, 3.12, at 205 (1952). Subsequent developments during the thirteenth through fifteenth centuries changed the lessee's status from the holder of contractual rights to the owner of an interest in real property for many purposes. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 539-43 (4th ed. 1948).

80. Clark & Lewis, Inc. v. Gardner, 91 Fla. 1059, 109 So. 192 (1926); Black v. Milner Hotels, 194 Ga. 828, 22 S.E.2d 780 (1942); Rigs v. Sokol, 318 Mass. 337, 61 N.E.2d 538 (1945); *see* 1 AMERICAN LAW OF PROPERTY § 3.17 (1952).

personalty distinction to the habitability duty. Technically, conveying an interest in the land to the tenant is a separate act from promising to maintain the premises in a certain condition. That technical difference, coupled with the judicial emphasis that habitability is a contract concept, supports the limitation of specific performance to unique circumstances. This rule, which *Pugh* adopted, is also buttressed by the observation that rental housing units are very often fungible.[81]

However, the contrary result—that specific performance is generally available—can be reached if the lease is seen as an integrated whole, which contains both conveyancing and contract aspects. When a contract to sell land is specifically enforced, all of the seller's promises that form a part of that contract are enforced, not merely the promise to convey.[82] Habitability, as part of the landlord's promise to lease, can be seen in a similar posture. The habitability covenant is an integral part of the definition of what is being conveyed. The landlord has promised to convey premises that are and will remain in a certain condition of repair.

4. Repair-and-Deduct

Five states have judicially recognized the tenant repair-and-deduct remedy.[83] Ten others have provided a statutory repair-and-deduct mechanism.[84] Under this remedy, whether judicial or statutory in

---

81. The court in Centex Homes Corp. v. Boag, 128 N.J. Super. 385, 393, 320 A.2d 194, 198 (1974), stated:

> [A] condominium apartment unit has no unique quality but is one of hundreds of virtually identical units being offered by a developer for sale to the public. The units are sold . . . [in] much the same manner as items of personal property are sold in the market place . . . . [I]n actuality, the condominium apartment units, regardless of their realty label, show the same characteristics as personal property.

82. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 358(1) (1981):

> An order of specific performance or an injunction will be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires. It need not be absolute in form and the performance that it requires need not be identical with that due under the contract.

83. Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Katurah Corp. v. Wells, 115 Misc. 2d 16, 454 N.Y.S.2d 770 (Sup. Ct. 1982); Jackson v. Rivera, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (Civ. Ct. 1971); Fair v. Negley, 257 Pa. Super. 50, 390 A.2d 240 (1978); Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 486 Pa. 272, 405 A.2d 897 (1979); Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202 (1984); Birkenhead v. Coombs, 143 Vt. 167, 465 A.2d 244 (1983); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); *cf.* Glasoe v. Trinkle, 107 Ill. 2d 1, 479 N.E.2d 915 (1985) (mentioning repair-and-deduct as a remedy that is possibly available).

84. ARIZ. REV. STAT. ANN. § 33-1363(A) (1974); CAL. CIV. CODE § 1942 (1985); LA. CIV. CODE ANN. art. 2694 (West 1952); MICH. COMP. LAWS ANN. § 125.536(1) (West 1986); MINN. STAT. ANN. § 566.29 (West 1986); MONT. CODE ANN. § 70-24-406(b) (1985); NEV. REV. STAT. §

origin, the tenant repairs the premises to bring them into compliance with the habitability standard and deducts the cost of repairs from the rent. In order to use the repair-and-deduct remedy the tenant must first notify the landlord of the breach and give the landlord a reasonable period of time to cure the breach.[85]

The deduction from rent is limited to the reasonable cost of the repairs.[86] This limitation could be applied in two different circumstances. First, if the tenant pays an unrealistically high amount for materials or repairs, the deduction would be limited to the market value of the materials or repairs. Second, the nature and extent of the repairs must be reasonable in light of the age and condition of the premises. For example, in a low-cost house having all single-pane windows this rule could limit the rent deduction if the tenant replaced a broken window with the best tempered double-pane window that is available.

The tenant may make the repairs himself or pay a contractor to perform the repairs. If the tenant purchases materials and personally supplies the labor, the question arises whether he can deduct the cost a contractor would have charged for the entire job. The labor could be nonreimbursable if the remedial goal behind repair-and-deduct is perceived to be restricted to covering the tenant's out-of-pocket expenses. Such a rule, however, would appear to be an undue limitation. It would compel knowledgeable tenants to forego undertaking repairs themselves and always engage an outside contractor. Further, if a tenant does the work himself, why should the landlord benefit from free labor? One New York case in effect splits the difference on the issue by limiting the tenant's deduction to the value of unskilled labor when the tenant is not engaged in the business of repairing the particular item involved.[87]

The remaining term of the lease also limits the repair-and-deduct remedy. The deduction cannot exceed the total rent due for the re-

---

118A.360(1) (1977); N.D. CENT. CODE § 47-16-13 (1978); S.D. CODIFIED LAWS ANN. § 43-32-9 (1983); WASH. REV. CODE ANN. § 59.18.100 (1986).

85. *E.g.*, Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 486 Pa. 272, 405 A.2d 897 (1979); Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202 (1984).

86. Katurah Corp. v. Wells, 115 Misc. 2d 16, 454 N.Y.S.2d 770 (Sup. Ct. 1982); Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 486 Pa. 272, 405 A.2d 897 (1979); Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202 (1984).

87. *See* Garcia v. Freeland Realty, Inc., 63 Misc. 2d 937, 314 N.Y.S.2d 215 (Civ. Ct. 1970). The court held that the tenant had the right to remove flaking paint from the premises, which, due to its lead content, constituted a menace to the health and safety of his family, and to charge the cost to the landlord. The court awarded damages of $45.53, which included the cost of materials and the labor of the tenant, who was not a painter by trade, at minimum wage.

mainder of the term.[88] For a month-to-month tenancy, this can be a severe restriction. In jurisdictions that have statutorily authorized repair and deduct, the deduction sometimes is limited to a dollar maximum or a stated number of months.[89]

Strict adherence to a contract view of habitability probably militates against adoption of the repair-and-deduct remedy. This appears to be the thinking behind *Teller v. McCoy*,[90] in which the West Virginia Supreme Court summarily rejected repair-and-deduct in view of "the wide range of contract remedies" it was willing to extend to tenants in habitability cases.[91]

In fact, repair-and-deduct appears to be *sui generis*, with neither it nor a close substitute commonly recognized by contract law. In the context of the sale of goods, a repair-and-deduct remedy would involve an election by the buyer to accept nonconforming goods and make them conform to the contract at the seller's expense. That is not a choice under the Uniform Commercial Code. Instead, rejection, cover, and damages are authorized.[92] More generally under contract law, a failure to perform is not redressed by the promisee's rendering of performance to himself at the promisor's expense. The Uniform Commercial Code remedy of cover,[93] under which the buyer obtains substitute goods from other suppliers and the seller pays the price differential, is not analogous to repair-and-deduct by the tenant. Rather, cover closely resembles a tenant's termination of the lease for a breach of habitability, with the tenant obtaining substitute housing and the landlord paying any increased rent as damages.

The repair-and-deduct device can best be equated to a self-help version of specific performance. Like specific performance, or in-

---

88. Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 486 Pa. 272, 405 A.2d 897 (1979).

89. California, Montana, and Washington restrict the amount to one-month's rent. CAL. CIV. CODE § 1942 (1985); MONT. CODE ANN. § 70-24-406(b)(1985); WASH REV. CODE ANN. § 59.18.100 (1986). Arizona permits the tenant to deduct the greater of $150 or one-half of the monthly rent to repair defects. ARIZ. REV. STAT. ANN. § 33-1363(A) (1974). Nevada limits the tenant's recovery to the greater of $100 or one month's rent, within any 12-month period. NEV. REV. STAT. § 118A.360(1) (1977). South Dakota requires the tenant to deposit the monthly rental into a bank if the repairs will exceed one month's rental and then notify the landlord of such action. S.D. CODIFIED LAW ANN. § 43-32-9 (1983). The deposited funds can be used only to repair the premises. In Louisiana, the tenant is limited only by a "just and reasonable" amount to make "indispensable" repairs. LA. CIV. CODE ANN. art. 2694 (West 1952). North Dakota seems to place no limit on the amount a tenant may spend to repair defective premises. N.D. CENT. CODE § 47-16-13 (1978).

90. 162 W. Va. 367, 253 S.E.2d 114 (1978).

91. *Id.* at 386-87, 253 S.E.2d at 126.

