Civil Remedies Available to Residential Tenants in Ontario: The Case for Assertive Action

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CIVIL REMEDIES AVAILABLE TO RESIDENTIAL TENANTS IN ONTARIO:
THE CASE FOR ASSERTIVE ACTION

BY DIANNE L. MARTIN*

A. INTRODUCTION

A potential housing crisis and a rapid increase in the numbers of urban citizens living in rental accommodations have combined to bring the law of residential tenancies into the twentieth century, as reflected by the addition of Part IV to The Landlord and Tenant Act of Ontario in 1970.1 The need for further reform was recognized2 and significant amendments were made to the Act in 1972 and 1975. The apparent result of this legislative action is that a residential tenant in Ontario is now ensured a safe, clean,3 private4 residence, secure from landlord harassment5 or arbitrary eviction.6

However, tenants do not appear to be rushing to the courts to pursue their newly granted rights,7 and there continue to be tenants in Ontario who do not enjoy safe, secure tenancies, and who continue to suffer from harassment, unlawful eviction, and sub-standard accommodation.8

This article will not attempt to explore the underlying socio-economic

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* © Copyright, 1976, Dianne L. Martin.
Ms. Martin is a member of the 1976 graduating class of Osgoode Hall Law School. Research for this article was done as a Parkdale Community Legal Services research programme under the supervision of Ron Ellis, Director.
3 S. 96 imposes a responsibility on a landlord to provide and maintain premises in a good state of repair.
4 S. 93 provides for a right to privacy.
5 S. 107(3) gives a judge power to refuse to grant a landlord a writ of possession when the tenant is being evicted for exercising his legal rights, and s. 107(4) contains a prohibition against withholding vital services from a tenant.
6 S. 107 stipulates that a landlord may only recover possession of premises under the authority of a court-issued writ of possession.
8 The files of a community law office offering legal services to low income tenants, such as Parkdale Community Legal Services in Toronto, reveal many instances of all these abuses.
reasons for this situation, but in focusing on the issue of security (rather than quality) of accommodation, will analyze the use of common law remedies by tenants faced with landlords who resort to self-help techniques to effect their goals. Landlords, for a variety of reasons, may wish to regain possession of their premises by the fastest and most expeditious means available. They may be ignorant or contemptuous of their rights and responsibilities under the Act. They may use threatening letters and phone calls, withhold supplies of heat and electricity, change locks, remove doors, and enter the premises at will, to force intransigent tenants out. There are cases that involve the entire battery of unlawful eviction techniques; any one of them is in contravention of the Act and an intolerable invasion of tenants' rights to dignity and security in their homes. However, it is poor comfort to dispossessed tenants to know that their landlord has acted contrary to law, when they have no practical means by which to stop the behaviour, or recover any compensation for their injury. Legislative reform that provides rights without remedies is incomplete, and it will be argued that those rights provided by statute must at times be enforced by common law actions.

The discussion will be divided into an analysis of causes of action, and a survey of possible remedies. The question of what constitutes an actionable interference with tenants' rights is fundamental, but complicated both by the hybrid nature of a tenancy agreement (as a contract and a conveyance of an interest in land), and by the on-going debate over the availability of common law causes of action when the legislature has entered the field. However, even with an avenue into the court, unless tenants can expect to receive substantial relief, their rights are illusory. Therefore, the issue of when the equitable remedy of injunction can be invoked for breaches of the Act will be explored, and the question of damages, exemplary and restitutionary, will be examined.

B. CAUSES OF ACTION

1. General

The nature of the modern residential tenancy agreement under a remedial Landlord and Tenant Act poses problems when one attempts to take an assertive stand on behalf of aggrieved tenants by seeking damages and/or injunctive relief. At common law the tenancy agreement afforded very few rights for tenants to assert; under the present legislation the problem is one of interpreting the Act to permit a collateral civil action for breach of provisions which purport to guarantee rights, but which provide few opportunities to tenants to assert those rights.

The relation of landlord and tenant was historically in contract; but from earliest times an essential feature of the relationship was the vesting of a limited estate in land, a leasehold, on the tenant by the landlord. However, the relationship has never lost its contractual characteristics, and landlord and tenant law reforms have strengthened them greatly. A basic 'source' of a cause of action to an injured tenant then, is for breach of contract.9

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9 The most serious drawback to the breach of contract approach, i.e., that no exemplary damages may be awarded, will be discussed further in the section on damages.
A civil wrong other than a breach of contract, which the courts will re-
dress by damages, is a tort, and tort law is equally important to the injured
tenant, both outside the landlord and tenant relationship per se, as in assault,
and within it, as in trespass or intimidation. The significance of tort law is
further increased because an actionable breach of statute is readily classified
as a tort, and, as will be discussed, the measure of damages may differ depend-
ing on whether the action sounds in tort or in contract.

Despite the overwhelming importance of The Landlord and Tenant Act,
an examination of the common law causes of action should precede a dis-
cussion of the law relating to statutory torts and breaches of the Act. It is
settled law that unless expressly excluded, a common law right of action con-
tinues, even if it has been affirmed by a statute providing a special remedy. Thus, it will be argued that tenants may sue for a breach of a covenant of the
tenancy agreement, and for any nominate torts committed against them,
whether or not the wrong also includes a breach of the Act.

2. Causes of Action at Common Law

(a) Breach of Covenant

In a tenancy agreement the landlord agrees to grant the tenant exclusive,
undisturbed possession of the premises for an ascertainable period of time
(less than that of the grantor's interest) for the consideration of rent. Ex-
pressed or implied in this agreement is the 'covenant' by the landlord for quiet
enjoyment; that is, for exclusive, undisturbed, possession of the premises
by the tenant. Breach of the covenant will ground an action for damages, and
may, as a failure of consideration, permit forfeiture of the lease and avoid
the tenant's obligation to pay rent. A breach of the covenant for quiet enjoy-

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12 Many of the early quiet enjoyment cases were also actions for wrongful evic-
tions, in that the 'material interference with possession' was in fact a denial of
possession. The distinction was important, as, prior to the 1970 reforms, breach of
covenant amounting to an eviction was the only breach by landlords that relieved
tenants of their obligation to pay rent. Now see s. 89, s. 106, and s. 107(3)(a) of the
Act.

The leading case on what constitutes an eviction is Uptown v. Towend (1855),
17 C.B. 30, where the court expressed a view similar to the one governing quiet
enjoyment cases at 64-65:

Getting rid thus of the old notion of eviction, I think it may now be taken to
mean this — not a mere trespass and nothing more, but something of a grave
and permanent character done by the landlord with the intention of depriving
the tenant of the enjoyment of the demised premises. (emphasis added)

The reference to the concept of 'intention' is curious as such a concept is foreign
to breach of contract rules. This anomoly will be discussed, infra, in the sections on
tort and on the availability of exemplary damages in landlord and tenant cases.
ment is a material, substantial interference with the tenant's use and enjoyment of the demised premises, and innumerable cases have been decided on exactly what constitutes 'substantial, material, interference'. The cases indicate, however, that the essence of the breach is some 'material' disturbance, 'by any means', of the tenant's possession, and thus may quite properly encompass disturbance by threats or harrassment.\textsuperscript{13} In fact, threats from the landlord may well be more disturbing to a tenant's enjoyment of a tenancy than more 'physical' discomforts, and thus represent activity that should be controlled.

