THE LANDLORD'S LIABILITY IN RESPECT OF THE MEANS OF ACCESS RETAINED IN HIS CONTROL AND SECTION 98(1) OF "THE LANDLORD AND TENANT ACT"

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I. *Introduction*

In assessing the effects on residential tenancies of the Part IV amendments to "The Landlord and Tenant Act" of Ontario,[1] D. H. L. Lamont states: "the amendments discussed in this article do not effect any change in the law applicable to liability arising from defective conditions of the means of access."[2] Therefore, Mr. Lamont would probably assert that S.98(1) of "The Landlord and Tenant Act,"[3] concerning the landlord's obligation to repair, is inapplicable to landlord liability arising from defective means of access.

Section 98 reads in part, as follows:

> *Landlord's Responsibility to repair.*
> 98(1) Subject to subsection (2), a landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy and for complying with health and safety

1. R.S.O. 1970 C.236, SS. 81-110. (The Landlord and Tenant Amendment Act, 1968-69, S.O. 1968-69, C.58).
2. D. H. L. Lamont, Q.C., **The Landlord and Tenant Act — Part IV, Carswell Co. Ltd., Toronto**, 1970, p. 30, and also **Residential Tenancies — The Landlord and Tenant Act Part IV** Second Edition, Carswell Co. Ltd., 1973, at p. 83.
3. R.S.M. 1970 C.L70, as amended by S.M. 1970, C.106, S.3; and S.M. 1971 C.35, especially S.10; and S.M. 1972, C.39, S.3 Any reference to the Act refers to the Act cited herein.

standards, including any housing standards required by law, and notwithstanding that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.

Responsibility of tenant.

98(2) The tenant shall:

(a) be responsible for ordinary cleanliness of the rented premises; and

(b) take reasonable care of the rented premises and repair damage to the rented premises caused by his wilful or negligent conduct or such conduct by persons who are permitted on the premises by him; and

(c) take all reasonable precaution to avoid causing a nuisance or disturbance to other tenants in the building by any person resident in his rented premises or by others who are permitted on the premises by him.

The adoption of Mr. Lamont's view could lead to many unfortunate results. Firstly, it would mean that although a landlord may not contract out of his duty to repair in regard to the dwelling units,[4] he might do so in regard to the means of access. Secondly, by virtue of S.98(1), the landlord's duty to repair remains, "notwithstanding that any state of non repair existed to the knowledge of the tenant before the tenancy agreement was entered into." However, if the means of access is excluded from the scope of 98(1), a tenant's knowledge of defects existing in the means of access at the time of letting would still afford the landlord a valid defence in an action concerning the defective condition of the means of access.[5] Thirdly, by virtue of S.98(1), and clause 7 of the Standard

4. See S.82: "notwithstanding any agreement or waiver to the contrary entered into or renewed before and subsisting when this Part comes into force or entered into after this Part comes into force."
and also see S.118(2): "Any term or condition in a tenancy agreement . . . (b) that contravenes any of the provisions of this Act; is void and has no effect."
Note that these sections prevent contracting out of a duty to repair, but are silent as to contracting out of liability in tort.
At common law a contractual duty to keep the means of access which is retained in the possession and control of the landlord in a reasonably safe condition, is an implied term, **Dunster v. Hollis** [1918] 2 K.B. 795 at p. 802. Therefore it is subject to variance by any express agreement between the parties.

5. Limerick, J.A. in **Lewis v. Leighside Holdings** (1970), 15 D.L.R. (3d) 770 (N.B.S.C. App. Div.), (a case involving a windowless door opening outwards from a corridor onto a narrow landing and common stairway), stated at p. 772:
"In order to succeed in this action the respondent must establish the existence of a concealed trap or show that a change has occurred in the condition of the premises since the date of renting which has created a new danger."
However, as early as 1918, Lush J. in **Dunster v. Hollis, supra** note 4 at p. 803 had made it quite clear that the duty involved more than merely avoiding traps:
In other words, is the lessor merely under an obligation to avoid exposing the tenant to a trap or is he liable if through want of care he allows the premises to be in an unsafe condition? In my opinion the latter is the correct view. I do not see how a lessor who had impliedly undertaken to keep the access reasonably safe can avoid liability by proving that the tenant knew that the steps were old, worn, and defective. That fact may be a good ground for the conclusion that the plaintiff was guilty of contributory negligence, but I must hold that that in itself affords no answer to the action.
Therefore, the position under the common law would seem to be that the landlord's duty to keep the common means of access reasonably safe is only prospective in nature; that is, the landlord is only under a duty to keep the means of access reasonably safe from the time of letting, with the exceptions of the defects then visible.
"The tenant takes the premises as they are at the time of renting, no matter what condition of **visible danger** may be present, and the tenant cannot normally complain of defects then present." per Limerick, J.A. at p. 772.
See also Buckley, L.J. in **Dobson v. Horsley** [1915] 1 K.B. 634 at p. 640.

Relative Agreement[6] compliance with all by-law and statutory requirements with respect to health, sanitation, fire, housing and safety standards become a covenant of the lease. Thus, for example, a tenant will probably have the right to sue his landlord for damages for injuries caused by the landlord's failure to comply with requirements of a city building by-law.[7] However, if the means of access is excluded from the scope of S.98(1) such right might not exist there,[8] for "The Municipal Act"[9] might not be regarded as giving sufficient power to the City council to confer a civil right of action[10] on private individuals. Fourthly, if S.98(1) excludes means of access, then a tenant might not be able to terminate the tenancy agreement under S.98(3) (in accordance with sections 100, 101, and 102) due to the landlord's failure to maintain the means of access in repair, even though he could terminate for the same failure on the part of the landlord with respect to the repair of the dwelling unit.

Further incidental results would include 1) the loss of protection afforded to the tenant in S.117(2) which makes it an offence for a landlord to give a tenant a notice to quit because of the tenant's attempt to secure his legal rights. If means of access is excluded from the scope of S.98(1), it could still be open to a landlord to give the tenant a notice to quit if the tenant sought to enforce his legal rights in regard to the landlord's keeping the means of access in a reasonably safe condition; and 2) the inability of the tenant to avail himself of the procedure under S.119 whereby a tenant might have the rentalsman effect repairs for him.