92. U.C.C. §§ 2-711(1)(a), -712(1),(2) (1978).

93. *Id.* § 2-712.

junctive relief, its goal is to make the premises habitable rather than to compensate the tenant for living in uninhabitable premises. The attractiveness of repair-and-deduct lies in its ease of implementation. Given the relatively small sums typically involved in residential lease disputes and the high cost of legal representation, any habitability remedy that can be asserted only by bringing judicial action against the landlord is doomed to nonuse. Repair-and-deduct can be asserted extrajudicially by a tenant, who then only faces legal expense if and when a landlord takes the initiative to commence litigation. Despite these advantages, equating repair-and-deduct to specific performance would tend to limit the remedy to situations in which damages are an inadequate remedy.

One other contract doctrine that has made recent inroads in the law of leases should be mentioned here. Courts have recently imposed a duty to mitigate damages upon a landlord who claims rent after the tenant has abandoned possession of the premises.[94] This duty to mitigate, by requiring the landlord to make reasonable efforts to relet the premises, has replaced the landlord's common law right to refuse to accept the tenant's surrender, let the premises stand vacant and collect all rent due for the remainder of the lease term.[95] The application of the mitigation principle to habitability would make repair-and-deduct the tenant's *sole* remedy under certain circumstances. When the damage to the tenant from the breach of habitability is substantially greater than the cost of repairs and that cost is within the tenant's economic means, the tenant is obligated to make the repairs in order to minimize his damages. No cases have yet applied mitigation to the residential tenant's claim of breach of the warranty of habitability, but the Restatement, with slightly different operative language, recognizes such a duty as a general part of landlord-tenant law.[96]

---

94. *See supra* note 4.

95. 1 AMERICAN LAW OF PROPERTY § 3.99 (1952) (describing traditional common-law rule).

96. RESTATEMENT (SECOND) OF PROPERTY § 10.2 comment i (1976) states:
"The tenant must take reasonable steps to mitigate his losses. His recovery will be limited to the damages which would have been incurred by a tenant who took all reasonable means to mitigate his losses." *See* 11 S. WILLISTON, *supra* note 1, § 1404, at 563.

One recent case involving a commercial lease required that the lessee, who had rented premises for a grocery store, mitigate the damages from the lessor's breach of a covenant to repair the roof. Sigsbee v. Swathwood, 419 N.E.2d 789, 798 (Ind. App. 1981). The roof had leaked periodically for over two years, with the lessor making several largely unsuccessful efforts at patching, while the lessee remained in possession. The court remanded for a redetermination of damages, stating: "[W]here the repair cost is slight with respect to the decrease in the value of the 'bargained for' premises, the amount recoverable by the lessee is limited to the cost of repair." *Id.* at 798 (relying upon S. WILLISTON, *supra*).

By a process of inverse reasoning, the duty to mitigate can provide a contractual justification for recognition of a tenant's right to repair-and-deduct. Contract law favors mitigation for reasons of efficiency. The total cost flowing from a breach of contract is minimized if damage rules are structured to provide an economic incentive for the nonbreaching party to minimize his losses. When it is clear that the landlord will not readily make fairly inexpensive repairs, efficiency supports allocating that responsibility to the tenant. Naturally, along with that duty to mitigate comes the right to do so.

5. Rent Withholding/Rent Abatement/Rent Escrow

In discussing remedies for breach of the duty of habitability, courts[97] and commentators[98] often discuss whether the tenant should have the right to withhold or abate rent or pay rent into escrow. The URLTA addresses this as well, using similar terminology.[99] However, these are not substantive remedies that are different from or in addition to the remedies of damages, specific performance, and repair-and-deduct discussed above. Rather, courts and commentators typically refer to these tenant actions when discussing what procedures the tenant may follow to claim damages or to apply his rent to the repair costs. Generally, rent withholding and rent abatement convey the idea that habitability and rent are dependent covenants. If the tenant has the right to withhold or abate rent, then after a decision on the merits of the habitability dispute the landlord will be able to collect all the accrued rent less the damages caused by the breach. Some courts refer to those damages as the amount of abated rent.[100]

Similarly, rent escrow is a procedural device designed to protect both parties from the insolvency of the other pending a determina-

---

97. *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 486 Pa. 272, 405 A.2d 897 (1979).

98. *E.g.*, Cunningham, *supra* note 11, at 113-14; Glendon, *supra* note 1, at 532; Abbott, *supra* note 38, at 58-59.

99. UNIF. RESIDENTIAL LANDLORD TENANT ACT § 4.105(a) (1972) states:

> In an action for possession based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may counterclaim for any amount he may recover under the rental agreement or this Act. In that event the court from time to time may order the tenant to pay into the court all or part of the rent accrued and thereafter accruing, and shall determine the amount due to each party . . . .

100. *E.g.*, Glasoe v. Trinkle, 107 Ill. 2d 1, 479 N.E.2d 915 (1985); 111 East 88th Partners v. Simon, 106 Misc. 2d 693, 434 N.Y.S.2d 886 (Civ. Ct. 1980); Pugh v. Holmes, 253 Pa. Super. 76, 384 A.2d 1234 (1978), *aff'd*, 486 Pa. 272, 405 A.2d 897 (1979).

tion of the habitability issues.[101] If the rent is escrowed with the court or some other person, part or all of it may be refunded to the tenant to the extent damages from the breach are proven. The landlord may then collect the remainder, if any, of the escrowed amounts as properly payable rent.

Rent withholding or rent escrow can also be used to facilitate the making of repairs by the landlord, the tenant, or a third party. If the court orders specific performance or sanctions a tenant's repair efforts, rent that is withheld or escrowed may be paid to the person who makes the repairs.[102]

IV. RECENT TORT INROADS ON HABITABILITY

As discussed above, the warranty of habitability was conceived of as and has overwhelmingly remained a creature of contract. Nevertheless, there are several recent cases which stand at a crosscurrent to the contract orientation and therefore merit careful attention. Courts in California, Massachusetts, and Oregon have recognized that a landlord's breach of the duty of habitability can give rise to tort liability even in the absence of physical injury. Although few in number and somewhat restrictive in their holdings, these decisions may stand as a harbinger of the advance of tort into the land of habitability.

A. California: Stoiber v. Honeychuck

In *Stoiber v. Honeychuck*,[103] a tenant brought a damage action against her former landlord for the failure to correct numerous habitability defects, most of which related to plumbing, electrical, and structural difficulties. After 34 months of occupancy, the tenant vacated the premises pursuant to an order of condemnation from the county health department. The tenant alleged damages under five separate causes of action: implied warranty of habitability, nuisance, intentional infliction of emotional distress, negligent violation of a statutory habitability duty, and constructive eviction.[104] She sought

---

101. *See Javins*, 428 F.2d at 1083 n.67 (applauding payment of rent into registry of court pending conclusion of habitability litigation as "excellent protective procedure").

102. *See* S. D. CODIFIED LAWS ANN. § 43-32-9 (1983) (authorizing tenant to withhold rent and deposit same in bank account to provide a fund for the making of necessary repairs costing more than one month's rent, with payment to whichever party makes repairs).

103. 101 Cal. App. 3d 903, 162 Cal. Rptr. 194 (1980).

104. *Id.* at 911, 162 Cal. Rptr. at 196. Although no longer in possession, the tenant also sought to enjoin the landlord's continued rental of substandard housing units as an "unfair or fraudulent business practice" under CAL. BUS. & PROF. CODE. § 17200 (West 1964). The appellate court affirmed the trial court's denial of injunctive relief on the ground that the tenant

damages of $20 per day for discomfort and annoyance for the entire term, $10,000 in punitive damages, and an unspecified amount for water damage to her personal property.[105] The trial court dismissed the tort and constructive eviction causes of action on the theory that the warranty of habitability constituted the tenant's exclusive damage remedy.[106] Evidently, all or most of her claimed damages would not have been cognizable in a contract action based on an implied warranty of habitability. In that type of action, California law would have awarded her the difference between the fair rental value of the premises as warranted and the fair rental in their defective condition.[107]

The court of appeals reversed and held that all three tort causes of action, as well as constructive eviction, were properly pleaded by the tenant's complaint.[108] The court held that the availability of a contractual habitability action did not preclude a tort action.[109] If the facts that give rise to a breach of the warranty of habitability independently satisfy the elements of one or more tort causes of action, the tenant can elect whichever cause of action offers the superior remedies. The only limitation that the court imposed is the obvious rule that a plaintiff having multiple causes of action can only recover once for an injury.[110]

Looking at prior California law, *Stoiber* appears to stand on solid ground. In the leading case of *Green v. Superior Court*,[111] the California Supreme Court implied a common-law warranty of habitability in the face of a broadly worded statutory warranty of habitability.[112] The statute expressly provided two tenant remedies:

---

lacked standing, no longer being an occupant of any of defendant's properties. Had it reached the merits, the court also suggested that it might have denied an injunction under the unfair business practices statute because of the adequacy of the tenant's other remedies, including injunctive relief under nuisance. *Id.* at 928, 162 Cal. Rptr. at 207.