A cause of action arising out of 'indirect' interference with the use and enjoyment of premises, despite its contemporary relevance, is not new. Pollock, B. ruled in \textit{Edge v. Boileau}\textsuperscript{14} that a demand, accompanied by threats of legal action, to subtenants to pay their rent directly to the defendant grantor of the head lease, was a breach of the plaintiff tenant's covenant for quiet enjoyment. The principle was approved and extended by the English Court of Appeal in \textit{Kenny v. Preen}.\textsuperscript{15} The defendant landlord, anxious to get rid of a tenant secure under \textit{Rent Act} provisions, maintained a steady stream of letters, phone calls, and confrontations designed to terrorize the elderly, widowed plaintiff. The Court held that the landlord's actions amounted to a breach of the covenant for quiet enjoyment. The facts, and the analysis of the legal principles, are particularly relevant to this discussion:

First, there was a deliberate and persistent attempt, by the landlord, to drive the tenant out of her possession of the premises by persecution and intimidation, and intimidation included threats of physical eviction of the tenant and removal of her belongings. In my view, that course of conduct by the landlord seriously interfered with the tenant's proper freedom of action in exercising her right of possession, and tended to deprive her of the full benefit of it, and was an invasion of her rights as a tenant to remain in possession undisturbed, and so would itself constitute a breach of covenant, even if there were no direct physical interference with the tenant's possession and enjoyment.\textsuperscript{16}

The case re-establishes the relevance of this covenant to the modern urban tenant. Less helpfully, it also takes the position that an action by a tenant against conduct of this type of a landlord, is an action for breach of a covenant only, and damages are thus governed by contract principles.\textsuperscript{17}

\textsuperscript{13} In \textit{Miller v. Emcer Products Ltd.}, [1956] 1 Ch. 304, the English Court of Appeal held that a failure to provide promised access to common toilet facilities would amount to a breach of the covenant for quiet enjoyment. In \textit{Frederic v. Perpetual Investments Ltd. et al.} (1969), 2 D.L.R. (3d) 50, the Ontario Supreme Court held that escaping carbon monoxide gas entering the plaintiff tenant's apartment in dangerous quantities from the landlord's garage was a breach of covenant for quiet enjoyment, (as well as the duty to contain noxious substances).

\textsuperscript{14} (1885), 16 Q.B.D. 117.

\textsuperscript{16} [1963] 1 Q.B. 499.

\textsuperscript{15} Id. at 513. See also: \textit{Hormidge v. Magur}, [1947] 1 D.L.R. 415.

\textsuperscript{17} Id. at 513, see discussion, \textit{infra}, on exemplary damages.
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The covenant for quiet enjoyment is fundamental to every lease; however, the parties may also 'bargain' to include specific covenants for almost anything in their tenancy agreements. Commercial tenancies routinely carry a wide range of restrictive and prescriptive covenants. In a residential tenancy, a common covenant is one for the supply of heat and services. Under Part IV of The Landlord and Tenant Act, s. 107(4), it is now an offence under s. 108 for landlords to withhold services that they have covenanted to supply under the tenancy agreement. Withholding services is thus both an actionable breach of a covenant at common law, as well as a breach of statute. A breach of this type was most commonly raised by a tenant as a defence to an action by the landlord for payment of rent. Because of the common law rule that only eviction justified the tenant’s avoiding the obligation to pay rent, the withholding of services was claimed as a “partial eviction” to justify non-payment.  

There is no reason, however, why a tenant should not actively enforce performance of this obligation, which is basic to the use and enjoyment of the demised premises.

In a case reviewed by the English Court of Appeal, Perera v. Vandiyar, the plaintiff tenant sued for damages for a breach of the tenancy agreement when the landlord, to force him out, cut off the gas and electricity for a period of six days. The tenant was granted an interlocutory judgment by the County Court, ordering the restoration of services, and was awarded special, general, and punitive damages. The Court of Appeal, in reasoning similar to that in Kenny v. Preen, allowed an appeal against the award of punitive damages on the ground that the acts complained of constituted a breach of contract, not a tort. However, the court did not disturb an award of £25 in general damages for the inconvenience suffered by the tenant because of the absence of services and the forced move to alternate accommodation.

The cases on breach of covenants and eviction fall into two categories. The early cases, and the contemporary cases involving commercial tenancies, are decided on the basis of contract principles; contract rules as to the heads and measure of damages apply fairly strictly. However, there are an increasing number of cases dealing with residential tenancies, in which the 'wrongfulness' of the parties' conduct has become a relevant factor. Traditionally, concepts of culpability have had no place in contract theory. The law pertaining

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18 In Sherwood v. Lewis (1939), 54 B.C.R. 72, a British Columbia County Court decision, the landlord's action in cutting off services in an effort to collect rent arrears was held to be a breach of covenant, and damages of $10.00 were awarded and set-off against the unpaid rent. This defence is available to tenants as well by s. 106(6) of The Landlord and Tenant Act; although it should be noted that the tenant is required to pay the disputed sum into court before being allowed to raise a breach of covenant as a defence.

19 [1953] 1 W.L.R. 672.

20 Supra, note 15.

21 See discussion, infra, of remedies.
to breach of covenant developed in a *laissez-faire* climate and evolved to arbitrate differences over 'private law', where consensual agreements were reached by two parties having equality of bargaining power. This fiction is becoming more transparent and unworkable, as the housing crisis and socio-economic conditions have combined to throw people together in situations and conditions which they would not have voluntarily chosen, and which hardly existed 20 years ago.

Although an action for breach of covenant *per se* is clearly available to tenants who are threatened or injured by a disruption of services, the action will rarely be worthwhile in itself because of the difficulty in proving actual damages. Breach of covenant will continue to be of interest primarily in defences to actions brought against tenants, but not as causes of action on their own. However, the notion of 'wrongful intent' introduces more flexible tort concepts on which the tenant should capitalize.

(b) Tort

Landlords taking self-help measures to rid themselves of unwelcome tenants rarely restrict themselves to a single wrongful act, but frequently embark upon a course of conduct that includes breaches of covenant, torts, and breaches of statute. Anglo-Canadian courts have been reluctant, however, to recognize "slumlordism" as a tort, or an actionable wrong *per se*, and have restricted awards under the guise of a failure in the pleadings, and the supremacy of contract principles over tenancy agreements. This judicial restraint in breaking away from the traditions of a landlord/land owner's paramount rights in regard to his own property, emphasizes the need to look to tort principles in seeking meaningful redress for aggrieved tenants; for tort law should have the flexibility to adapt to evolving civil wrongs.

The tort of assault will not be discussed here, for the landlord and tenant relationship does not affect the basic principles in any way and its importance within the context of this paper is primarily that an assault would make an already wrongful course of conduct even more repugnant, and thus more likely to be dealt with sympathetically.

The ancient tort of trespass is perhaps the most significant nominate tort for tenants' purposes. Any direct, physical, intentional interference with property (or person or goods) is actionable in trespass, no matter how slight. Damages in trespass need not be pleaded or proved; the damages stem from
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there are countless trespass cases involving infringements both slight and serious; however, most actions have been brought by plaintiff land owners, whose right to protect and enjoy their property undisturbed need hardly be discussed. The more difficult problem is to establish a cause of action in tenants whose leasehold premises have been interfered with, not by strangers, but by the owner of the remainder interest — the landlord.

A tenancy agreement grants an interest in land, and despite the rapid return of contract principles, this concept has not yet been overruled. Tenants at common law have always had the right to sue for a trespass to their leaseholds perpetrated by strangers. They were required to prove the duration of their interest and were awarded damages on a sort of pro rata basis. Their property interest in the premises was exclusive for the period of the lease. However, trespasses by the landlord/land owner have been more commonly treated and pleaded as a breach of the covenant for quiet enjoyment, or as an eviction, in tribute to the land owner's superior interests. An action against the landlord for trespass, however, has the advantage of clearly delineating the issues; that is, that a tenant in (lawful) possession has the same right as an owner to enjoy that possession undisturbed by anyone; and that any person, including the landlord/land owner, who infringes upon that possession is a trespasser. The issue of 'lawful possession' will be treated more fully in the discussion of the Act, but it should be noted here that until the recent reforms which protected, by statute, tenants' right to privacy and possession undisturbed except by due process of law, a tenant in arrears of rent, for example, had few rights against the landlord, except the right to freedom from assault or a breach of the peace.