On the other hand, to say that the landlord's obligation to repair under S.98(1) does not encompass the means of access retained in his control would, in effect, be saying, that the landlord is under a much more onerous duty with respect to premises in the control and occupation of his tenants, than that duty which he is under with respect to parts which the landlord himself retains, that is, the means of access as well

6. Landlord and Tenant Act, 1970 R.S.M. C.L70 s. 118(1).
7. In **Walker and Wife v. Hobbs & Co.** (1889), 23 Q.B.D. 458 the tenant was held to have a right to sue for injuries caused by the premises not being "reasonably fit for human habitation," as required by S.12 of the "Housing of the Working Classes Act," 48 & 49 Vict. C.72 owing to any defective state of disrepair; in that case, a defective ceiling.

Note: the protection of clause 7 of the tenancy agreement extends only to parties to the agreement. Contractual conditions implied by statute which force the landlord to keep the premises fit for habitation do not render the landlord liable for injuries caused by the defective premises to the tenant's wife, family or guests. See **Middleton v. Hall** (1912), 108 L.T. 804; **Ryall v. Kidwell & Son** [1913] 3 K.B. 135, (C.A.).

However, even though the landlord is not liable to these third persons under contract (clause 7 of the Tenancy Agreement), he might still be liable to these persons under S.98(1) itself if it can be determined that these third persons are also members of the "particular and ascertainable class" of persons who were intended to be protected by Part IV of The Landlord and Tenant Act. See, infra, part 5.5. Note that "tenant" includes occupant (S.2(h)) and therefore the tenant's wife and family, as occupants, would arguably have a right to sue the landlord in damages for breach of S.98(1) which cause them to suffer personal injuries.
8. See, **infra**, Part 4.
9. S.M. 1970, C.100. See, infra Part 4. Residents of Winnipeg must look to the relevant sections in "The City of Winnipeg Act" S.M. 1971 C.105.
10. See **infra** Part 4.

as the parts used in common by all the tenants. On the other hand, to say that S.98(1) includes the means of access, but effects no change in the landlord's liability under the general law, is to ignore the fact that under the general law a landlord's duty to keep the means of access reasonably safe is only a prospective liability, that is, a liability in respect of 1) visible defects arising after the commencement of the letting, and 2) defects which were not visible at the time of letting (concealed traps). Under the common law tenant takes the means of access as he finds it,[11] and the landlord is not prevented from contracting out of his duty to keep the means of access in a reasonably safe condition. To say that S.98(1) effects no change in liability concerning the means of access and yet assume that S.98(1) includes the means of access, is to ignore all the new benefits conferred on the tenant throughout Part IV as mentioned in the preceding paragraphs.

In all fairness to Mr. Lamont, it should be pointed out that the wording of S.98(1) itself creates considerable doubt as to whether or not the section has any application to the means of access. The landlord's responsibility for providing and maintaining the premises in a good state of repair and fit for habitation applies only to the "rented premises;" (yet, it is possible to read the landlord's duty to comply with health and safety standards as not being under that limitation).

It seems inconceivable that the legislature intended to exclude from the scope of "rented premises" the means of access retained in the control of the landlord. Consider two different situations: first, where a tenant leases a small dwelling house; second, where a tenant leases only one of a number of self-contained dwelling units in an apartment block. In the first situation of the rental of a small dwelling house "together with all the rights, members and appurtenances whatsoever to the said premises belonging or appertaining," "rented premises" will include all that area bounded by the lot line[12] and will therefore include the steps and sidewalk as they will probably be demised with the house.[13] Thus, the means of access in this situation which is retained in the control of the tenant, will be subject to the landlord's duty to repair in S.98(1) as they are clearly part of the rented premises. However, the situation is altogether different in the second example. Here, it might be open to the landlord to argue that as the sidewalk and steps leading to the apartment block are retained in his control, they do not form part of the "rented premises" as such, and therefore, his obligation under S.98(1) does not extend to

11. See **supra**, note 5.

12. a) See **Evans v. Templin** (1910), 13 W.L.R. 714 per Mathers C.J.M. at p. 715.
b) Similarly, where the tenant was responsible to keep the means of access clean, etc., the porch was held to be part of the contract of letting: **Agnew v. Hamilton**, 46 B.C.R. 362, affirming [1932] 3 W.W.R. 57.

13. See **Brown v. Liverpool Corporation**, [1969] 3 All E.R. 1345 (C.A.).

the steps and sidewalk.[14] In the final analysis, the possible anomalous result would be this: Landlords would be under a duty to repair by S.98(1) only if the tenant retains control of the means of access, where the landlord retains control he may escape the duty to repair under S.98(1), and his duty would be limited to the less stringent obligation under the general law with respect to the means of access.

There are indications that the legislature did not intend to limit the scope of S.98(1) to the dwelling units themselves; rather, the intention of the legislature was to attribute to S.98(1) a broader application than merely that of dwelling units. Consider S.123 which applies to boarding houses with five or more tenants. That section declares that ". . . the provisions of Part IV, to the extent that they may be reasonably applicable, apply to the *room accommodation* provided by the landlord" (emphasis added). The absence of such a restriction on the scope of S.98(1) with regard to all other types of residential premises must certainly be taken as evidence that the legislature intended the scope of S.98(1) to be greater than merely room accommodation.

Also, consider Part (14) of the Tenancy Agreement pursuant to S.118(1):

> *Care by Landlord*
>
> 14. The Landlord is responsible for providing and maintaining the rented premises, the amenities and facilities provided at Part (4) above in a good state of repair and fit for habitation during the tenancy; notwithstanding that any state of disrepair existed to the knowledge of the Tenant before this Tenancy Agreement was entered into.