105. *Id.* at 913, 162 Cal. Rptr. at 197.

106. *Id.* at 911, 162 Cal. Rptr. at 196.

107. *See infra* note 115. The *Stoiber* court and the parties assumed that mental distress damages and injury to the tenant's personal property are not recoverable in an action for breach of implied warranty. A 1977 court of appeal of the superior court decision denied damages for discomfort and annoyance in such an action. Quevedo v. Braga, 72 Cal. App. 3d Supp. 1, 140 Cal. Rptr. 143 (1977). Conceivably, if *Quevedo* is incorrect, such damages could be awarded as consequential damages foreseeably caused by the landlord's breach. The supreme court did not negate this possibility in Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

108. 101 Cal. App. 3d at 931-32, 162 Cal. Rptr. at 209.

109. *Id.* at 929-30, 162 Cal. Rptr. at 208.

110. *Id.* at 931-32, 162 Cal. Rptr. at 209.

111. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

112. *Id.* at 629-31, 517 P.2d at 1169-70, 111 Cal. Rptr. at 712-14. CAL. CIV. CODE § 1941 (West 1985), enacted in 1872, requires that lessors of residential property, in the absence of a

repair-and-deduct, and the right to abandon.[113] The *Green* court found the statutory framework was not intended by the legislature to exclude the judicial common-law fashioning of other tenant rights and remedies.[114] On that basis, the court recognized rent abatement as a tenant remedy under the implied warranty.[115] The *Stoiber* court merely followed the process of remedial expansion started by *Green* in this area. There is no indication in the California case law that growth in the common law of the landlord-tenant relationship has to stop with the contractual habitability doctrine.

One potential obstacle to tort remedies for a breach of the warranty of habitability is the old doctrine of landlord immunity from tort liability for injuries occurring on the leased premises.[116] In states where this doctrine has retained some degree of vitality, courts might hold that tort remedies for breach of habitability are inappropriate. In California, however, cases decided several years prior to *Stoiber* removed this roadblock by holding that landlords owe their tenants a duty of care under the usual standards of reasonableness.[117]

After deciding that the tenant generally could sue in tort for breach of the duty of habitability, the court in *Stoiber* discussed each of the four alternative causes of action that would allow damages for physical discomfort and mental annoyance—nuisance, intentional infliction of emotional distress, negligent violation of a statutory duty, and constructive eviction. Finding nuisance applicable, the

---

contrary agreement, maintain it in fit condition and repair all dilapidations "which render it untenantable."

113. CAL. CIV. CODE § 1942.

114. 10 Cal. 3d at 629-31, 517 P.2d at 1169-70, 111 Cal. Rptr. at 712-14. Cases prior to *Green* had held that the two statutory remedies constituted the sole procedure for enforcing the lessor's statutory habitability duties. *E.g.*, Van Every v. Ogg, 59 Cal. 563, 566 (1881). These cases foreclosed the option of implying new remedies to secure the tenants' statutory rights, making necessary the recognition of a common-law implied warranty of habitability.

115. 10 Cal. 3d at 629-31, 517 P.2d at 1169-70, 111 Cal. Rptr. at 712-14. Under *Green*, the amount of rent abatement is equal to the damages caused by the landlord's breach. Relying on cases from other jurisdictions, the court equated the damage to "the difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy by the tenant in the unsafe or unsanitary condition." *Id.* at 638, 517 P.2d at 1183, 111 Cal. Rptr. at 719 (quoting Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972)).

116. *See supra* text accompanying notes 20-28.

117. Evans v. Thomason, 72 Cal. App. 3d 978, 140 Cal. Rptr. 525 (1977); Brennan v. Cockrell Inv., Inc., 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (1973). Rejection of the traditional doctrine of landlord immunity was based upon a statute providing:

> Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

CAL. CIV. CODE § 1714 (West 1985). *See* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

court indicated that damages for discomfort and annoyance would be recoverable.[118] Exemplary damages would also lie, provided the nuisance was intentional, rather than negligent.[119]

The use of nuisance in habitability cases is novel and intriguing. Nuisance protects the owner of an interest in land from the activities of other persons that cause substantial and unreasonable injury.[120] Historically, nuisance protected the ownership of land when trespass did not lie due to the absence of a tangible physical invasion. Clearly, as the court notes, a tenant's interest in the leased premises is a sufficient property right to be safeguarded by nuisance law.[121] A substantial body of precedent allows a tenant relief in nuisance when adjoining landowners interfere with the tenant's possessory rights.[122] On the surface, *Stoiber's* use of nuisance comports with standard hornbook law: defendant-landlord, by breaching the duty of habitability, substantially and unreasonably interferes with the tenant's right to possession. Beneath the surface, *Stoiber* expands nuisance in two directions. First, nuisance liability traditionally has applied to the affirmative conduct of a defendant. Here, there is no affirmative act by the landlord that interferes with the tenant's property. Rather, there is only a failure to act and make repairs. In the past, courts have not utilized nuisance to impose liability upon persons who have an affirmative duty to protect the property of others. Basing nuisance solely upon a defendant's omission breaks new ground.[123]

---

118. 101 Cal. App. 3d at 919-20, 162 Cal. Rptr. at 201-02. The court indicated that affirmative defenses traditionally recognized in tort law, such as consent, contributory negligence, and assumption of the risk, could be raised by the landlord, not only for nuisance but also for the tenant's negligence action. *Id.* at 920-21, 925, 162 Cal. Rptr. at 202, 205. Justice Brown's concurring opinion makes the same point more strongly. *Id.* at 932-33, 162 Cal. Rptr. at 209-10.

119. *Id.* at 920, 162 Cal. Rptr. at 202. Nuisance typically is classified according to the defendant's intent. It is an intentional tort if the defendant knew of the harm caused by his activities. In the absence of that intent, recovery in nuisance is justified if the defendant's conduct negligently caused unreasonable and substantial injury to the property of others. In some cases in the absence of intent to cause harm or negligence, nuisance liability has been predicated upon strict liability when the defendant engaged in ultrahazardous activities. *See* 6-A AMERICAN LAW OF PROPERTY § 28.24 (1952).

120. In California, nuisance is defined by statute as: "[a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, ..." CAL. CIV. CODE § 3479 (West 1970). As related to property, the statutory definition is sufficiently broad and vague to permit the California courts the same latitude in shaping nuisance law as enjoyed by other courts that look solely to common law.

121. 101 Cal. App. 3d at 920, 162 Cal. Rptr. at 202.

122. *See* 6-A AMERICAN LAW OF PROPERTY § 28.31 (1952).

123. The court relies on Prosser for the proposition that the defendant's omission, rather than affirmative conduct, can constitute a nuisance. 101 Cal. App. 3d at 920, 162 Cal. Rptr. at

The second innovation is a corollary of the first. Nuisance, as a branch of property law, defines a duty that the whole world owes to the landowner. Anyone can breach this duty by interfering with or diminishing the plaintiff's enjoyment of his property. Labeling a breach of the duty to *provide* habitable premises as a nuisance changes the nature of nuisance as a common-law property action. In this instance, nuisance lies for the breach of a duty that is not owed by everyone, but only by the landlord. Rather than defining the plaintiff's rights against the world, as does traditional common-law nuisance, nuisance as a cause of action for breach of the duty to provide habitable premises only defines the plaintiff's rights against a limited class of persons—landlords.[124]

Stoiber's expansion of nuisance can be examined on at least two levels. The immediate question is whether a tenant nuisance action for breach of the duty of habitability is justified. Resolution of this question should turn on a comparison of nuisance remedies with those afforded in a contract action for breach of habitability. Unless nuisance offers broader remedies than the contract action, this issue, although interesting theoretically, is of no practical importance. This comparison will differ jurisdiction by jurisdiction. Generally, nuisance may permit damages for discomfort and annoyance and offer injunctive relief in situations not permitted in a contract action.[125] Also, exemplary damages may be available in nuisance when they would be precluded in a contract action.

At another level, the broad view of nuisance espoused by *Stoiber* may have ramifications beyond the context of habitability. Virtually any material breach by a landlord of his obligations under the lease can fit the definition of nuisance as a substantial and unreasonable interference with the tenant's property rights. Whether a tenant should generally have a tort action in nuisance to remedy breaches by the landlord is a fairly broad question. Actually, the core issue is

---

202 (citing W. PROSSER, LAW OF TORTS § 87, at 575-77 (4th ed. 1971)). Prosser does state that a defendant's failure to inspect and repair his premises may be actionable in nuisance; however, the cases he cites indicate that the basis for liability is the failure to conduct an activity with due care by, for example, repairing equipment. *E.g.*, Schindler v. Standard Oil Co., 207 Mo. App. 190, 232 S.W. 735 (1921) (leaking water pipe).