The case of Lavender v. Betts is one of the few actions for damages for 'trespass' taken by a tenant against a landlord, and it relies in part on the operation of statutes. The defendant landlord, after only partial success in collecting rent arrears, and when 'unofficial' (that is not in compliance with statutory requirements) notice continued to be ignored, entered the premises and removed all the doors and windows, rendering the flat "habitable only at considerable danger to the health of the occupants . . .". The court recognized that at common law a landlord had no obligation to keep an unwanted tenant regardless of whether or not rent was due, but per s. 15(1) of the Increase of Rent and Mortgage Restrictions Act of 1920 a landlord required an order from the County Court to retake possession against a tenant's will:

Therefore the landlord has no conceivable right to interfere with their possession

27 Merest v. Harvey (1814), 5 Taunt. 442.
30 Tyman v. Knowles, 13 C.B. 222, 22 L.J.C.P. 143.
31 Supra, note 17.
33 Id. at 72.
34 Compare with s. 106.
or to trespass upon the premises occupied by them, unless he obtains an order giving him possession of the premises.26

The court noted the existence of the covenant for quiet enjoyment, but significantly, proceeded on the basis of trespass, found an unlawful interference, and awarded exemplary damages on the basis of the ‘wrongful’ tortious conduct.

The case was referred to and distinguished in *Perera v. Vandiyar*,28 on technical grounds rather than by functional analysis. The court declined to look beyond the contractual nature of the tenancy agreement, and in drawing the lines in the tort versus contract debate in landlord-tenant disputes, Evershed, M.R. stated that: “insofar as eviction is achieved, it seems to me prima facie to be a breach of contract. Nor am I satisfied that there was any trespass here in relation to the gas and electricity”.27 Romer, L.J. expanded the point:

It did not constitute an interference with any part of the demised premises, and therefore could not be regarded as a trespass. It was merely a breach of contract, the object of which was to persuade or induce the tenant to go. That is not a tort. Although the intention of the defendant here was precisely the same as the intention proved in that case, the defendant in *Lavender v. Betts* resorted to trespass for the purpose of getting his own way.28

Romer, L.J. firmly rejected the idea that mere intention could transform a breach of contract into a tort, or that the concept of trespass implied a disturbance of the use and enjoyment of property, as much as a physical contact.29

26 Supra, note 33 at 73.
28 Supra, note 19.
27 Id. at 675.
28 Id. at 676. There is a familiar ring to this argument, as it has been made to support the opposite conclusion in modern labour disputes. In that context, a breach of contract by union members has been found to be tortious if intended to induce the plaintiff or a third party to abandon lawful rights. See *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.) and *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265.
29 Id. at 676-77. The Court in *Kenny v. Preen*, supra, note 15 at 513, was of a similar opinion, although it restricted its award on the very narrow point of a “flaw” in the pleadings.

The English court of appeal made some attempt to classify wrongful eviction in *Commissioners of Crown Lands v. Page*, [1960] 2 Q.B. 274. The fact situation is barely analogous to our problem, for it involves an action by a Crown agency for rent against an expropriated tenant. However, the tenant raised eviction as a defence, and although the court ruled that entry by the Crown is never eviction, the analysis of what does constitute an eviction is helpful.

Lord Evershed M.R. expanded on the principle put forward in *Upton v. Townend*, supra at 282:

But apart from any requisite of wrongfulness, the landlord’s act must (1) be of a ‘permanent character’ and (2) be done with a particular “intention”, namely, that of disabling the tenant from continuing to ‘hold’ the subject of his demise or of depriving him of the ‘enjoyment’ of the thing demised, or some part thereof.

Ormerod, L.J. agreed that ‘wrongfulness’ was a necessary element, and spoke to the hybrid nature of a landlord’s intrusion at 288-89:

There are various reasons why a landlord may enter on the demised premises, or otherwise interfere with the demised premises, which may not be regarded as wrongful . . . . If however his entry was not by leave, or pursuant to his powers under that lease, then it appears that his action would be wrongful and amount to a trespass, or an eviction, or (which may well amount to the same thing) a breach of the lessor’s covenant for quiet enjoyment.
The point was raised again in the English Court of Appeal in *Mafo v. Adams*, in an action brought by a tenant for the loss of a protected tenancy. Plaintiff's counsel argued trespass and wrongful eviction as a tort, and sought relief for a wrong functionally different from a breach of contract. Defendant's counsel denied that eviction could be a tort *per se*, and argued that, in any case, physical expulsion and/or trespass was a necessary ingredient to establish a cause of action, or the interference with any legally protected interest. The court neatly avoided deciding the point by finding a cause of action in 'deceit'. However, Sachs, L.J. did refer to the merits of viewing the wrong as a whole:

Speaking for myself, I was much attracted by the simple view that upon principle and in common sense when one person agrees to give exclusive possession of his premises for a period to another, that ought to carry with it an implied agreement that he, the landlord, and those claiming through him, will not dispossess the tenant during that time.

It is not an oversight that the discussion of landlord and tenant torts has centred around English cases, for there are very few Canadian cases and virtually no Ontario cases based on tort *per se*. It must be concluded that for tenants to bring an action for trespass against their landlord, or to sue in tort for wrongful eviction, would be a novel action in Ontario and would need to be firmly grounded in *The Landlord and Tenant Act* to succeed. The residential tenant is the inheritor of an hierarchial concept of property interests which grew out of feudalism, flourished under *laissez-faire* economics, and is only now being questioned as unjust and unrealistic. Canadian courts can be expected to move cautiously in re-assessing the nature of the landlord-tenant relationship and the rights of tenants in relation to land owners.

C. STATUTORY RIGHTS AND COMMON LAW REMEDIES

It has already been noted that the majority of cases involving actions by residential tenants against their landlords are English. Part of the reason lies in the fact that statutory reform of landlord-tenant law occurred earlier in England than it did in Ontario or the rest of Canada, and the English courts have had more opportunity to interpret the effect of the new rights.

The most important result of the statutory reform has been the 'elevation' of a residential tenant's interest in the demised premises to one which will sustain an action for trespass even against the landlord/land owner. This operation of statute must be distinguished from an action based solely on a breach of a statutory duty. The action for breach of statute *per se* is in pursuit of a right that did not exist at common law, while it can be argued (and the cases implicitly support this position), that in an action for trespass or wrongful eviction, the tenant (although enabled by statutory provisions), is pursuing an extant common law right. It must be remembered, however, that landlord

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41 *Supra*, note 39.
43 *Supra*, note 40 at 557.
and tenant law reform includes penalties for contravention. The common law position regarding penal statutes is far from clear, and poses unique problems, which will be addressed separately.

The relationship between statutory rights and common law remedies is well illustrated by two New Zealand cases which rely on common law principles, but which would never have been heard had war time housing legislation not affected the landlord-tenant relationship. In *Johnston v. Fischer*, the New Zealand Supreme Court sustained an award of damages to a tenant for a 'wrongful entry' (which is, in essence, a trespass) by a landlord seeking to remove a tenant who had ignored notices to quit. The Court's discussion of the effect of the legislation on landlord's rights is useful:

The defendant asserts that his action in entering was justified by reason of his ownership and the determination of the plaintiff's tenancy. Apart from the effect of the war legislation referred to this would be the case, but the plaintiff asserts that by reason of that legislation the defendant's action was unlawful. In that I think the plaintiff is right . . . . Independently of the legislation in question there would, of course, be no doubt that an expiry of the notice determining the tenancy the tenant's continued possession without the assent of the landlord would have been wrongful, and that the landlord would have been at liberty to enter upon and resume actual possession of the premises in virtue of his right as an owner.

Hosking, J. examined the relevant provisions of the war legislation (which were similar to ss. 106 and 107 of the Ontario Act, except that no penalty was provided for breach) and continued:

It follows therefore, in this case that when the defendant entered — the rent not being in arrears nor the other conditions of the tenancy broken — he entered wrongfully and so became liable to an action. On his entry he disturbed to a substantial extent the lawful possession which the plaintiff held under his statutory right.

He applied the same principles, and again found for the tenant, a year later in *Tankard v. Twomey*, on almost identical facts, except that this time the tenant was in arrears of rent when the landlord climbed in through a window and locked all the furniture into one room.