Note that the obligation under S.98(1) also extends to amenities and facilities. Therefore, S.98(1) might also encompass the means of access retained in the landlord's control. Unfortunately, it might still be open

14. a) See the Statement of Hodson, L.J., in **M & J.S. Properties Ltd.** v. **White**, [1959] 2 All E.R. 81(C.A.) at p. 82: "It seems to me plain that the word premises is on the face of it directed to premises which are capable of physical occupation, and is not directed to an incorporeal right or easement which may be added to the tenancy." (right of a tenant to use a garden in common with another tenant).

b) Note that in **Hagen v. Goldfarb et al** (1961), 28 D.L.R. (2d) 746 (N.S.S.C.), Currie, J. held at p. 759, that the tenant's "occupancy was the inside of the store . . . , and he had nothing to do with repairs to the outside of the premises." The outside of the premises was therefore not part of the "rented premises".

c) In **Reid** v. **Mimico** [1927] 1 D.L.R. 235 (Ont. C.A.) the term "appurtenance" was given a narrow definition. In that case, the terms of the lease read "All that messuage or tenement situate lying and being . . . the storeroom and the front part of the cellar of the premises now known as 130 Mimico beach, in the town of Mimico, Ontario, with the appurtenances thereunto belonging or appertaining." (p. 237). Masten, J.A. held that the intervening space between the appellant's shop and the street was not demised to the appellant by the words "with the appurtenances thereunto belonging or appertaining".

d) However, Macdonald, J. in **Wallich** v. **Great West Construction Co.** (1914), 6 W.W.R. 1404, 24 Man. R. 646 held that the tenants of the suites in an apartment block have a right to use the hallway leading to their suites as "a right appurtenant to their occupation".

e) And, in **Mitchell** v. **City of Winnipeg** (1907), 6 W.L.R. 31 where an agreement provided for taking over "premises" and all materials thereon, and some materials were on the street adjoining the building in question, it was held that the portion of the street occupied by the material was within the term "premises" for the purposes of the agreement.

to the ingenious landlord to evade his duty by stipulating under Part (4b) that the means of access is one of the "privileges, amenities and facilities that are reserved to the landlord or his designate and are not included within the scope of this Agreement." However, this would seem doubtful. Even though the means of access is retained in the landlord's control, it is still an easement[15] which is clearly the right of a tenant, and which is, of necessity, granted to the tenant for the duration of the tenancy agreement. Therefore, such a right of easement cannot be *reserved* to the landlord. Just as Lamont argues that "the intent of the amendments as remedial legislation for tenants will, it is hoped, bring a liberal interpretation of the words "rented premises" and include landlord's fixtures,"[16] similarly, the words "rented premises" should also be interpreted to extend the landlord's obligation in S.98(1) to the means of access (even where retained in the control of the landlord); the use of which is a tenant's right appurtenant to the occupation of the dwelling unit.[17] Such an extension would effectively serve to eliminate the possible inequities that were mentioned earlier. Admittedly, the duty to repair might not be synonomous with the duty to keep reasonably safe. This might therefore necessitate a specific amendment of 98(1) in order to extend the landlord's obligation under S.98(1) to the means of access retained in the landlord's control.

II. *The Landlord's Obligation at Common Law*

In *Sinclair* v. *Hudson Coal and Fuel Oil Ltd.*[18] the plaintiff had a contractual right to occupy one of the several self-contained unfurnished

15. See **Devine** v. **London Housing Society, Ltd.** [1950] 2 All E.R. 1173 (K.B.D.).
16. **Supra** note 2 at p. 28.
17. See **Supra** note 14(c).

In **Miller** v. **Hancock** [1893] 2 Q.B. 177 (C.A.) it was held that where a landlord retains the staircase in his possession and control, in the absence of express agreement, he impliedly granted to the tenant "what may be called an easement" or "an easement with special circumstances" over the means of access. (See also **Supra** note 15 at p. 1174 per Croom-Johnson, J.: "easement of necessity".) This easement differs from the ordinary easement. At common law, the person enjoying an ordinary easement would be bound to repair it. See E. K. Williams, **Canadian Law of Landlord and Tenant**, Carswell Co. Ltd., Toronto, 3rd ed., 1957, p. 374: Although **Miller** v. **Hancock** has been widely criticized on other points, the "easement" principle with regard to the means of access has not been questioned.

In **Whitley** v. **Stumbles**, [1930] A.C. 545 (H.L.), fishing rights were demised along with corporeal hereditaments by the same lease. Viscount Hailsham considered whether this incorporeal right was part of the "premises" within S.5 of the Landlord and Tenant Act of 1927 (17 & 18 Geo. 5, C.36). He concluded that it was, in spite of the reference in S.4(1)(a) to "the premises" being demolished; and also in spite of the reference in S.5(3)(b)(ii) to the landlord proving his intention to "pull down or remodel the premises".

Viscount Hailsham, at p. 547, noted that the term "premises" must include some incorporeal hereditaments such as, for instance, easements.

> "I see no sufficient reason for supposing that that Legislature did not there include not merely the actual buildings in which a trade is carried on, but also the land surrounding them, **the easements granted as appurtenant to them, and any other incorporeal hereditaments** which may form part of the premises in the strict legal sense of the term which are the subject matter of the habendum."
> (emphasis added)

18. (1966), 56 D.L.R. (2d) 484 (Ont. C.A.).

dwelling units. The means of access from the street to the dwelling unit were retained in the control of the landlord. Kelly, J.A., stated:

> "In these circumstances notwithstanding the fact that there was no express contractual provision dealing with the means of ingress and egress, there was with respect to the portions of the defendant's premises retained under the defendant's control, over which the plaintiff was expected to pass, an implied contract by reason of which the defendant was under an obligation in regard to the physical condition of the parts retained."[19]

Mr. Justice Kelly considered that the landlord is under two different duties, or rather, two different standards of duty. Where the use being made of the premises at the time of the injury is the main purpose of the contract of letting, the landlord's obligation is: "that the premises be as safe for the purposes contemplated by the contract as reasonable care and skill on the part of anyone can make them."[20] However, where the use is merely incidental or subsidiary to the main purpose, the standard of duty "only entails the obligation on the part of the occupier to take reasonable care to see that the premises are reasonably safe for the purpose for which the injured party is entitled to make use of them".[21]