124. A case relied upon by *Stoiber* illustrates the contrast between affirmative conduct and mere omission. In Jones v. Kelly, 208 Cal. 251, 280 P. 942 (1929), the tenants successfully brought an action in nuisance against their landlord for cutting off the tenants' water supply. Because the landlord's acts were not authorized by the lease, the landlord had the same liability to the tenants as would any third party who interfered with the tenants' water. *Id.* at 255, 280 P. at 943. In this type of case, nuisance prohibits the landlord from doing to the tenant what no third party could do to the tenant *i.e.*, nuisance defines the tenant's property in the classic sense of an interest protected against all who might take or destroy it.

125. *See supra* note 107.

even broader. A landlord undoubtedly has an interest in real property, both in his reversion and in the rents. Should a landlord therefore have a nuisance action for a material breach by a tenant on the theory that his property rights are substantially and unreasonably injured? Indeed, should the breach of any promise that is related to real property constitute the tort of nuisance?

Intentional infliction of emotional distress, unlike nuisance, does not depend upon the tenant's ownership of a property interest. *Stoiber* defines the elements of intentional infliction of emotional distress as: "(1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of emotional distress."[126] California, like a growing number of other states, allows recovery for the intentional infliction of emotional distress without physical injury.[127] In *Stoiber*, the court held that whether the landlord acted outrageously and whether the tenant suffered severe mental distress were factual questions.[128] Arguably, a landlord's intentional failure to repair habitability defects that threaten the tenant's health or safety could be considered outrageous per se, but the court did not choose to go this far. Under this cause of action, exemplary damages as well as compensation for mental distress are recoverable. If nuisance is also available, however, that avenue is preferable for the tenant. The same damages are recoverable, according to *Stoiber*, and in nuisance there is no need to prove that the defendant's breach was "outrageous" or that the distress was "severe."[129] If nuisance is available for habitability cases, intentional infliction of emotional distress is superfluous.

The third tort action sanctioned by *Stoiber* is negligent violation of a statutory duty.[130] In California, a statute requires that a lessor of residential premises maintain the premises in fit condition and repair all dilapidations that "render it untenantable."[131] California housing codes also supply standards for habitable housing. The court in *Stoiber* held that a landlord's violation of these statutory duties gives rise to a rebuttable presumption of negligence.[132] Proof

126. 101 Cal. App. 3d at 921, 162 Cal. Rptr. at 202. This is a standard definition. *See* RESTATEMENT (SECOND) OF TORTS § 46(1) (1964).

127. State Rubbish Collections Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Golden v. Dungan, 20 Cal. App. 3d 295, 97 Cal. Rptr. 577 (1971). After *Stoiber*, the California Supreme Court extended recovery to negligently inflicted emotional harm. *See infra* note 135.

128. 101 Cal. App. 3d at 922, 162 Cal. Rptr. at 203.

129. *Id.* at 920, 162 Cal. Rptr. at 202.

130. *Id.* at 922, 162 Cal. Rptr. at 203.

131. CAL. CIV. CODE § 1941 (West 1985).

132. 101 Cal. App. 3d at 924, 162 Cal. Rptr. at 204-05.

that "the landlord did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law" would rebut this presumption.[133]

The relief available for negligent violation of a statutory habitability duty includes damages for discomfort and annoyance and for injury to the tenant's personal property. To reach this result, the court relied upon the California rule that negligent infliction of emotional distress is compensable without physical injury when the defendant tortiously interferes with property.[134] This special rule, which substitutes harm to property for physical injury as a prerequisite for mental distress damages, is no longer necessary in California. Several months after *Stoiber*, the California Supreme Court, in *Molien v. Kaiser Foundation Hospital*,[135] decided that plaintiffs can recover for pure emotional harm in negligence cases.

The relationship of this negligence action to the intentional torts of infliction of emotional distress and nuisance is far from clear. The negligence action, while presenting substantially fewer hurdles for the plaintiff than intentional infliction of emotional distress, appears to offer the same relief with the exception that exemplary damages generally are not recoverable in negligence. Thus, the intentional tort is unnecessary whenever the landlord's failure to repair is statutory and the tenant does not seek exemplary damages. As to nuisance, it is often said that this tort may be founded on the defendant's intent or upon his negligence.[136] With the court's emphasis on the negligent interference with the tenant's property rights, perhaps the action for negligent violation of statutory duty essentially is nuisance. Then the landlord need not have intended to cause a nuisance; negligence suffices. The statute gives the tenant the benefit of a presumption of negligence. Perhaps it might also make the landlord's failure to repair a species of nuisance per se.

The last damage cause of action discussed by the *Stoiber* court is constructive eviction.[137] Under this action, the tenant can recover damages for the benefit of her bargain, measured by the same formula used for contract damages for breach of the implied warranty of habitability. Moving expenses to new premises are also recoverable.[138] Under California law, a wrongfully evicted tenant can elect to sue in tort. With this election, the *Stoiber* court indicated

133. *Id.* at 924-25, 162 Cal. Rptr. at 205.

134. *Id.* at 922, 162 Cal. Rptr. at 203 (citing Crisci v. Security Ins. Co., 66 Cal. 2d 425, 433-34, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 19 (1967)).

135. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

136. *See, e.g.*, *Stoiber*, 101 Cal. App. at 920, 162 Cal. Rptr. at 202.

137. *Id.* at 925, 162 Cal. Rptr. at 205.

138. *Id.* at 925-26, 162 Cal. Rptr. at 205-06.

that the tenant could recover an award for mental anguish and pain, as well as, when justified by the landlord's conduct, exemplary damages.[139]

B. *Massachusetts:* Simon v. Solomon

In *Simon v. Solomon*,[140] the tenant's basement was flooded with water and sewage a number of times over a period of almost four years. Each time the landlord pumped out the water, but never rectified the plumbing and foundation defects that caused the flooding. Three years after the tenancy began, the landlord sued to evict the tenant for nonpayment of rent. Citing the floods and other defects, the tenant denied that rent was owed and counterclaimed for damages on four separate counts: (1) breach of implied warranty of habitability, (2) intentional infliction of emotional distress, (3) breach of implied covenant of quiet enjoyment, and (4) negligent infliction of emotional distress.[141]

The trial judge granted summary judgment for the landlord on the negligence count, ruling that emotional harm unaccompanied by physical injury was not compensable under Massachusetts law.[142] The jury returned verdicts for the tenant on the other three counts: $1000 for breach of the warranty of habitability, $10,000 for breach of the covenant of quiet enjoyment, and $35,000 for the intentional or reckless infliction of emotional distress.[143]

On appeal, the supreme judicial court affirmed the tenant's judgment for intentional infliction of emotional distress, defining the tort

---

139. *Id.* For the tenant's election to sue in tort, the court cites 42 CAL. JUR. 3d § 132, at 156-57 (1978). The leading case cited by that encyclopedia is Richardson v. Pridmore, 97 Cal. App. 2d 124, 217 P.2d 113 (1950), in which a tenant suffered a miscarriage after the landlord wrongfully evicted her from her apartment. The court permitted the tenant to waive the breach of contract and sue for the intentional infliction of emotional distress. *Id.* at 129, 217 P.2d at 117. *Richardson* does not suggest that the wrongful eviction provided an independent basis for tort liability. In *Stoiber*, however, the tenant was claiming mental distress damages under both constructive eviction and the intentional infliction of emotional distress, as independent causes of action. 101 Cal. App. 3d 903, 921-22, 162 Cal. Rptr. 194, 202-03. Unless the *Stoiber* court intended to expand a tenant's rights under constructive eviction, it erred by holding that mental distress damages were properly pleaded under constructive eviction when the tenant was simultaneously proceeding under the intentional tort theory. *Id.* at 926, Cal. Rptr. at 206.

140. 385 Mass. 91, 431 N.E.2d 556 (1982).

141. *Id.* at 93, 431 N.E.2d at 560-61.