In *Majo v. Adams*, the case turned on the deceitful efforts of the defendant landlord to trick the plaintiff into abandoning his protected tenancy. Neither the deceit, nor the loss of something of tangible value, *i.e.*, a tenancy agreement regulated by the *Rent Acts*, could have occurred without the operation of statute. Similarly, in *Lavender v. Betts* and *Kenny v. Preen*, had it not been for the statutory protection of the tenants' security of tenure, landlords faced with obdurate tenants would have invoked the sympathy, but not the censure, of the courts.

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44 S. 108.
46 Id. at 530.
47 Id. at 532.
49 Supra, note 40.
50 Supra, note 32.
51 Supra, note 15.
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There has been little Canadian discussion on this (or any other) aspect of the landlord and tenant statutes, partly, as has been noted, because reform occurred so recently here, and partly because a housing crisis exacerbating relations between landlords and their tenants has become serious only recently, while in England the crisis has become a litigious fact of life. Whatever case law exists, however, seems to follow the English position, and indicates that trespass by a landlord is an actionable tort under certain circumstances.

In the early part of the century, the Ontario Divisional Court awarded damages of $75.00 for 'wrongful entry' against a landlord who retook possession for a breach of a covenant not to serve alcohol on the premises. Section 13 of The Landlord and Tenant Act, 1897 is almost identical to s. 19(2) of the present Act, which provides relief against forfeiture of commercial leases for breaches of covenant (except the payment of rent) until the tenant has been given notice of the breach and has had time to make compensation and/or to remedy the breach. The defendant landlord had not bothered to comply with this provision, and had moved to expel his intemperate tenant as expeditiously as possible. The court recognized a limitation on the landlord's traditional rights, and found accordingly. The courts were reluctant, however, to extend the principle too far, and continued to regard the landlord's interests as supreme, and to view with disfavour, tenants' attempts to benefit from their own "wrongdoing". The protections afforded to tenants under the early legislation were minimal, and the courts interpreted them narrowly. However, modern legislation is more explicit in protecting tenants' security, and in making courts available for settlement of disputes; there is some indication that the courts may be willing to give a liberal interpretation to these provisions.

The Supreme Court of British Columbia recently took a more functional approach to landlord-tenant relations in Parkes et al. v. Howard Johnson Restaurants Ltd. et al. The plaintiff, a tenant on a commercial lease, brought an action against his landlords for a breach of the covenant for quiet enjoyment. The parties were in dispute over a number of matters concerning the terms and conditions of the lease, and the landlords brought an action for possession which was dismissed, without prejudice, because no valid notice to quit had been given. The landlords then resorted to self-help, as some landlords are wont to do, and decided to "take the law into their own hands". They embarked on a course of conduct which included both direct and indirect interference: they interrupted the elevator service, intermittently turned off the heat and electricity, removed the doors to the main premises, smashed the lock on the tenant's storage area with a sledge hammer, and finally posted a guard at the front door.

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52 Walters v. Wylie (1912), O.W.N. 567.
53 Quaere whether s. 19(2) is applicable to residential tenancies, but see the additional protections in s. 103f(2), (3).
54 Supra, note 52 at 568.
57 Id. at 261, and 263.
The landlords' actions were in breach of covenants to supply heat, electricity, and elevator services. Such breaches amounted to trespass, and were, if not in contravention of statutory requirements, in contempt of them. The tenant was not entirely blameless in the dispute, but the court was not prepared to sanction any paramount right in landlords to their premises when a statute provided a means to settle any disputes. The court approached the incident in its totality and awarded exemplary damages without once referring to any distinction between tort and contract, whether real or artificial, and without finding the need to interpret the relevant sections of the British Columbia Landlord and Tenant Act to permit or deny a cause of action. The case represents a realistic and relevant approach to disputes of this nature and hopefully, signals a new era in landlord and tenant law. However, the decision is not binding on an Ontario court, and, it can be distinguished on its facts. One decision is not a 'trend'.

The above cases are illustrative of actions taken in pursuit of common law rights and remedies which are strengthened by statute. However, with the exception of the English statutes which specifically provide that civil remedies survive, the statutes on which these cases rely neither penalize the prohibited conduct, nor specify the remedy. Security of tenure provisions in Ontario, however, are subject to a penalty for breach, and provide tenants with specific, if limited, access to the courts. It remains to be determined whether a breach of these provisions would also found an action for damages or an injunction.

D. BREACH OF A PENAL STATUTE

Landlords must respect the privacy and security of their tenants' homes, and may neither harass nor inconvenience tenants' possession; the Act penalizes such behaviour. However, if the possibility of incurring a fine does not deter a landlord bent on dispossessing tenants, and if these actions by the landlord have caused the tenant to suffer damages and inconvenience, is there any recourse left?

The general rule is that breach of a penal statute or a statute specifying a particular remedy does not found a collateral civil action. The rule stems from the mid-nineteenth century reforms which curtailed the old method of

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58 S.B.C. 1974, c. 45.
59 Rent Act 1965, XIII & XIV Eliz. 2, c. 75, ss. 30(4)(5).
60 S. 106, s. 108.
61 Tenants may initiate an action before the Court under:
   (1) S. 106(1)(a) for termination of the lease;
   (2) S. 106(1)(e) for return of a security deposit;
   (3) S. 106(1)(f) for an abatement in rent; and
   (4) S. 106(1)(g) for relief against forfeiture.
62 Breach of s. 93, the right to privacy; s. 95, the prohibition against changing locks; s. 107(4), the prohibition against withholding services; s. 107(1), the prohibition against re-entry without a writ of possession, all make the landlord liable to a fine up to $2,000.00 per s. 108.
63 The leading case on breach of penal statutes is still Doe de Bishop of Rochester v. Bridges (1831), 1 B&Ad 847.
enforcing statutory duties by means of criminal indictments brought by individuals who then had a claim to the penalty or fine. The laying of indictments and the collection of money penalties came to be vested solely in the Crown. However, exceptions were made almost immediately, as the courts sought to preserve to individuals, benefits guaranteed by statute. All of the leading cases on breach of penal statutes, and many commentators and text writers, set out their own lists of cases which express their view of the exceptions; for in the absence of clear legislative expression on the point, it is necessary for the court to determine the scope and purpose of the particular Act, and decide whether or not it was the "intention" of the legislature to allow a civil action.\(^6\)

The first rule is to determine whether or not the statute was passed for the protection of a particular class of persons, or for the benefit of the public at large. If aimed at the protection of a particular class, a cause of action accrues to a member of that class injured by a breach.\(^6\) The courts have been willing to find that a particular penal statute was enacted for the benefit of a particular class of persons in personal injury cases, although in these actions the issue of statutory 'negligence' versus strict liability becomes a factor.\(^6\) However, the courts have been far less willing to find that penal legislation involving property and civil rights, as in the rights of tenants against landlords, was enacted for the benefit of a particular class. The House of Lords examined the question of statutory breach exhaustively in Cutler v. Wandsworth Stadium Ltd.\(^7\) The plaintiff bookmaker sought damages for loss of business from the owner of a dog track for breaches of penal provisions of the Betting and Lot-

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\(^6\) The first exceptions were made on behalf of injured workers, who came within the scope of penal protective legislation, but who had no source of compensation for their injuries other than an action against their employers. Lord Kinnear in Black v. Fife Coal Co. Ltd., [1912] A.C. 149 expressed the rule in an action by a coal miner injured by a breach of the *Coal Mine Act* at 165:

> We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended . . . . But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention . . . . Therefore I think it is quite impossible to hold that the penalty clause detracts in any way from the *prima facie* right of the persons for whose benefit the statutory enactment has been passed to enforce the civil liability.


ties Act, 1934 which prohibited the exclusion of private bookmakers. The Law Lords emphasized the exclusiveness of the penalties as a mode of enforcement to find that the Act was designed for the public good and not the protection of a particular class. The need to examine the legislation as a whole was reiterated, and three basic tests were set out as guides to determine whether or not the legislation had a "public" object:

1) Legislation benefitting the public as a whole will evidence varied and complex objects;

2) Benefit to a particular class will be incidental to the overall scheme of the legislation;

3) The penalties provided in the legislation will be an effective sanction, and will provide adequate protection for individual interests.