On the facts of the case the court held that the landlord was only under the lower duty of care. Note that the landlord's duty is determined *at the time of the injury*. The question left unanswered is whether *any* use of the means of access will be considered as merely *incidental* to the main purpose of the contract of letting; — or whether only an *incidental* use of the means of access will be considered as merely incidental to the main purpose. In *Sinclair*, the plaintiff had already traversed the full length of the means of access; and at the time of the injury he was merely waiting for a taxicab. If Mr. Sinclair had suffered his injury, while only half way across the sidewalk, would the landlord have been under the higher duty? The judgment leaves this question unanswered. However, Mr. Justice Kelly's reference to "the time of the injury" as opposed to "the location of the injury" leaves the inference that the use of the means of access may at times be purely incidental, while at other times the use may constitute the main purpose, and therefore on the latter occasions, the landlord will be under the higher duty.

Dunster v. *Hollis*[22] laid down the measure of the landlord's obligation in respect of maintenance and repair of passageways in a building in which sets of rooms are let to tenants. In that case, Lush, J. considered the alternative standards of obligations:

> There are three possible standards of obligation on the part of the lessor: First, the lessor may be under an absolute obligation towards his tenant

19. Id. at p. 488. See also Dunster v. Hollis [1918] 2 K.B. 795 at p. 802.
20. Supra, note 18 at p. 488.
21. Ibid.
22. [1918] 2 K.B. 795.

> to keep the steps in a reasonably safe condition; or, secondly, the lessor may be under an obligation towards his tenant to take reasonable care to keep the steps in a reasonably safe condition; or, thirdly, the lessor may only be under an obligation towards his tenant to take reasonable care to avoid exposing the tenant to a concealed danger or a concealed trap of which the tenant has no notice or warning.[23]

The second obligation was concluded to be the correct one.[24] The landlord's obligation is greater than merely avoiding traps.[25] The landlord's liability cannot be avoided by proving that the tenant knew the steps were old, worn, and defective.[26] However, if the defect was visible at the time of letting, the landlord will not be liable.[27]

What is of special interest in *Dunster* v. *Hollis* is that in addition to liability under the general law, counsel for plaintiff also argued that the landlord was under an absolute obligation by virtue of the "Housing, Town Planning, Etc. Act" of 1909.[28] He had contended that a house is not "fit for human habitation" if the steps are out of repair and dangerous. Mr. Justice Lush thought otherwise:

> It would be stretching the language of the Act to say that it imposes an obligation on the lessor to keep the steps in repair whether he could or could not know that they were defective, and that it was intended to give the tenant a right of action which at common law he did not possess in a case where the house is fit for human habitation in the ordinary sense but where the steps have become defective.[30]

Of course, Mr. Justice Lush would not have had to stretch the language of the 1909 Act, if, in addition to the duty of keeping the house fit for human habitation, that Act had also expressly imposed a duty to repair as does S.98(1) of our Act. Where there is such a duty to repair, the rule that the landlord is not liable unless he has been given express notice has no application where he demises only a portion of the premises and retains in his own control the portion whose defective conditions causes the damage. However, *Bishop v. Consolidated London Properties*

23. **Id.** at p. 796.
24. **Supra**, note 22, at p. 802. (See also **Watt** v. **Adams Brothers** [1927] 3 W.W.R. 580 at p. 589).
25. **Id.** at p. 803. (See also **Supra**, note 5).
26. **Ibid.** In this respect, the duty owed by a landlord to a tenant, here, is greater than the duty owed by an occupier as invitor to an invitee; — the invitee's knowledge might afford the invitor with a valid defence where the risk is perfectly obvious to the invitee. (p. 797).
27. See **Supra**, note 5. quaere: If knowledge is no defence then why should the landlord be able to escape liability if the defect was visible at the time of letting? The answer is that the tenant accepts the risk of using the access in the form in which it is provided: **Dobson** v. **Horsley** [1915] 1 K.B. 634: "the tenant using it is not trapped in any way" (p. 640). **Dobson** v. **Horsley** was cited with approval by Lush J., in **Dunster** v. **Hollis**. See also **King** v. **Mainella** [1914] 1 W.W.R. 288 (Man. C.A.).
28. 9 Edw. 7, C.44.
30. **Supra**, note 22 at p. 804.

Ltd.[31] and *Melles & Co.* v. *Holme*[32] both dealt with covenants to repair the exterior of the premises – portions retained in the control of the landlord. Section 98(1), on the other hand, only imposes on the landlord the duty to repair the *"rented premises"*. This is even more unfortunate when it is realized that the duty in S.98(1) is not merely a duty to repair, but rather to provide and maintain *"in* a good state of repair" so that notice to the Landlord of the want of repair is not necessary.[33] So by one measure the Legislature has eliminated the requirement of notice, in effect, thus giving a benefit by equating (in respect of notice) the position regarding the duty to keep the demised premises in repair with the position regarding the duty to repair parts in the landlord's control; but by another measure, that is by restricting the scope of the section to "rented premises", the Legislature has possibly precluded S.98(1) from operating with respect to parts retained in the landlord's control.[34]

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31. See **Bishop v. Consolidated London Properties Ltd.** (1933) L.J.K.B. 257. Damage to tenant's premises and damage to property in tenant's premises caused by defective pipe outside the demised premises. Defendants had covenanted to "keep the exterior of the premises and all parts of the building including halls, staircases and passages not the subject of this or some other letting in good repair".

32. See also **Melles & Co.** v. **Holme** [1918] 2 K.B. 100. Defective roof gutter causing damage to goods in plaintiff's premises. Defendants covenanted to "keep the outside of the demised premises and the roof and walls and drains thereof other than those within the demised rooms in good and tenantable condition".

33. E. K. Williams, **Canadian Law of Landlord and Tenant**, Carswell Co. Ltd., Toronto, 3rd ed., 1957, p. 398. But see also, infra, Part 5.3.