142. *Id.*

143. *Id.* The jury found that the landlord acted outrageously and, although not intending to cause emotional distress, knew or should have known that his conduct would accomplish that result. *Id.* at 94 n.2, 431 N.E.2d at 560 n.2. Psychiatric testimony supported the tenant's claim that she had suffered from severe depression as a result of her flooded apartment and was in need of substantial psychiatric treatment. *Id.* at 94, 431 N.E.2d at 560.

by reference to the same four elements identified by the California court in *Stoiber*.[144] The landlord's principal contention on appeal focused on causation. The landlord argued that the tenant had not identified a specific defect that, if repaired, would have stopped the flooding, and that abuse of the building's plumbing system by other tenants probably caused the problem.[145] Conceding this uncertainty, the supreme judicial court still found ample evidence in the record that the landlord failed to exercise reasonable care in investigating and solving the flooding problem, and that this failure proximately caused the tenant's emotional harm.[146]

The tenant's claim for interference with quiet enjoyment was based upon a statute providing in part that "any lessor or landlord who directly or indirectly interferes with the quiet enjoyment of any residential premises by the occupant . . . [shall] be liable for actual and consequential damages or three months rent, whichever is greater, and the costs of action, including a reasonable attorney's fee . . . ."[147] The court does not mention constructive eviction. Essentially, however, this statute codifies a constructive eviction action, eliminating the common-law requirement that the tenant must abandon the premises within a reasonable time period to avoid a waiver of his rights. Under Massachusetts common law, an action for breach of the covenant of quiet enjoyment was contractual in nature, and the usual measure of damages was the loss of rental value.[148] The *Simon* court stated that the statutory term "actual and consequential damages" has a broader meaning and includes damages for all reasonably foreseeable personal injuries caused by the breach, including mental distress.[149] Because of this broad view

144. *Id.* at 95, 431 N.E.2d at 561-62. *See supra* text accompanying note 126.

145. 385 Mass. at 95-96, 431 N.E.2d at 561.

146. *Id.* at 96-97, 431 N.E.2d at 562.

147. *Id.* at 99, 431 N.E.2d at 563; MASS. GEN. LAWS ANN. ch. 186, § 14 (West 1985).

148. *See* Darmetko v. Boston Hous. Auth., 378 Mass. 758, 393 N.E.2d 395 (1979); Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 163 N.E.2d 4 (1959).

149. 385 Mass. at 112, 431 N.E.2d at 570. The court states that recovery of damages under § 14 does not depend upon any specific intent of the landlord to interfere with the tenant's quiet enjoyment. The statute as a whole is poorly drafted. The first part of § 14 imposes the same liability for actual or consequential damages or three months' rent on a landlord who "willfully or intentionally" fails to provide essential services that he is obligated to furnish. Until 1973 the clause prohibiting interference with quiet enjoyment was also limited to willfull or intentional conduct of the landlord. A 1973 rewriting of § 14 dropped the intent requirement from this clause, retaining it in the clause relating to essential services. With this textual justification, the *Simon* court concluded that the legislature wanted no intent requirement for quiet enjoyment actions under § 14. *Id.* at 101-02, 431 N.E.2d at 564. Perhaps so, but the result is that the first part of the statute dealing with essential services is now superfluous. Any tenant whose essential services are interrupted can avoid the intent requirement by claiming that the interruption also interferes with quiet enjoyment. This strategy should succeed; for a

of the damages recoverable in quiet enjoyment, in Massachusetts the use of the tort of intentional infliction of emotional distress appears unnecessary in habitability cases. In Massachusetts, quiet enjoyment provides for damages for emotional distress without the requirement that the landlord's conduct be outrageous or that the harm meet a threshold of severity.

After recognizing that a cause of action for quiet enjoyment exists for breach of the duty of habitability, the *Simon* court vacated the $10,000 judgment for interference with quiet enjoyment because it duplicated damages separately awarded for intentional infliction of emotional distress ($35,000) and for loss of rental value under breach of warranty ($1000).[150]

The court in *Simon* affirmed the summary judgment dismissing the tenant's cause of action for negligent failure to maintain the premises. The tenant requested that the court join the small number of jurisdictions that recently have permitted the victims of negligence to recover for emotional harm in the absence of physical injury. Alternatively, she argued for the imposition of strict liability upon landlords for injuries caused by breaches of the duty of habitability, including emotional injuries. The court declined to sanction either theory, citing the established Massachusetts rule that purely emotional harm is noncompensable in negligence,[151] and mentioning that the tenant apparently recovered the entirety of her emotional distress damage under the intentional tort theory.[152]

C. *Oregon:* Brewer v. Erwin

In *Brewer v. Erwin*,[153] a month-to-month tenant rented the upstairs apartment of an old, deteriorating house. The landlord decided to demolish the house and sent the tenant a 30-day eviction notice. The tenant refused to vacate, and she soon joined a neighborhood group dedicated to stopping the demolition of old homes. The landlord persisted with extralegal efforts to regain possession. A number of confrontations between the parties ensued, and the landlord made some vague threats about the consequences

---

court to deny it would create the anomaly that the landlord's liability is greater when the breach is other than a failure to provide essential services (*e.g.*, the failure to provide nonessential services is more heavily penalized if it interferes with quiet enjoyment).

150. *Id.* at 108-11, 431 N.E.2d at 568-70.

151. *Id.* at 98, 431 N.E.2d at 562. The court cited Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978), and McDonough v. Whalen, 365 Mass. 506, 313 N.E.2d 435 (1974). In a case decided after *Simon*, the supreme judicial court continued to adhere to this position. Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171 (1982).

152. 385 Mass. at 98-99, 431 N.E.2d at 563.

153. 287 Or. 435, 600 P.2d 398 (1979).

of the tenant's refusal to leave. Thereafter, the landlord disconnected the natural gas to the house and partially demolished the unoccupied downstairs apartment.[154]

Eventually, the landlord, resigning himself to the necessity of litigation, brought an action against the tenant in district court for forcible entry and detainer.[155] Prior to the conclusion of that action, the tenant commenced a separate action against the landlord in circuit court to enjoin prosecution of the forcible entry and detainer action, for damages for intentional infliction of emotional distress, for a battery stemming from one of the parties' confrontations, and for violations of the Oregon Residential Landlord Tenant Act.[156] The circuit court refused the injunction, granted her judgment on a $650 jury verdict for battery, and dismissed all other damage claims.[157]

The tenant sought to recover emotional distress damages and punitive damages both under the Oregon Residential Landlord Tenant Act and in an independent tort action. The Oregon Act is based upon the Uniform Residential Landlord Tenant Act, with some local modifications. The supreme court struggled with the Oregon Act, finding no clear direction from the statutory language,[158] which in various provisions permits the recovery of "damages," "actual damages," or "appropriate damages."[159] Comments to the Uniform Act alleviated very little of the confusion.[160] The most charitable assessment one can make of the statutory treatment of damages is to observe that the drafters left the door open for judicial innovation.

The *Brewer* court's holding on statutory damages for emotional distress is not altogether clear. Procedurally, it reversed the trial court's ruling that psychic injuries are noncompensable under the Act. Justice Linde, writing for the court, identified two variables that bear on the question: the type of habitability violation and the willfulness of the landlord's violation.[161] The Act defines certain

---

154. *Id.* at 436-37, 600 P.2d at 401.

155. A judgment awarding the landlord possession was affirmed in Marquam Inv. Corp. v. Brewer, 40 Or. App. 175, 594 P.2d 1327 (1979).

156. OR. REV. STAT. §§ 91.700-.935 (1985).

157. 287 Or. at 436, 600 P.2d at 402.

158. *Id.* at 437, 600 P.2d at 402-03.

159. *E.g.*, OR. REV. STAT. §§ 91.725, 91.745, 91.760(9), 91.800(2), 91.815, 91.840(10). The Act contains a number of specific remedial provisions tailored to certain types of breaches, as well as the following advisory provision: "The remedies provided by [the Act] shall be so administered that an aggrieved party may recover appropriate damages. The aggrieved party has a duty to mitigate damages." *Id.* § 91.725.

160. The URLTA comment to the OR. REV. STAT. § 91.725, quoted in *supra* note 159 states: "[This section] is intended to negate unduly narrow or technical interpretation of remedial provisions and to make clear that damages must be minimized . . . ." UNIF. RESIDENTIAL LANDLORD TENANT ACT § 1.105(a) comment (1972).

161. 287 Or. at 453, 600 P.2d at 409.