The first two tests can be met easily with regard to landlord-tenant legislation which is most reasonably construed as legislation enacted for the benefit of persons in the particular relationship of landlord and tenant. With regard to the third test, one must argue that the possibility of a fine which may not exceed $2,000.00 is inadequate to deter landlords from breaching the Act to effect their purpose, and that, in any case, the penalty does nothing to remedy the harm suffered by the injured tenant.

Part IV of the Act has received little judicial interpretation to date, with the exception of s. 96, which imposes an obligation on landlords to maintain premises in good repair. The Supreme Court of Canada, in Re Herbold et al.
Tenants' Remedies v. Pajelle Investments Ltd.,72 recently affirmed a decision of the Ontario Court of Appeal on a s. 96 application. The Court of Appeal spoke to the intent and purpose of Part IV:

The recent amendments in The Landlord and Tenant Act have brought about substantial changes in the relations between landlords and tenants . . . The legislation reflects the efforts on the part of legislators to govern and control the standard of social behaviour of inhabitants of large modern multiple housing units not only towards their lessors but also towards each other with a view to promoting peace and tranquility from a social as well as environmental point of view.73

The Court of Appeal has gone further, and has affirmed a cause of action in tort for personal injury resulting from a breach of the landlord's duties of repair and fitness imposed by s. 96 of the Act. Cunningham et al. v. Moore74 is a seminal decision that may well pave the way for actions for economic or 'psychic' injury based on breach of other provisions of the Act. The court applied the 'tests' concerning statutory breach to s. 96 and had no difficulty in finding a cause of action:

(1) By introducing the present s. 96 into the Landlord and Tenant Act, the intention of the legislation was to create a cause of action in favour of a particular class, to wit, tenants . . . .
(2) If this is so, the remedies provided are totally inadequate and do not represent adequate compensation should damages be suffered . . . . (Part IV) indicates an intention, in my opinion, to drastically alter the pre-existing law and to establish a ground for civil liability.75

There is some evidence that this 'expansion' is already occurring. In a recent British Columbia decision, Re MacIssac and Beretanos et al.,76 a Provincial Court judge awarded damages for the breach of the 'privacy' section of the B.C. Landlord and Tenant Act,77 which is virtually identical to s. 93 of the Ontario Act, except that no penalty is provided for breach of the British Columbia provision, an 'oversight' corrected in Ontario in the 1975 amendments. The decision is based on an exhaustive judgment, which although delivered in an inferior court of another jurisdiction may well have persuasive value. The Court examined the conduct functionally:

The evidence is quite clear and is not contradicted in any way, that the landlord repeatedly entered into the rented premises and such repeated entry amounted to a harassment culminating in the tenant being evicted without lawful justification.78

The approach taken by the British Columbia Court is significant, for although the Provincial Court judge considered the rules concerning breach of statute,

72 S.C.C., Nov., 1975, report #152, (as yet unreported).
73 (1975), 4 O.R. (2d) 133 at 138.
75 Id. 28 D.L.R. (3d) at 289; see also, Summers v. Salford Corporation, [1943] A.C., damages awarded for personal injury suffered from a breach of the Housing Act 1936.
77 Supra, note 58, s. 46.
78 Supra, note 76 at 611.
and breach of covenant, he based his judgment on the broad policy concerns expressed in remedial landlord-tenant legislation:

The right to privacy in its widest sense, including all possessions, including all rights and privileges, and hence embracing all personality, affords alone that broad basis upon which the individual demands can be rested. . . . In legislating s. 46, the provincial Legislature must have considered the common law right to privacy, and the need to incorporate that right in a statute, thereby creating a statutory tort.

He interpreted the legislation as providing an aggrieved tenant with access to the courts; it is submitted that this is the most rational interpretation for all of the rights and protections contained in the reformed legislation. Rights without remedies are the height of cynicism, and without access to judicial relief, tenants, as well as landlords will be thrown upon their own resources.

E. REMEDIES

1. General

Much, if not all, of the foregoing has been addressed to the question of the availability of civil remedies to residential tenants from the point of view of possible causes of action; that is, access to a judicial determination of the conflicting interests. The cause of action cannot, however, be extracted from the question of remedies for there is a tautology inherent in the distinction; if there are remedies available, a cause of action exists.

Civil remedies fall into two categories; the common law remedy of damages as compensation for a civil wrong and/or confirmation of a civil right, and equitable remedies (for the purposes of this paper, injunctions) for the restraining or remedying of a breach of a legal right, either alone or in conjunction with an action for damages.

The question of damages is complicated by the confusion surrounding the nature of the landlord and tenant relationship and whether wrongs sound in contract, or in tort, or both. As the issue has already been thoroughly examined, it will not be discussed again; rather the measure of damages for breach of contract will be handled separately from the analysis of the rules governing awards of exemplary damages for certain torts, except when the cases turn on the distinction.

2. Compensatory Damages

The fundamental rule of damages, in both contract and tort, is restitutio in integrum, that is, a money award is ordered that serves to restore a party, whose rights have been violated, to the position that would have been enjoyed.

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70 Supra, note 76 at 613.
80 Supra, note 76 at 614.
81 Even if access to the courts and traditional remedies should become more available urban tenants will grow increasingly aware of the benefits to be gained from collective action in pursuit of better and more secure living conditions. See: Landlord and Tenant Relations — Rent Withholding in Ontario (1970), 48 Can. B. Rev. 323.
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if the wrong had not occurred. The principle is compensatory, not punitive, and questions of motive, intention, wounded feelings, are not in issue. The rule is basic to all awards of damages, but it is the 'only' rule applicable to cases involving breaches of contract or breach of covenant, (except for breach of promise to marry). No considerations of aggravated injury or exemplary damages may be made, as is possible in tort.

The leading case on the measure of damages for wrongful eviction and breach of the covenant for quiet enjoyment is Haack v. Martin, a Supreme Court of Canada decision from the Saskatchewan Court of Appeal. The case involved breach of a commercial tenancy agreement, and there was no dispute over the application of contract principles to the measure of damages. The point in issue was the determination of losses flowing naturally from the breach, and the court held without hesitation that the losses included more than the value of the unexpired terms. The courts have had little difficulty in perceiving the nature of the interests involved in disputes over commercial leases, and have compensated for the costs of moving and establishing a new location, as well as for the loss of prospective profits. Contract principles are, in the main, well suited to settling disputes over the terms of commercial tenancies and awarding suitable compensation for breach. Both lessor and lessee are motivated by similar commercial concerns, and the loss of profits, or of a valued location, is readily understood by courts well versed in disputes of this type. The loss of a home is less well understood, as is the statutorily-protected right to remain in that home against the owner's will, and the courts have proved to be both conservative and bound by technicalities when faced with the assertion of novel rights of tenants.

The tenant farmer in Greenwood v. Rae was able to establish his right to remain on the farm, but the court did not view infringement of this right as a matter suitable for compensation. The court makes it clear that the statutory protection has not altered the landlord's traditional rights:

It would therefore be manifestly unfair, that he recover damages based upon his having been deprived of the use of the premises and of the benefit of the ploughing that had been done in the fall before his eviction — in other words, the damages to which he would have been 'entitled if there had been no breach of the condition and no right in the landlord to evict him.'

This unwillingness to break new ground, or to go too fast in recognizing new rights and interests may well have been uppermost in the court's mind in

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85 Id. at 21.
89 Supra, note 55.
90 Id. at 371.
Kenny v. Preen, when the rights of the plaintiff tenant were sustained, but the remedy was reduced from £100 to a nominal 40 shillings. The award was reduced because the claim was in contract, not in tort. The inconvenience and loss of comfort caused by weeks of harassment either could not be quantified, or, did not 'flow' from the landlord's breach. The British Columbia Provincial Court in Re Maclissac, however, was not so constrained, perhaps because the tenant was in fact forced to find new premises, or, because the court had a more sympathetic assessment of the nature of the harm.

It is unlikely that courts will award more than nominal damages to tenants disturbed in their possession, if the cause of action sounds in contract alone, for the psychic harm resulting from the activities of a landlord bent on eviction cannot easily be measured by contract principles. The total nature of the residential tenancy must be perceived as a relationship liable to tortious wrongdoing and suitable for compensation by means of the more flexible doctrines of tort law.