34. (1) Note: **Halsbury's Laws of England**, Vol. 23, 3rd ed. p. 562-3, para. 1233.
Even though ". . . In the absence of express stipulation, or of a statutory duty, the landlord is under no liability towards the tenant to put the demised premises into repair at the commencement of the tenancy or to do repairs during the continuance of the tenancy . . . The fact that the landlord remains in control or possession of part of the premises does not affect the application of the rule, and so he is not liable to keep the premises in repair so as to render the demised part habitable." . . . ,
"The landlord must, however, take reasonable care that the part retained in his possession is not in such a condition as to cause damage to the part demised." (emphasis added)

See **Cockburn** v. **Smith**, [1924] 2 K.B. 119 (C.A.); **Hargroves, Aronson & Co.** v. **Hartopp** [1905] 1 K.B. 472; approved in **Fairman** v. **Perpetual Investment Building Society**, [1923] A.C. 74 (H.L.).

(2) The liability (to third persons) of the landlord in possession of part of the premises is stated in **Halsbury's Laws of England**, Vol. 23, 3rd ed. p. 573. para. 1247.
"Where the landlord retains possession of part of the premises, such as the roof or one floor of a building, his liability for injury to persons or property on the demised premises resulting from the non-repair of that part depends, not upon any contractual obligation to repair, but upon negligence*, namely, the ordinary duty of an occupier of property to take reasonable care that his property does not become dangerous to adjoining property or to persons lawfully thereon (u)."

(2b) Note, though, in one of the cases cited in footnote (u), **Bishop v. Consolidated London Properties, Ltd.** (**supra**, note 31a) there was an express covenant by the landlord to repair the exterior. Similarly in **Melles & Co.** v. **Holme** (**supra**, note 32), there was also an express contractual duty to repair. The **Bishop** case dealt not with liability to third persons but rather with liability to the tenant; the same is true of the **Melles** case.
*The landlord's liability in negligence is partially dealt with in Part 3 **infra.**

(3) For a decision where the tenants are in exclusive possession of the means of access, see **Ringuette v. Martin** (1971), 3 N.B.R. (2d) 598 (N.B.S.C. App. Div.) (plaintiff falls on icy steps leading from apartment to the street below). It was held that even though the stairway may have been originally constructed in such a way as to occasion the accumulation of ice, the landlord was not liable as there had been no change in the construction of the building nor the steps since the beginning of the tenancy: "The tenant should before entering into his lease, inspect the premises and make such contract as he may need. If he does not, he has only himself to blame." per Bugold, J.A. at p. 601.

II.(b) *What is the Nature of the Tenant's Right and Status at Common Law?*

In *Frampton* v. *Lackman*,[35] Ritchie, J.A. held that the right to use a clothes line on the roof and the cognate right to have access to the roof in the exercise of it were, from its commencement, implied terms of the lease of the apartment upon which the plaintiff was entitled to rely.[36] In respect to the plaintiff's right of access to the roof, the relationship between the parties was, in its nature, contractual. Subsequent cases have extended this principle. For example, in *Sinclair* v. *Hudson Coal and Fuel Oil Ltd.*,[37] Kelly, J.A., held that since the standard of landlords is taken to be one implied in the contract of occupancy, cases dealing with the obligation of an invitor to an invitee are irrelevant.[38] Similarly in *Lewis* v. *Leighside Holdings Ltd.*[39] Limerick, J.A., held: "Principles of liability of an occupier relating to invitees and licensees do not apply to the issues here involved: *Cavalier* v. *Pope* [1906] A.C. 428 (H.L.)."[40]

No doubt the last two statements help practitioners in that they put an end to the quandary of whether or not a practitioner should frame his pleadings in contract or in tort. Previous to *Sinclair*, there was considerable uncertainty in this respect in Ontario.[41] For instance, in *Beauchamp* v. *Sandown Holdings*,[42] the landlord's liability was determined through the use of the conventional invitor-invitee test. However, in *Richardson* v. *St. James Court Apartments Limited*,[43] Mr. Justice Aylen proceeded to decide the case by use of the "reasonable man test". In both these cases the judges acknowledged that the duty on the landlord was based upon a contract, express or implied; but the ultimate decisions in these cases were based on different tort theories. The *Sinclair* case represented an attempt by the Ontario Court of Appeal to bring these (and other) varying legal decisions into a more consistent form[44] by stating that the duty on the landlord arises from contract, while the test of liability is one of pure negligence: did the defendant take reasonable steps to ensure that the premises were reasonably safe for the purpose for which the plaintiff was entitled to use them?[45]

35. (1958) 16 D.L.R. (2d), 45 (N.B.S.C. App. Div.). Plaintiff was injured when her foot slipped off a board walk while she was pushing open a heavy door that gave access to the road.
36. Id. at p. 48 and see p. 49.
37. Supra note 18. Plaintiff slipped on icy sidewalk.
38. Id. at p. 489.
39. (1970), 15 D.L.R. (3d) 770 (N.B.S.C. App. Div.). Tenant opened windowless door outwards from corridor on second floor onto narrow landing which struck plaintiff tenant and caused her to fall down the stairs.
40. Id. at p. 772.
41. L. A. Roine, 'Negligence: Occupiers Liability: Landlord and Tenant: Classification of Action: Test to be Applied:' (1966), 1 Ottawa L. Rev. 239, at p. 241.
42. [1958] O.W.N. 11. Plaintiff tenant slipped on a flight of exterior steps leading to the entrance of the apartment building.
43. (1963), 38 D.L.R. (2d) 25. Plaintiff tenant slipped on a patch of ice on the access sidewalk.
44. Supra note 22 at p. 242-243.
45. Id. at p. 243.