"essential services" that a landlord must provide, such as heat and water.[162] The statutory standard for habitability also encompasses elements other than essential services, such as structural maintenance and fire safety measures.[163] For a deliberate failure to provide essential services, the court stated that a tenant can recover for "actual psychological harm."[164] At the other end of the spectrum, damages for mental distress are not recoverable for the landlord's "nonculpable or negligent" failure to supply habitable premises.[165] What "deliberate" and "nonculpable" mean are a bit of a mystery. From the opinion, a deliberate breach appears to be something more than mere negligence on the part of the landlord, but probably something less than outrageous conduct. Arguably, any failure to repair a habitability defect is deliberate or intentional when the landlord has actual notice of the problem and fails to correct it promptly. The *Brewer* court does not explain how a deliberate habitability breach that does not involve an essential service is to be treated, nor is it clear whether there is a threshold the tenant must meet to collect for "actual psychological harm." Another part of the opinion justifies recovery when a breach causes "tangible consequences such as physical illness, medical bills, inability to sleep, to eat or work in one's dwelling, separation of family members or similar disruptions of one's personal life."[166] Conceivably, damages for annoyance and discomfort might not be allowed unless they rise to a level akin to "severe emotional distress," as that term is employed in the realm of intentional tort.[167]

The court in *Brewer* refused to permit punitive damages for a landlord's violation of the Oregon Act.[168] The statute generally authorizes "appropriate damages"[169] and does not expressly

---

162. OR. REV. STAT. § 91.815 (1985).

163. *Id.* § 91.770(1).

164. 287 Or. at 453, 600 P.2d at 409.

165. *Id.*

166. *Id.* at 449, 600 P.2d at 407.

167. *See supra* text accompanying notes 126-27. For an example of the confusion caused by the *Brewer* opinion, see L & M Inv. Co. v. Morrison, 44 Or. App. 309, 605 P.2d 1347 (1980). Prior to *Brewer*, the Oregon Court of Appeals had decided that mental distress damages were not recoverable under the Oregon Act. Ficker v. Diefenbach, 34 Or. App. 241, 578 P.2d 467 (1978). In *Morrison*, the same court stated: "Although we would normally assume that our decision in *Ficker* represents the state of the law on this question, the subsequent decision in *Brewer* . . . indicates there may be some doubt on that issue under certain circumstances, although *Ficker* was not disapproved." 44 Or. App. at 317-18, 605 P.2d at 1352. The *Morrison* court did not decide the issue because the landlord failed to raise it on appeal.

168. 287 Or. at 453, 600 P.2d at 409.

169. OR. REV. STAT. § 91.725 (1985).

preclude punitive damages. For certain specified violations, the Act permits the tenant to collect two month's rent or twice the actual damages, whichever is greater.[170] The court reasoned that the selective use of this type of provision, which in effect provides for statutory punitive damages, evinced a legislative intent that additional punitive damages of an unlimited amount should not be implied.[171]

The *Brewer* tenant also prevailed before the supreme court on her tort cause of action. Like *Stoiber* and *Simon*, the *Brewer* court recognized that a tenant may recover damages from the landlord for the intentional infliction of emotional distress, even in the absence of physical injury.[172] *Brewer*, however, departs from the other cases in its handling of the defendant's intent. Oregon ordinarily requires that the defendant's actual purpose is to inflict mental suffering on the plaintiff.[173] In *Brewer* the tenant's complaint met this standard because she alleged that the landlord deliberately sought to cause her enough stress that she would abandon the house.[174] In most habitability cases, unlike *Brewer*, the landlord will lack this type of wrongful intent. Most often, a landlord's deliberate failure to repair will be motivated by economics rather than the desire to inflict suffering.

The court recognized an exception to the wrongful purpose requirement when there is a relationship between the parties that imposes a special obligation upon the defendant.[175] When such a relationship exists, the defendant is liable if he recklessly causes emotional distress, even if there is no deliberate intent to cause that harm. The court referred to physicians, public carriers, and innkeepers as types of relationships that trigger this relaxed intent requirement.[176] Surprisingly, there is no hint at all as to whether the relationship between a residential landlord and tenant might qualify for this recklessness standard.[177]

---

170. *E.g.*, *id.* §§ 91.745(2) (inclusion of forbidden provisions in lease), 91.760(8) (wrongful withholding of security deposit), 91.815 (wrongful eviction or wilfull interruption of essential services).

171. 287 Or. at 443, 600 P.2d at 404.

172. *Id.* at 457-58, 600 P.2d at 411-12.

173. *See* Turman v. Central Billing Bureau, 279 Or. 443, 568 P.2d 1382 (1977) (harrassing debt collection techniques constituted intentional infliction of emotional distress).

174. 287 Or. at 458, 600 P.2d at 412.

175. *Id.* at 457-58, 600 P.2d at 411-12.

176. *Id.* at 457, 600 P.2d at 411.

177. The court's statement that an innkeeper is subject to the higher standard would certainly seem to raise the question whether a residential landlord should be similarly treated. A modern landlord has obligations that are more akin to those of an innkeeper under English common law than to a lessor of real property.

V. PROPOSAL FOR REFORM: SPLITTING HABITABILITY INTO TORT AND CONTRACT

A. Tort Damages

Habitability should be separated into two separate and distinct actions, one a tort action, the other contract, based upon whether the duty to repair the defect is waivable. When a housing defect significantly threatens the tenant's health and safety, the great weight of authority, with ample justification in public policy, considers the duty to repair that defect to be nonwaivable.[178] Such a duty certainly is not contractual in nature because its existence does not stem from the parties' bargain in fact. There is no reason why a breach of this duty which is not contractually created should be redressed by contract remedies when the tenant has not obtained a protectable expectation through the bargaining process.

Tenant actions based on nonwaivable housing defects should sound in tort and be remedied solely under tort principles. Under the rubric of tort, two types of damages potentially would be available: actual economic loss incurred by the tenant, and noneconomic loss. The breach of a nonwaivable habitability duty may or may not produce economic loss. Such loss will result if, when the lease was made, the parties believed that the premises were habitable or would be made so; in other words, if an underlying assumption of the bargaining process was that the landlord would obey the law. In this situation, the application of ordinary tort rules provides the tenant with the proper compensation. The value of the tenant's property, the leasehold, has been diminished by the landlord's breach. The measure of damages for such a tort is the diminution in value of the plaintiff's property interest, comparing the value of what he bargained for (habitable premises) with the value of what he received. This is true whether the tort is classified as trespass, nuisance, or negligence. This measure perfectly compensates the tenant, unlike a number of the contract measures devised by the courts that often undercompensate or overcompensate.[179]

Economic loss is not caused by a habitability breach if, when the lease was made, neither party in fact expected that repairs would be made. Such an expectation occurs in the prototypical slum lease, in which the rent is set at a low figure that reflects the dilapidated condition of the housing unit and the surrounding neighborhood. The tenant receives precisely what he bargained for, even though the transaction is tainted by illegality. Contract law remedies often suf-

178. *See supra* text accompanying notes 43-46.

179. *See supra* text accompanying notes 50-60.

fer from the impediment of awarding compensatory damages for this scenario.[180] Recovery for economic loss should not be permitted here. The tort damage measure of diminution-in-value achieves this result because the value of the property interest that the tenant bargained for and the value of the interest that he received are equal.

The primary advantage of treating the breach of a nonwaivable habitability duty as a tort lies in the use of noneconomic damages. Indeed, if the slum tenant described above has a private damage action, it should clearly be recognized as one for noneconomic damages such as emotional distress or pain and suffering. By shedding the fetters of contract law, courts would have the opportunity to address, without obfuscation, the real issue in this type of case—compensation for noneconomic injury.

The issue of whether a jurisdiction should award noneconomic damages in tort is not capable of easy resolution. The argument for such damages could extend to all residential leases, but is strongest when applied to the slum lease, because the denial of noneconomic damages will leave the tenant with no damage action at all (assuming that no award is given for phantom economic loss).

There are two reasons why such damages may be desirable. First, recognition of noneconomic damage may deter landlords from breaching their habitability duties. Some statistical studies of habitability tend to indicate that the new habitability duties are underenforced and generally have had little impact in the real world, away from academia.[181] These studies can be interpreted to provide empirical support for the need for added deterrence. It can be hypothesized that, at least in some communities, landlords consciously adopt a policy of not repairing habitability defects. That policy reflects a rational economic decision if the landlord has concluded that the cost of repairs would exceed the risk that some tenants might obtain damage judgments. Allowing recovery for noneconomic damages on a widespread scale would change this decision-making calculus.[182] The landlord is less likely to breach the

---

180. *See supra* note 59 and accompanying text.

181. *See, e.g.*, Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 62-64 (1976); Heskin, *The Warranty for Habitability Debate: A California Case Study*, 66 CALIF. L. REV. 37 (1978); Rose & Scott, *"Street Talk" Summonses in Detroit's Landlord-Tenant Court: A Small Step Forward for Urban Tenants*, 52 J. URBAN L. 967 (1975).