3. Exemplary Damages

Tortious wrongs are distinguished from breaches of contract by more than the niceties of pleadings. There is an element of morality and social policy in tort awards that is kept to a minimum in contract cases; as is exemplified by tort law's ultimate weapon — exemplary damages.

Exemplary damages are an anomaly, a relic from the time when tort and crime were less clearly distinguished and a judge had the power "to punish and deter contumelious and outrageous wrongdoing" as part of the judicial arsenal against any wrong, civil or criminal.

The concept flourished in the nineteenth century and was used to deter duelling and other flagrant breaches of social mores. Merest v. Harvey is a classic example of this role of the courts, and remains the most frequently cited case on exemplary damages. This case involved an action in trespass against a drunken nobleman who persisted in attempting to join a shooting party, uninvited and most unwelcome because of his abusive behaviour. The Court upheld an award of £500, and proclaimed deterrence as the first principle governing exemplary damages:

I wish to know, in a case where a man disregards every principle which dictates the conduct of gentlemen, what is to restrain him except large damages.

Solatium is the second principle, although the one most commonly relied on. The award of exemplary damages proceeds on subjective principles; the

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01 Supra, note 15.
02 Id. at 513. See also: Perera v. Vandiyar, supra, note 19; Majo v. Adams, supra, note 40.
03 Supra, note 76.
04 Id. at 613-14.
05 Huckle v. Money (1763), 2 Wils. 205.
06 Supra, note 26.
07 Id. at 443.
motives and conduct of the defendant, the plaintiff's reaction, and the court's opinion of the entire matter. This is clearly in contrast to the objective aims of the doctrine *restitutio in integrum* supposedly fundamental to the law of damages, although perhaps not so far removed from awards for 'pain and suffering', 'mental suffering', or 'loss of enjoyment of life' routinely made in personal injury cases. In fact, the subject has been seen by many writers to be completely confused, with many awards of so-called 'exemplary' damages being made, not to honestly punish or deter the defendant, but to provide a larger sum to the plaintiff as a balm to hurt feelings and injured dignity.98

The House of Lords, in *Rookes v. Barnard*,99 re-examined the whole subject, and tried to separate those awards increased because of aggravated injury caused the plaintiff by the defendant's high-handed methods or contumelious motives, from those 'purely' exemplary, in the sense of retributive and deterrent. Lord Devlin, in an exhaustive judgment, approved the principle of aggravated damages while seeking to restrict severely the cases in which a civil court could undertake to punish behaviour of which it did not approve, the imposition of such sanctions being a prerogative of the criminal courts. Lord Devlin's concern was that the civil courts have no place usurping the prerogative of the Crown to punish improper behaviour via the criminal courts, and that a civil action, with its lesser burden of proof and fewer procedural safeguards, should be restricted in meting out punishments.

His efforts to rationalize and regularize the award of exemplary damages were not entirely successful. The commonwealth courts in general refused to follow *Rookes v. Barnard*, and even the English Court of Appeal, in an incredible burst of independence in *Cassel & Co. Ltd. v. Broome*,100 attempted to disregard the rule. The courts of Australia refused absolutely to be bound by the decision, and in *Australia Consolidated Press v. Uren*,101 the Privy Council recognized Australia's authority to follow its common law development of the principles.

The Canadian common law prior to *Rookes v. Barnard* clearly provided for the award of exemplary damages and the principles of deterrence and solatium were clearly recognized.102 The only discussion of *Rookes v. Barnard*,

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99 Supra, note 38.


102 Fleming v. Spracklin (1920), 48 O.L.R. 533; (1921), 50 O.L.R. 289; Pollard v. Gibson (1924), 55 O.L.R. 424. More recently, in *Carr-Harris v. Schacter* (1957), 6 D.L.R. (2d) 225, an Ontario High Court action for trespass to land, the court awarded $5,000.00 exemplary damages above the compensatory award because of the high-handed wilful nature of the trespass, approving the ratio in *Merest v. Harvey*.

The House of Lords statement of the law at first was not even referred to by the Canadian courts. In *Pretu v. Donald Tidey Co. Ltd.* (1966), 53 D.L.R. (2d) 504, a classic action for trespass to land, the Ontario High Court awarded $600.00 exemplary damages above the $1,142.00 special damages against a real estate developer who had 'walked roughshod' over the plaintiff's privacy and property.
in the Supreme Court of Canada is by Mr. Justice Spence in *McElroy v. Cowper-Smith and Woodman*,\(^\text{103}\) and is *obiter dicta*. He would not have disturbed the award of exemplary damages in this action for libel and defamation, (the majority did so because of mitigating circumstances, but did not disagree with his statement of the law) and clearly affirmed the availability of exemplary damages in Canadian courts:

Moreover, I am of the opinion that in Canada the jurisdiction to award punitive damages in tort actions is not so limited as Lord Devlin outlined in *Rookes v. Barnard*,\(^\text{104}\)

Most Canadian courts have preserved to themselves the discretion to award exemplary damages in 'suitable' cases, and have avoided reconciling the distinction between 'aggravated' and 'punitive' damages.\(^\text{105}\)

The courts have clearly been particularly willing to protect property rights and deter trespassers through awards of exemplary damages. The concept has been transferred to the protection of a tenant's property interest with some success, *Lavender v. Betts*,\(^\text{106}\) would appear to be one of the first instances of such an award to a tenant against a landlord. The Court's expression of the principles augurs well for future cases:

> Therefore a landlord has no conceivable right to interfere with their possession or to trespass upon the premises occupied by them, unless he obtains an order giving him possession of the premises . . . . That is his method of riding rough shod over the Acts of Parliament . . . . This is a case for aggravated damages, and, in my judgment, I think a jury might give very high damages, but, for all that, one has to be reasonable as one can, and I assess the damages for this trespass at £45, bearing in mind that the defendant has been before the magistrates in this matter.\(^\text{107}\)

However, these principles were not followed in subsequent cases, and *Lavender v. Betts* was distinguished on its facts in both *Kenny v. Preen*\(^\text{108}\) and

\(^{103}\) (1967), 62 D.L.R. (2d) 65; see also Fridman, *Punitive Damages*, supra, note 98.

\(^{104}\) Id. at 71.

\(^{105}\) In *Fraser v. Wilson et al.* (1969), 6 D.L.R. (3d) 531, the Manitoba Court of Queen's Bench awarded an additional $500.00 exemplary damages in an action brought by a tenant for trespass and assault by a bailiff seeking to distrain for rent.


\(^{106}\) *Supra*, note 32.

\(^{107}\) Id. at 73-74.

\(^{108}\) *Supra*, note 15.
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Perera v. Vandiyar, cases in which the Court of Appeal reversed awards of exemplary damages. The award of exemplary damages was not disturbed in Mafo v. Adams, but the case has limited application because of the holding that the cause of action arose in deceit, and not in trespass.

The cases can only be reconciled on technical grounds, for in all of them, plaintiff tenants were disturbed in the use and enjoyment of their homes by the unlawful actions of their landlords, who chose to ignore the procedures set by Acts of Parliament. The most promising approach to this welter of rules and jungle of principles is the one taken by the British Columbia Supreme Court in Parkes v. Howard Johnson Ltd. The Court dealt with the breaches of covenant and statute, the trespass and assaults, as a ‘single’ course of conduct designed to evict a tenant without lawful authority, and responded accordingly. The language used is reminiscent of the position taken in Lavender v. Betts, and is both helpful and persuasive:

It is well established that the court may take into account matters of aggravation and award exemplary damages where the conduct of the defendant has been malicious or high handed. It has been said that to award a nominal amount in this regard would be but an invitation to the persons responsible to continue to violate property rights . . . . After reviewing the authorities, I am of the opinion that the actions of the landlords in this case are such that exemplary or punitive damages should be awarded. Conduct of this type on the part of landlords cannot be condoned, and such actions should be deterred by a substantial award of damages.