What must be remembered is that even though the *Sinclair* and *Lewis* cases eliminate a quandary for practitioners, these cases make the invitor-invitee test inapplicable in lessee-injury cases. In so doing, these cases seek to ignore the tendency in some means of access cases which hold that the tenant is an invitee of the landlord or to admit that he is.[46] This, in effect, reverts the tenant's position back to the position expressed by Mr. Justice Beck in *Watt* v. *Adams Brothers Harness Manufacturing Company*[47] in 1927:

> . . . and a tenant is only one of a class of persons — a guest in an inn is another — who have a right to use the premises, *not by licence or invitation* as occasion arises, but by a contract which gives a right to such use continuously during the currency of the contract *without licence or invitation.* (emphasis added)

Evidence of the alteration of the general position as stated in *Watt* is found in the fact that even hotel guests have since been held to be invitees in *Gordon and Gordon* v. *Blakely*[48] and in *Buxton v. Carriss;*[49] and,[50] as stated above, prior to *Sinclair,* there had been a development of a case law holding a tenant to be an invitee with respect to the means of access.

It is arguable that the statements in *Sinclair* and *Lewis* should not be taken to mean that a tenant will for all time be precluded from pleading an invitor-invitee relationship in all cases. Rather, these statements should merely mean that a tenant's rights arise through a contractual relationship, quite apart from an invitee-invitor relationship. Although the tenant's rights against the landlord under the implied

46. **Supra** note 34 at p. 374. For example, see **Rose** v. **Prescesky** (1955), 16 W.W.R. (N.S.) 347 (B.C.); **Hart** v. **Liverpool Corporation** (1949), 65 T.L.R. 677 (C.A.); **Holman** v. **Ellsmar Apartments Ltd.** (1963), 40 D.L.R. (2d) 657 (B.C.S.C.).

b) Admittedly, in most cases it will be wiser for a tenant to rely on his contractual right and not on the rights of an invitee, (see **supra** note 33 at p. 374) as the tenant's knowledge is no defence to a landlord under the action based on contract (**Dunster** v. **Hollis**). If the tenant relies on the rights of an invitee he will run the risk of having the landlord prove that the tenant knew **and fully appreciated the risk involved.** (See **Holman v. Ellsmar Apartments Ltd. supra**).

The duty of an owner of premises towards an invitee is set forth in the well-known passage in **Indermaur** v. **Dames** (1866) L.R. 1 C.P. 274 at p. 288 [aff'd L.R. 2 C.P. 311]:

". . . we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

Consider the statement of Mr. Justice O'Halloran in his dissenting opinion in **Power and Power** v. **Hughes** [1938] 2 W.W.R. 359 (B.C.C.A.) at p. 368:

"I use the term "invitee" in the sense that permission of user to both respondents from the landlord was a matter of business and not a matter of grace — vide **Salmond on Torts**, 8th ed., p. 510, and **Ellis** v. **Fulham Borough Council** [1938] 1 K.B. 212, 107 L.J.K.B. 84, at 93, [1937] 3 All E.R. 454."

47. [1927] 3 W.W.R. 580 at p. 582.

48. [1931] 2 W.W.R. 902 (Morrison, C.J.S.C., B.C.). Plaintiff guest fell onto an unlit balcony from a 12 inch step, after walking onto a balcony from the corridor which led to the guest's room. **Dobson** v. **Horsley** [1915] 1 K.B. 634 was considered.

49. (1957), 11 D.L.R. (2d) 766 (B.C.C.A.). Death of a hotel guest due to defective gas burner.

50. See contra **Beauchamp** v. **Ayotte et al** [1971] 3 O.R. 21 at p. 27.

contract theory are higher than those of an invitee,[51] the tenant should still be allowed to plead the lesser duty under an invitor-invitee relationship in means of access cases where circumstances might merit such a plea.[52]

Consider a judgment of the Manitoba Court of Appeal in 1916: *Erickson* v. *Traders Building Assn. Ltd.*,[53] Mr. Justice Cameron, in referring to authorities in the United States, pointed out that a landlord's duty to repair does not include the removal of snow or ice which might accumulate on the passageway and render the use of it difficult or dangerous.[54] It might therefore be open to a landlord to have this doctrine reasserted under his newly imposed obligation of S.98(1) to repair.[55] However, under the law with respect to the conventional invitor-invitee relationship, it is possible for ice on steps to constitute an unusual danger.[56] It is under this area of the law (—the duty owed to invitees—) that there has been much change in judicial thinking since the *Erickson* case.

For instance, the predominant view in 1916 is stated by Perdue, J.A.:

> Knowledge in defendant of the existence of the ice was not shown. *The climate of this City of Winnipeg in the month of February is such that it would be impossible to maintain the approach to a building always free of snow or ice.* The entrance doors in question face to the south. Snow may fall upon the pavement or be carried there by the feet of persons entering the building and may thaw and freeze there within a short time.[57]

and also by Cameron, J.A.:

> The doors were within a large arch, with a wide passage leading up to them. In the climatic conditions of this country it would be natural to expect to find ice formed or snow collected with this archway in the winter. When these are present they tend to make the footing more or less insecure, as everyone knows.[58]

However, in *Campbell* v. *Royal Bank of Canada*,[59] where, according to "one of the plaintiff's witnesses, the condition of the floor was no more

51. **Supra** note 33 at p. 374.
52. See **supra** note 466.
53. (1916), 11 W.W.R. 272 (citing **Watkins** v. **Goodall** 138 Mass. 533 and **Woods** v. **Naumkeag Steam Cotton Co.** 134 Mass. 357).
54. **Ibid.**, at p. 282. Note, though, that this decision preceded the **Dunster** v. **Hollis** decision. Also, this decision dealt with an employee (stenographer) of the tenant.
55. This is assuming that the courts might extend the obligation in S.98(1) to passageways.
Quaere: Would S.98(1) affect decisions in such as **Rinquette** v. **Martin** (**supra** note 34(3)) in regard to snow and ice removal where the tenants retain possession of the means of access (26 steps leading from the apartment to the street below)? In this case, ice formed on the steps from water which was allowed to escape from melting snow on the roof. It was held that as there was no evidence that the eaves were in a rotten condition, in the absence of an express agreement to repair, the landlord owed no duty to the tenant to remove the accumulated ice and snow from the steps which had naturally accumulated thereon.
56. **Letang** v. **Ottawa Electric Railway Co.**, [1926] A.C. 725.
57. **Supra** note 53 at p. 278.
58. **Supra** note 53 at p. 281.
59. (1964), 46 W.W.R. 79 (S.C.C.). Plaintiff fell due to dangerous glaze of water on bank floor caused by customers tracking in snow during winter snowstorm.