182. If landlords are liable for noneconomic damages, that liability should extend to all intentional breaches of habitability when the defect is nonwaivable. There should be no independent requirement that the landlord has acted "outrageously," as is commonly required for the tort of intentional infliction of emotional distress. *See supra* text accompanying notes 126-27. It should suffice that the breach is intentional and the defect, because it is nonwaivable,

duty to provide habitable premises if noneconomic damages are ordinarily available, not only because damage awards will be larger, but also because they will be less predictable, with no easily identifiable cap on liability.

Two counter-arguments can be made to the argument that added deterrence justifies noneconomic damages. First, the pat argument of tort defendants everywhere can be raised—jury awards for items such as pain and suffering are too variable, unpredictable, and catastrophically costly.[183] To the extent that one accepts this criticism of our present compensation system for personal injuries, it applies equally to the extension of noneconomic damages to habitability cases.

The second and more important objection directly challenges the need for deterrence when, as is often the case, the defect violates a housing code.[184] Tenant damage actions designed to deter code violations, it is argued, are unnecessary or even counterproductive to the extent that state law assigns discretionary enforcement of the housing codes to public officials.[185] In determining whether state law

---

threatens the health or safety of the occupants of the leased premises. If necessary, it can be said that such an intentional breach is outrageous as a matter of law.

Likewise, liability for noneconomic damages, if cognizable at all, should not be limited to "severe" emotional distress, as is often the case for the intentional infliction of emotional distress. Any harm should be recoverable. It does not make sense to deny a damage action for distress that is substantial, but fails to rise to the level of the factfinder's conception of severity. Moreover, if deterrence of landlords' noncompliance with habitability is the justification for noneconomic damage, then for deterrence to be effective damages must be imposed generally in run-of-the-mill cases, not just in exceptional cases.

The cases to date that have imposed tort liability on landlords for breach of habitability generally have required that the landlord acted outrageously, or that the harm was severe. *See supra* text accompanying notes 103-77. The nuisance approach in *Stoiber*, however, effectively eliminates these roadblocks. *See supra* text accompanying notes 107-16.

General trends in tort law also support widespread landlord liability for noneconomic injuries to tenants. During the past decades, courts have greatly expanded the recovery of damages for psychic injuries. *See* Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 217-18 (1985).

183. *See, e.g.*, Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476 (1959). Such considerations have led some state legislatures to limit noneconomic damages to a maximum dollar amount in medical malpractice cases. *See, e.g.*, CAL. CIV. CODE § 3333.2 (West Supp. 1986) ($250,000 limit). That limit was upheld against constitutional attack in Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *cert. denied*, 106 S. Ct. 214 (1985). For discussion of constitutional issues involved in statutory reform of medical malpractice liability, see Smith, *supra* note 182.

184. In a number of jurisdictions habitability is defined as a warranty that the dwelling unit complies with the housing code. In that type of jurisdiction, all habitability defects violate the housing code. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

185. The argument here parallels the justification for prosecutorial discretion in criminal law. Discretion on the part of housing officials is desirable, if under some set of cir-

should sanction noneconomic damages, a court should assess the nature and extent of the role of public officials in ameliorating substandard housing. If it is determined that the official role is sufficiently extensive so that private deterrence is unnecessary or undesirable, then noneconomic damages should not be recognized. In the past, a few courts have faced the same issue—resolving the role of tenants vis-a-vis public officials in housing code enforcement—when deciding whether tenants had any rights at all under the codes. *Javins* permitted rental abatement based on code violations, rejecting the argument that this right would unduly interfere with official functioning.[186] The Wisconsin Supreme Court reached the opposite conclusion in a later case, finding that state law envisioned discretionary code enforcement in an administrative forum by the housing commissioner, with no room for tenant enforcement in the courts.[187] The issue here is different than in *Javins*, and a line could be drawn between rental abatement and noneconomic damages. In a jurisdiction following *Javins*, the issue is, given that the housing code impliedly grants the tenant a right to rental abatement, would the further remedy of noneconomic damages improperly interfere with the official role in code enforcement? Possibly a tenant right to abate rent or terminate a lease is compatible with the official role, but the assessment of noneconomic damages would interfere with the discretionary levying of civil or criminal fines for code violations.

The second major justification for noneconomic damages is distinct from deterrence and invokes considerations of tenant worthiness and landlord fault. Tenants who suffer because of housing defects, especially when they rise to the level of slum-like conditions, may deserve compensation. Concomitantly, there is outrage at landlords who callously and repeatedly refuse to make needed, legally required repairs.[188] This argument has a moral tone to it and at bottom is essentially redistributional. One can accept the proposition that low-income tenants, as a class, deserve better housing. The question then becomes who pays for it, for the tenants cannot. The problem is inseparable from that of poverty generally; the poor cannot afford to pay the minimum rent required for the production of standard housing. The next argument sometimes made in support of redistribution is that slum landlords, because of their history of op-

---

cumstances, rigorous code enforcement would not benefit the community. Arguably, failure to enforce the code is justified in a neighborhood where enforcement would result not in compliance, but in widespread abandonment by landlords of their properties.

186. Javins, 428 F.2d at 1080-82.

187. Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

188. *See, e.g.*, Sax, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967).

pression and disregard for the human rights of tenants, should bear all or the lion's share of the economic burden of eliminating substandard housing.[189] Arrival at this point, however, does not support the recognition of noneconomic damages on a widespread basis. If such redistribution is desirable, it should not be done by the courts through awards for noneconomic damages or any other type of damages. Due to the ad hoc nature of litigation, only some landlords would pay and only some low-income tenants would receive benefits. Moreover, even if a flood of tenant litigation resulted in widespread transfers, the cost of handling this judicially would be far too inefficient. If it is determined that tenants have a right to standard housing, regardless of their income level, the necessary redistribution should be funded through taxation, whether the tax is levied upon some defined group of "slumlords," or residential landlords as a whole, or some larger segment of society. On the delivery side, a number of options would be available, such as public housing programs, cash payments to tenants, or subsidized rents through governmental payments to landlords.[190]

B. Contract Damages

The first cases defining the term "habitability" emphasized the nonwaivable, health and safety related, housing defects described above. In many jurisdictions at the present time, such a definition fully defines the contours of habitability.[191] However, a more expansive view of habitability has gained some recognition. The scope of habitability varies among jurisdictions, and some states define habitability broadly enough to include elements of the parties' bargain in fact.[192] For example, consider a lease of an air conditioned house, with no lease covenant addressing repairs to the air conditioning. In a jurisdiction that defines habitability by reference to community standards, in addition to or in lieu of a housing code, habitability may require that the landlord repair air conditioning if it ceases to function during the term of the lease. This defect is waivable, as the landlord and tenant could have expressly agreed that the landlord would not be responsible for air conditioning repairs. All that habitability does in this context is to add an implied covenant to the lease, assigning the repair duty to the landlord, when the

189. *Id.* at 874-75.

190. *See* F. DE LEEUW, S. LEAMAN & H. BLANK, DESIGN OF A HOUSING ALLOWANCE (1970).

191. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

192. *See, e.g.*, Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

parties were silent. This use of habitability reverses the common-law rules of caveat emptor and waste, which allocated the responsibility to the tenant. The rationale for using habitability in this fashion is based on classic contract principles. Provisions that the parties would have expressly stated, had they thought about the matter when the lease was made, are impliedly included in the contract. The implication is based upon contemporary standards and practices in the community. Landlords, rather than tenants, usually repair air conditioners when the need arises.

Habitability claims based upon waivable defects, such as the one described above, differ substantially from nonwaivable habitability claims. They originate in the parties' implied bargain in fact. In contrast, the nonwaivable habitability duties are imposed by law as a matter of public policy to safeguard the health and safety of tenants and others who may enter the premises. Given the different legal underpinnings of these two species of habitability claims, it is not surprising that each should have its own remedial strategy. The public and private interests to be protected are dissimilar, and the attempt to treat both using contract principles is too confining. A bifurcation of habitability into the realms of tort and contract offers the promise of developing a coherent remedial framework for each class of cases.