Exemplary damages of $4,000.00, over and above the special damages, were awarded.

Exemplary damages are a purely discretionary matter, within the prerogative of the court. They do not need to be specially pleaded, although it would undoubtedly be prudent to bring the possibility to the court’s attention, but there is no ‘rule’ which could force an award. The award is totally subjective, and the court could easily refuse to make an award on the grounds that the plaintiff’s own conduct precipitated the defendant’s excesses. There are also at least three grounds in law that could be used to justify the refusal of an award. Since the Supreme Court of Canada has not ruled definitely on the matter, it is open to an Ontario court to be persuaded by the reasoning in Rookes v. Barnard, although Lord Devlin’s categories clearly do not exclude the landlord who dares a penalty under s. 108, or an order to compensate. Even more telling is the argument that the incidents (barring assault or ‘outrageous’ trespass) amount to a breach of the covenant of quiet enjoyment

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109 Supra, note 19.
110 Supra, note 40.
111 Supra, note 56.
112 Id. at 264-65.
and damages must therefore be assessed according to contract principles.114 Finally, a very strong argument can be based on the provisions for penal sanctions within the Act. As has been noted so often, one of the primary objects of an award of exemplary damages is punitive — deterrence and retribution. The legislature has moved into the field, and, it may be argued, removed the need for the civil courts to punish for breach of the Act. The availability of a penal sanction was not referred to directly in Rookes v. Barnard as a bar to exemplary damages; however, criticism of civil courts usurping the punitive function of criminal courts was a major tenet of Lord Devlin's analysis. The point has only been approached obliquely, however, and it should be remembered that a court wishing to express its disapproval through exemplary damages, is rarely deterred by any consideration.115

The only apparent rule that emerges from the exemplary damage cases, whether a statutory breach is involved or not, is that the court, in certain, subjectively determined circumstances, may always award damages above and beyond those actually proved. The court may merely choose to consider the particular plaintiff's position, and award increased damages to soothe an aggravated injury, or, the court may go further, and make an award designed to have a punitive effect on the particular defendant, taking the defendant's means and motive into account. The matter is highly discretionary, and rests on what a particular court views as 'outrageous contumelious' behaviour.

114 A reply to this argument may be found in the Ontario Court of Appeal decision in Denison v. Fawcett (1958), 12 D.L.R. (2d) 537, an action for breach of contract, conspiracy to defraud and deceit, where Schroeder, J.A. stated at 542-43:

Exemplary or aggravated damages are not, broadly speaking, awarded in actions for breach of contract, because damages for breach of contract are in the nature of compensation, and the motives and conduct of the defendant are not considered relevant to the assignment of damages . . . . It would seem therefore, that where the wrong done is such that aggravated damages could be awarded in tort, the mere fact that the wrongful act is also breach of contract and that the action is akin to an action for breach of contract will not itself preclude an award of exemplary or punitive damages.

The case has not yet been followed on this point, but the argument remains available.

115 The defendant in Lavender v. Betts, supra, note 32 was prosecuted by the District Counsel for a breach of the Public Health Act for the removal of the plaintiff's doors and windows and was subject to a fine: Betts v. Penze U.D.C., [1942] 2 A11 E.R. 61. This did not bar Atkinson, J. from awarding damages on an increased scale, although he referred to the award as “aggravated” rather than exemplary damages.

In Sharkey v. Robertson (1969), 50 D.L.R. (2d) 176, the Court refused to award exemplary damages for a vicious assault, because the Criminal Code provided adequate deterrence. Conversely, in S. v. Mundy, [1970] 1 O.R. 764, the Ontario Supreme Court did award exemplary damages in a case of indecent assault. They avoided the problem of the deterrent factor of criminal charges by holding that the award was for 'aggravated' injury, and further that the distinction between aggravated and exemplary damages was artificial and unnecessary. In Mafo v. Adams, supra, note 40, the issue was again avoided, for the court awarded exemplary damages for 'deceit,' and chose to find a breach of the penal provisions of the Rent Acts.
4. **Injunction**

(a) **General**

The remedy of injunction is even more discretionary in nature than the award of exemplary damages, although the rules seem to be more specific. Injunctions are still considered to be equitable remedies, while damages are a legal remedy, and the maxims of equity still govern; e.g., “he who seeks equity must do equity”. In order for a tenant to be granted injunctive relief against a landlord the basic principles governing injunctions must be satisfied, and then the effect of *The Landlord and Tenant Act* must be determined; for, as in an action for damages, statutory interpretation must confirm common law rules or the action may be defeated.

The general principles apply to all types of injunctions and are governed by general equitable principles. Of major importance is the ‘balance of convenience’ rule; that is, is there a sufficiently high probability of unlawful conduct to justify the court’s intervention in the circumstances. The court must balance ‘the magnitude of the evil’ and the chance of its occurrence or continuance against hardship to the defendant. On the principle that no person should be harmed unheard, or without benefit of a full trial of the issues, a high burden of proof rests on a plaintiff, particularly when seeking interlocutory and/or *ex parte* relief to establish the degree of risk and inadequacy of other remedies.

Mandatory injunctions require the consideration of certain additional factors. This type of relief is apt to be of great importance in a landlord-tenant dispute involving, for example, withdrawal of services; the order is designed either to force the defendant to ‘undo’ the wrongful act done to the tenant, or, to ‘perform’ some positive obligation. Equitable courts traditionally were unwilling to enforce any positive act and must still be satisfied that the situation complained of would have warranted a prohibitory injunction if sought earlier, may not be sufficiently dealt with by other legal remedies, and may be performed reasonably and without undue hardship to the defendant. It should not be difficult to bring the restoration of heat and electricity within those principles.

The plaintiff tenant must show that a legal right exists to be protected and/or determined. At one time it was necessary to establish a proprietary interest in need of protection, however, this concept has evolved to provide protection of any legal right. The plaintiff must establish a *prima facie* case, and satisfy the court that there is a fair question to be determined concerning the existence of the right alleged. The plaintiff is then, *prima facie*, entitled to an order, unless some reason exists why no order should be made. One such reason is that the plaintiff’s remedy at law, damages, is deemed to be adequate; or in the case of the interlocutory injunction, that a risk of irreparable damage has not been established. The two are essentially the same. The plaintiff must show that an award of damages would be inadequate to restore him to the position enjoyed before the defendant’s wrongful act. Clearly damages are an inadequate remedy in regard to a future, or continuing injury, such as occurs when a landlord threatens a course of conduct to harrass, intimidate
and evict a tenant. Illegal conduct threatened, such as cutting off services, should be prevented; illegal conduct embarked upon should be redressed by damages, or if damages are inadequate, by injunction.

An additional argument to be made in applications for interlocutory relief, (the most likely in the circumstances contemplated in this article), is that an injunction is necessary to preserve the status quo until the issue is determined. Thus, if services have been cut off, or, eviction threatened, an injunction is necessary and suitable to allow the plaintiff tenant to remain in peaceful possession until the landlord's right to re-enter as against the tenant's right to remain has been determined.

(b) Statutory Breach

The rules of statutory interpretation which determine a cause of action for a breach of statute apply as well in determining the availability of injunctive remedies to remedy a breach of statute, with the important difference that equitable principles may provide relief where legal rules do not. The statute must be categorized as penal, or not; in the case of The Landlord and Tenant Act, of course, the sections may be either. The rights conferred or confirmed by the statute must also be categorized as having existed at common law or having been created by the legislature. As when seeking a legal remedy, the willingness of the courts to act ranges from entirely willing, in the case of a common law right confirmed by a statutory provision which provides no new remedy, to rather reluctant, in the case of a new right established by a statute which contains its own mode of enforcement by penal sanction. It is the latter situation which is of most importance here.