than one would expect in a public place on a snowy day."[60] Spence, J., adopted the statement of Freedman, J.A., in the Manitoba Court of Appeal:

> "Counsel for the defendant advanced the argument that to hold the defendant liable in circumstances such as the present would be to impose an unfair and intolerable burden upon occupiers of premises. With respect, I do not share that view. Naturally one does not expect perfection of conduct from an occupier of premises. Moreover, one must make allowances for climatic conditions and the hazards they bring. *But if weather conditions bring with them risks, they are no less accompanied by a corresponding duty to take reasonable precautions against damage that might be caused therefrom. 'The risk reasonably to be perceived defines the duty to be obeyed,'* said Cardozo, J. (*Palsgraf* v. *Long Island Railroad Co.* [1928] 248 N.Y. 339), and it is appropriate to recall those words here."[61] (emphasis added)

Admittedly, the *Campbell* case dealt with the liability of shop-keepers in Manitoba (in this case, a bank) and therefore it is not binding authority for a landlord's liability with respect to snow and ice removal. Nevertheless, the *Campbell* case represents a marked change in judicial opinion regarding what constitutes an unusual danger in light of climatic conditions of Western Canadian winters. Although it is impossible to maintain the approach to a building always free of snow and ice, alternatively an occupier "cannot stand idly by, do nothing to protect invitees from damage arising from a wet floor, and then simply look to the snowstorm to exonerate him."[62] Spence, J., considered that where economical and easy precautions can be taken, and where a member of the public would have been entitled to expect precautions to be taken, then "their absence would tend to make the danger an 'unusual' one."[63] Thus, one test to determine whether or not a condition is one of unusual danger is to investigate the case of removing it.

If the landlord, as occupier of the means of access retained in his control, is not held responsible for removing snow and ice under his duty to repair in S.98(1), it would still be possible for an injured tenant to recover in circumstances where the slippery condition amounts to

60. **Id.** at p. 89 per Spence, J. reading from the judgment of Guy, J.A., (1963), 41 W.W.R. 91 (Man. CA..) at p. 102.

61. **Supra** note 59 at p. 92 from (1963), 41 W.W.R. (Man. C.A.) at p. 95.

62. **Supra** note 59 at p. 90 adopting the statement of Freedman, J.A. in (1963), 41 W.W.R. 91, at p. 95.

63. **Supra** note 59 at p. 91. Along this line of reasoning, if a landlord has made it a past practice to remove snow and ice, his failure to take this expected precaution on a subsequent occasion might tend to make the danger an unusual one. In this sense, the duty under the invitor-invitee relationship is superior to the duty to repair where the landlord's past practice is irrelevant:

> "So that the case remains one in which the tenant takes the premises as they are and assumes the risk of using this particular approach in the form in which it is provided. That the defendants undertook to take care of the entrance of the building and did actually take such care, thereby fulfilling an implied obligation, seems to me of no moment."

per Cameron, J.A. in **Erickson (supra)** at p. 281.

See also **London Hospital, Board of Governors** v. **Jacobs** [1956] 2 All E.R. 603 (C.A.) at p. 609, 610. The fact that the landlord has carried out repairs when the responsibility for repair lay upon the tenant does not prove that there has been any transfer of burden.

one of unusual danger. The landlord could still invoke the principle that an unusual danger must "be such danger as is not usually found in carrying out the function which the invitee has at hand, and was intended to exclude the common recognizable dangers of every day experience in premises of an ordinary type."[64] Even with this defence, it might still be possible for a tenant to satisfy the court that in the circumstances of his particular case, the slippery condition constituted an unusual danger. But if the tenant is not even allowed to do this, he might be without any recourse at all if future decisions also hold that the duty to repair in S.98(1) does not include snow and ice removal.[65] At least until the full extent of the obligation in S.98(1) is known, it is arguable that tenants should not be totally prevented from invoking the invitor-invitee relationship when dealing with means of access cases. Admittedly, it would be far better to follow a growing trend in some jurisdictions in the United States which simply hold that a landlord's duty to maintain portions retained in his control reasonably safe must include the duty to remove natural accumulations of ice and snow[66] within a reasonable time.

III. *When Will The Tenant Have a Right of Action in Nuisance and in Negligence?*

E. K. Williams stated that nuisance on the demised premises gives no cause of action against a landlord.[67] The rational, as expressed by Collins, M.R., in *Cavalier* v. *Pope*[68] is that liability should rest upon the person who has control of the premises; it has never been placed on one

64. **London Graving Dock Co.** v. **Horton** [1951] A.C. 737 (H.L.[E]) per Lord Porter at p. 745 and Lord MacDermott, p. 762.

65. Assuming that S.98(1) does, in fact, extend the landlord's duty to repair to the means of access.

66. Such jurisdictions follow the Connecticut rule as opposed to the earlier Massachusetts rule. The Massachusetts rule was originally enunciated in **Woods** v. **Naumkeag Steam Cotton Co.** (1883), 134 Mass. 357, 45 Am. Rep. 344 (Sup. Judicial Ct. of Mass.) which case was adopted by the Man. Court of Appeal in **Erickson** (**supra** note 55).