A habitability action for damages based upon the landlord's failure to repair the air conditioning in a timely fashion is contractual. The proper measure of damages gives the tenant the benefit of his bargain by awarding the fair rental value of the premises (with air conditioning), less their value hot and steamy, for the duration of the breach. This is the appropriate measure of damages because it treats a covenant implied under the habitability doctrine in the same manner as an express covenant covering the same topic. The same measure of damages would apply had the landlord expressly promised to repair the air conditioning, and then defaulted.[193]

C. Election of Tort or Contract

The division of habitability into tort and contract has implications for the election of remedies. The basic issue is whether a tenant generally should have the option of treating a breach of the duty of habitability either as a contract breach or as a tort. Presently, the evolving case law indicates that there will be a substantial overlap;

---

193. *See, e.g.*, Noble v. Tweedy, 90 Cal. App. 2d 738, 203 P.2d 778 (1949); Zion Indus., Inc. v. Loy, 46 Ill. App. 3d 902, 361 N.E.2d 605 (1977); *see also* Bradley v. Godwin, 152 Ga. App. 782, 264 S.E.2d 262 (1979) (using as the measure of damages the difference between the agreed rent and the rental value of the premises in an unrepaired state).

breach of contract will always lie, and a tort action exists if the elements for that particular tort are also met.[194] Of course, a tenant having multiple causes of action in tort and contract based on the same defect is limited to one satisfaction for his injury.[195]

The overlap between tort and contract, with the potential for election, is largely eliminated by dividing habitability into tort and contract. If this division is made, the existence of a nonwaivable defect generally will constitute a tort, but not a breach of contract. With that division, a problem will arise when an express covenant covers a nonwaivable defect. Should an election between contract and tort be allowed when the landlord has breached the duty to repair a nonwaivable defect that he has also expressly covenanted to repair? For example, in the lease the landlord might covenant to maintain the plumbing in good, functioning condition. Failure to do so would breach that covenant and violate a nonwaivable habitability duty as well, by materially affecting the tenant's health and safety. Arguably, in this situation the tenant should have the choice between suing on the express covenant, which presumably was bargained for, and suing in tort. On the other hand, under the remedial proposals made in this article, the choice really serves no useful purpose and could be eliminated, if for no other reason than for the sake of conceptual neatness. The tenant who received the plumbing covenant obviously deserves compensatory damages, but even if he is limited to tort damages, the tenant will collect compensatory damages for injury to his property interest, based upon its diminution in value. In this connection, perhaps the express covenant can serve as some evidence that the tenant has incurred actual economic injury. Moreover, from a theoretical point of view, it is questionable whether the tenant in fact did bargain for the plumbing covenant, because no other agreement on that topic was legally permissible. The express covenant can be viewed not as a right that was independently bargained for, but as a reminder that the lease is subject to governing law. Why should a tenant who has obtained a covenant that merely states existing, nonwaivable law be in a better position with respect to remedial choices than a tenant who decides not to obtain a written covenant that would be superfluous?

A second problem with allowing the tenant to elect between tort and contract remedies is the converse of the situation described above. Can the landlord's breach of an express covenant relating to a waivable defect also be tortious? For example, with respect to the air conditioning covenant described above, when, if ever, should the

194. *See supra* text accompanying notes 103-77.
195. *See supra* text accompanying notes 110, 150.

landlord's deliberate refusal to repair be a tort as well as a breach of contract? Should it be a tortious wrong if, when a heat wave hits, an elderly tenant is threatened by heat stroke, and the landlord still neglects to repair, even after notice of these facts? Again, present case law in a few jurisdictions suggests that such a tenant can elect to sue in tort. However, it is not clear that such an election is necessary for the adequate protection of tenants. Whatever legitimately could be recovered in a tort action might just as readily be compensable in a contract action as consequential damages and punitive damages.

D. Other Remedies

While the principal remedial consequence of bifurcating habitability into tort and contract is in the analysis of damages, there are ramifications for some of the other tenant remedies. Other tenant remedies that have been recognized include termination of the lease, specific performance, and repair-and-deduct. For each remedy, the pertinent question is to what extent the shift from a contract to a tort conception changes the nature and availability of the remedy. How these remedies are presently handled, and should be handled, under contract law is discussed above.[196] This section analyzes the treatment of these tenant remedies from the perspective of tort law.

Termination of the lease for the landlord's breach of the duty of habitability is presently conceived of as a contract right that is available provided that the breach is material. There is no reason why the tenant right to terminate should change if the breach of a nonwaivable habitability duty is recast as a tort. Conceptually, termination is then justified not because of a material default, but because of the landlord's material injury to the tenant's property. The law of bailments provides support for this result. In jurisdictions that view bailment as a property doctrine, rather than a contractual relationship, injury to the bailed property justifies the bailee's termination of the bailment.[197]

Under contract law specific performance of the landlord's habitability duties may be limited by the requirement that damages

---

196. *See supra* text accompanying notes 61-96.

197. The analogy applies when the bailment is to continue for a definite period of time and the injury to the bailed property is not due to the bailee's lack of due care. The bailee may want to return the bailed goods to avoid payment of the agreed rental. This type of bailment is often referred to as a lease of personal property. *See* Fuchs v. Coe, 62 Wyo. 134, 171-72, 163 P.2d 783, 797 (1945). *See generally* J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS §§ 417, 417a (8th ed. 1870); 9 S. WILLISTON, *supra* note 1, § 1034, at 887. Williston defines bailment in terms of property rather than contract as "the rightful possession of goods by one who is not the owner." *Id.* § 1030, at 875.

would provide inadequate relief.[198] Under tort law the question would become, should the court enjoin an activity (the landlord's refusal to repair) that constitutes a continuing tort? Traditional principles of equity would permit great flexibility here. The court could borrow the contract-law limitation on specific performance, or alternatively grant injunctive relief on a more liberal basis. Analogies can be made to the practice of enjoining nuisances and continuing trespasses to property.[199]

Repair-and-deduct is *sui generis* as a tenant remedy.[200] It is not a traditional contract-law remedy, and some courts have denied it to tenants on that basis. Nor is repair-and-deduct part and parcel of hornbook tort law, but tort principles provide some limited support for this remedy. Ample authority exists than an owner of property is privileged to take measures that prevent the commission of a tort with respect to his property.[201] If breach of habitability is a tort, then the tenant who repairs is exercising this privilege—the repair abates the continuing tort. Under repair-and-deduct, however, the tenant then takes the next step of charging the tortfeasor with the costs of abatement by an offset to rent. While nothing in tort law at the present time authorizes the rent deduction, if the need for tenant action to repair is seen as a reasonably foreseeable consequence of the tortious conduct, then it could be encompassed as an element of economic damage. If the tenant's repair costs would be recoverable in a tort action brought against the landlord, and alternatively would be allowed as a counterclaim if the landlord brought an action for unpaid rent, then plainly the tenant should be permitted to deduct the costs from the rent. Modern landlord-tenant law has cast aside the ancient dogma that the respective duties of the landlord and tenant are independent.[202] If the landlord sues for rent or for possession and the tenant establishes that the tort counterclaim is meritorious, then the tenant should not be deemed to have breached the lease.

VI. CONCLUSION

After more than a decade of judicial and legislative innovation, the duty of a residential landlord to provide habitable premises is firmly entrenched as a part of American law. Presently, the relevant

198. *See supra* text accompanying notes 72-82.

199. *See* 6-A AMERICAN LAW OF PROPERTY §§ 28.17 (trespass), 28.35 (nuisance) (1952).

200. *See supra* text accompanying notes 92-93.

201. *See* W. PROSSER & W. KEETON, LAW OF TORTS §§ 21, 89 (5th ed. 1984). The privileges include the right to prevent or terminate a trespass to land and the right to abate a continuing nuisance by self-help.

202. *See supra* text accompanying notes 97-100.

debate focuses on the contours of the duty and the choice of remedies available to the aggrieved tenant. Yet in the process of reforming the law, a wrong step was taken. To escape the shackles of the ancient pro-landlord dogma of caveat emptor, the courts turned to contract law as the fountainhead for the habitability duty. Contract, however, has nothing to do with habitability when, as a matter of public policy, all leased dwelling units must comply with minimum standards relating to safety and the provision of essential services. Tort law should be recognized as the basis for this type of habitability duty.

Recognition that a landlord's breach of a nonwaivable obligation to provide habitable premises is a tort leads to better analysis of remedies. Freed from the need to resort to a fictitious bargain, where none in fact exists, courts can award or deny damages for economic loss by measuring the diminution in value of the tenant's leasehold. When a tenant claims noneconomic damages in the nature of emotional distress or pain and suffering, judicial recognition of such an action should depend upon the need within the jurisdiction to deter landlords' intentional evasion of their habitability duties. When that need is great and is not being alleviated by other mechanisms such as vigorous housing code enforcement by public officials, it is proper for courts to expand landlord liability to encompass noneconomic damage. Although there can be no guarantee that the added potential liability will cause all or even most landlords to comply, it makes compliance more likely by forcing landlords to recalculate the cost of violating habitability standards.

Grounding the concept of habitability in tort law does not wholly remove contract from the picture because a number of jurisdictions recognize, as an element of habitability, a landlord's duty to maintain the premises in accordance with community standards. That duty, when it may legally be modified by an express agreement between landlord and tenant, is based upon an implied bargain in fact. This type of habitability should remain the province of contract law and should be recognized as separate and distinct from the tort action described above.