If an injunction is otherwise available on equitable principles, which of course include a consideration of the adequacy of legal remedies, it will not generally be refused because of statutory penalties, unless the particular legislation specifically excludes injunctive relief. The general rule has been established that a right to equitable protection is rarely excluded by the existence of statutory provisions per se, because such relief is always merely prospective and ancillary to the statutory provision. However, a line of cases in exception to this general principle has developed around the distinction between 'public' and 'private' rights. The distinction is analogous to the determination of 'the particular class to be benefitted' necessary to founding a cause of action in law for statutory breach. The rule has developed to permit (or require) an Attorney General, only, to seek injunctions when the statute is enacted in the public interest, thus effectively barring applications by injured

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individuals who are considered to have failed to establish a ‘legal right’ in need of protection.\textsuperscript{117}

A similar rule may exist in regard to mandatory injunctions, on the principle that no general equity exists which may compel the performance of statutory obligations.\textsuperscript{118} However, the point is undecided, and the most obvious positive obligation in The Landlord and Tenant Act, the s. 96 duty to repair, is not relevant here. An order to ‘undo’ a wrong should be governed by the general principles.

It is unlikely that a defendant landlord would succeed in arguing that a tenant was statute-barred from injunctive relief. The Landlord and Tenant Act is very different from a municipal zoning by-law, or from Lord’s Day legislation in that a clearly private relationship is being regulated, with only remote and incidental benefit to the public peace. It would be absurd to join the Attorney General in an application to order the resumption of a tenant’s hydro, or to restrain a bullying landlord. Moreover, the common law rights of tenants to quiet enjoyment, privacy, and compliance with covenants, which have been expanded and strengthened by statute, have always been liable to equitable protection and as such come within the general rule.\textsuperscript{119}

The case law similarly establishes the availability of equitable relief for breaches of landlord and tenant legislation,\textsuperscript{120} although there are no Canadian cases concerning the penal provisions of legislation pertaining to residential tenancies. The principles have been fairly well established, but it must always

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\textsuperscript{117} Institute of Patent Agents v. Lockwood, [1894] A.C. 347. A variation of this principle was applied by the Supreme Court of Canada in Orpen v. Roberts, [1925] S.C.R. 364, an appeal from the Supreme Court of Ontario on an application by an individual for a \textit{quia timet} injunction to restrain the construction of an apartment building in breach of municipal zoning regulations. The Supreme Court held that a right to equitable relief was not available to a private person in this instance, but only to the municipal government, (or the Attorney-General). The principle was affirmed recently by the Saskatchewan Court of Queen’s Bench in Moose Jaw Merchandisers Ltd. v. Westport Enterprises Ltd. (1972), 23 D.L.R. (3d) 21.

\textsuperscript{118} Jones v. Llanrwest Urban Council, [1911] 1 Ch. 393, Glossop v. Heston & Isleworth Local Board (1879), 12 Ch. D. 102.

\textsuperscript{119} In Cockburn v. Quinn (1890), 20 O.R. 519, an injunction was granted to restrain the lessee from running auctions on the leased premises in breach of a covenant that the store would be used only for the purpose of selling men’s clothing.

In Allport v. The Securities Corporation (1895), 64 L.J. Ch. 491, North, J. granted the tenant a mandatory injunction ordering the landlord to restore a staircase removed in breach of the tenant’s covenant for quiet enjoyment and use of common areas.

In Mahas v. Canadian Imperial Bank of Commerce, [1963] 2 O.R. 447, Fraser, J. granted a commercial tenant an interlocutory injunction restraining the defendant from construction activities on an adjoining property also owned by him. He ruled that the plaintiff had made out a strong \textit{prima facie} case that the construction was a breach of the covenant for quiet enjoyment, incorporated into the lease by operation of statute.

\textsuperscript{120} See Perera v. Vandiyar, supra, note 19, in which the action for damages was preceded by an interlocutory order to restore gas and electricity, and Kenny v. Preen, supra, note 15 in which a perpetual injunction was granted to restrain the landlord from engaging in threats and harrassment. See also Johnston v. Fischer, supra, note 45 at 532, Parkes v. Howard Johnson Ltd., supra, note 56 at 263.
\end{flushright}
be remembered that English cases involving the modern Rent Acts are affected by clear legislative approval of civil actions, alongside their penalty sections.

Two English decisions dealing specifically with the issue of injunctive relief are particularly helpful. In Luganda v. Service Hotels Ltd., the English Court of Appeal upheld an interlocutory injunction ordering the reinstatement of a hotel licensee, granted security of tenure under the Rent Act of 1968, who had been locked out of his room when he protested a rent increase to the rent tribunal. The decision was relied on by Stamp, J. in Warder and another v. Cooper, a motion for an interim injunction restraining the defendant from interfering with the plaintiff’s use and occupation of the residence supplied to him as part of his (terminated) employment. Although the plaintiff had lost his right to the premises when his employment terminated, overholding tenants, by reason of the Rent Act of 1965, could not be involuntarily dispossessed without a court order, and were protected against self-help techniques used by landlords, such as having their furnishings removed or the locks changed. The Court’s reasoning is relevant both to equitable, and legal remedies:

... [H]ere, what the defendant has done is to infringe the terms of an Act and so committed a tort.

The intention of Parliament that possession of premises occupied by a person in the position of the first plaintiff may not be obtained except by proceedings in the court, is clear from s. 32. The first plaintiff is entitled to the benefit of the section. If the court were to refuse the injunction, leaving the first plaintiff to a remedy in damages for the tort, it would be allowing just the mischief which the section was designed to prevent. If the matter had come before the court on a threat by the defendant to lock out the first plaintiff, I entertain no doubt that an injunction would have been granted. And to quote Lord Denning in the Luganda case, ‘he should not be in a better position by wrongfully locking him out.’

The cases clearly support the position that aggrieved tenants may seek and be granted injunctions against landlords infringing their right to peaceful possession, which may only be interrupted against their wishes by means of a court-ordered writ of possession. It is of interest to note, however, that in all of the cases involving both an application for an injunction and an action for the breach of landlord-tenant legislation, no exemplary damages were awarded. No discussion of this point is contained in the cases and this result may be merely 'coincidental'. It is possible, however, that a court may hesitate to exercise its special discretion in more than one direction at a time in dealing with novel rights of tenants. The court did not hesitate to find a tort when no question of measure of damages fell to be decided, while in the stronger fact situations in Kenny v. Preen and Perera v. Vandiyar, the

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123 Id. at 115-16.
124 The exception is Parkes v. Howard Johnson, supra, note 56.
125 Supra, note 15.
126 Supra, note 19.
F. CONCLUSION

The argument that residential tenants in conflict with their landlords may find relief through litigation, is not meant to imply that the courts are the most suitable forum for the resolution of landlord-tenant disputes. Litigation, even if expedited by summary procedures, is time consuming and costly; the pursuit of a novel remedy involves greater risks and requires greater caution. Ideally, tensions and conflicts between tenants and their landlords should be settled through consultation and negotiation. The climate for such a process, however, cannot exist unless the parties meet as equals, willing to respect each other’s rights.

Traditionally, tenants have had few rights, and low income tenants in particular, have been unsuccessful in confrontations with their landlords. Reformed landlord-tenant legislation is, in part, a response to this situation, and presumably, has altered the balance of power between the parties. However, to be meaningful, the new rights of tenants must be enforced, and the parties must learn to live within their strictures. In this context, litigation becomes a useful tool in achieving this balance. A legal victory for an abused tenant may serve to educate other landlords and tenants, and thus may result in creating an atmosphere conducive to more peaceful methods of dispute settlement. Tenants will be motivated to present their views, perhaps through tenants’ associations, and landlords will find it worth their while to listen.

Post Script

Some of the principles discussed above were argued recently in a County Court action before Mr. Justice Cornish. The court was not prepared to award exemplary damages in the action, on the basis that The Landlord and Tenant Act did not contemplate such damages. Moreover, the action, commenced by way of notice of motion, under s. 96, s. 106, and s. 107 of the Act, was a summary procedure, and thus not suited for a determination of such an issue. However, Mr. Justice Cornish specifically recognized that an action for damages was warranted in the case. The claim involved both mental suffering and property damage. The decision on the summary motion was made without prejudice to a separate action for damages.

127 Beyer and Others v. Absamco Development Ltd. and Others, March 8, 1976, County Court, Cornish, J. (unreported).