See for example: Michael R. Gareau, 'Landlord's Liability for Ice and Snow' (1967), 16 Clev. Mar. L. Rev. 301. The "Massachusetts Rule" has received criticism in the United States for failing to take into consideration the increase in apartment living and the increase in tenants who are neither able nor equipped to remove ice and snow from the common ways. In some jurisdictions there has therefore been the adoption of the "Connecticut Rule" or the "Modern Rule" which was first enunciated in **Reardon** v. **Shimelman** (102 Conn. 383, 128 A. 705, (1925)). The view in this rule is that a landlord who retains a portion of the leased premises owes his tenants a duty to maintain such portions in a reasonably safe condition by **removal of natural accumulations of ice and snow.** There are 2 main provisos to this rule: 1) The Courts allow the landlord a reasonable length of time after the snow or ice has accumulated in which to remove it. In **Sheehan** v. **Sette** 130 Conn. 295, 33 A. 2d 327 (1943), the Supreme Court of Connecticut held that the jury was justified in finding the defendant landlord guilty of negligence when he had 4¾ hours to remove the ice from the apartment house steps, such time being long enough to fix the landlord with **constructive notice** of the defect; 2) This broadened scope of duty does not make the landlord an insurer of his tenant's safety. (See for example, **Reuter** v. **Iowa Trust & Sav. Bank,** 244 Iowa 939, 57 N.W. 225 (1953)).

67. **Supra** note 33 at top p. 370. See also article 97 p. 394.

68. (1905), 74 L.J.K.B. 857 (C.A.) at p. 861. Decision affirmed [1906] A.C. 428.

who is not deemed to have control. Similarly, in *Cameron* v. *Young*,[69] Lord Robertson stated that a tenant's wife could not rely on principles of the law of neighbours which deal with external or foreign relations of the owner of a house rather than the rights of the inhabitants.

But in certain circumstances, liability will come to rest on a landlord where the landlord is deemed to have control, that is, where the landlord is in exclusive occupation of the defective portion. In such a case, the ordinary principles of the law of tort will be applied and the landlord will be liable to the tenant and his family. For example, in *Cunard and Wife* v. *Antifyre Limited*,[70] where a heavy piece of guttering fell from the main roof of the apartment building through the glass roof of the plaintiff's kitchen, causing broken glass to strike Mrs. Cunard and injure her, the defendant landlords as occupiers of the main roof and guttering, were held to be liable. It was immaterial that the tenements were part of the same structure,[71] for although the injury occurred within the demised premises, the defect was with respect to a non demised part. Similarly, in *Taylor and Another* v. *Liverpool Corporation*,[72] *Cavalier* v. *Pope* was held inapplicable, and the landlord was held to be liable in circumstances where the female plaintiff (daughter of, and housekeeper to the male tenant plaintiff) was severely injured by a brick which fell from a defective chimney stack into the yard adjoining the house. The yard was within the curtilage of the house and was used in common by all the occupants as the only access to the watercloset. It was also used for the purpose of gaining access from the back of the premises to the street. Stable, J., held that the yard was not part of the demised premises, but if it were, the plaintiffs were still entitled to recover under the authority of *Cunard v. Antifyre Ltd.* Talbot, J. made it quite clear, in *Cunard*, that the use of the word "nuisance" was incorrect in the circumstances,[73] though, no doubt, a nuisance may be caused by negligence.[74]

69. [1908] A.C. 176, 77 L.J.P.C. 68 (H.L.) especially p. 69.
Where there is no public nuisance, but merely a defect in the interior of the premises and injury results to a member of the tenant's family, or guest, the analogy of cases of nuisance adjoining places of passage or public highways is inapplicable.
However, in **Elgetti v. Smith** [1937] 3 W.W.R. 114 (B.C.C.A.) where defective railing was held to constitute a trap, and **where the lessor had agreed to make all necessary repairs**, it was held that the premises were let with an existing **nuisance** known to the lessor;

> "Now we have upon the finding of facts the landlord undertaking the duty of repair but disregards it — it must then be taken that he has authorized his tenant to leave the premises as they are, that is, in a state of disrepair, and in such a case which is this case the liability must fall on the landlord: **Pretty** v. **Bickmore** (1873) L.R. 8 C.P. 401, 28 L.T. 704. I am not unmindful of **Cavalier** v. **Pope** [1906] A.C. 428, 75 L.J.K.B. 608; **Cameron** v. **Young** [1908] A.C. 176, 77 L.J.P.C. 68, but on the special facts of this case, having undertaken to make all necessary repairs and knowing the existent conditions at the time of the letting and not making the repairs it is a case of patent liability on the lessor: **Payne** v. **Rogers** (1794) 2 H. Bl. 350, 126 E.R. 590; **Rex v. Pedley** (1834) 1 Ad. & E. 822, 110 E.R. 1422; **Todd** v. **Flight** (1860) 9 C.B. (N.S.) 377, 30 L.J.C.P. 21, 142 E.R. 148; **Pretty** v. **Bickmore, supra; Nelson** v. **Liverpool Brewery Co.** (1877) 2 C.P.D. 311, 46 L.J.C.P. 675."

per Phillips, J.A., at p. 117-118.

70. [1933] 1 K.B. 551 (K.B.D.).
71. See, however, **Shirwell** v. **Hackwood Estates Co. Ltd.** [1938] 2 All E.R. 1.
72. [1939] 3 All E.R. 329 (K.B.D.).
73. **Supra** note 70 at p. 556-557.

A point to note with respect to the *Cunard* and *Taylor* cases which distinguishes them from other cases dealing with the landlord's liability towards the tenant or tenant's friends, guests, servants or lodgers, is that the injury is caused neither by some defect in the demised premises nor *"by the situation of something overhanging the demised premises which at the time the damage is done, remains substantially where it was at the time of the creation of the tenancy."* (emphasis added):[75]

> This brick did not fall on the demised property at all, but, even if it had, the whole trouble was not that the brick at the time of the accident was where it was at the commencement of the tenancy. The whole trouble was caused by reason of the fact that it was not. It had moved. It had become dislodged. It had fallen off the chimneystack and hit Miss Taylor on the head.[76]

Had Miss Taylor, the tenant's daughter, suffered injury due to the presence of a loose stone, or a hole present in the yard which she was using, she would have been precluded from recovering on the basis of *Fairman* v. *Perpetual Investment Building Society*.[77] There, the House of Lords held that a lodger with one of the tenants in an apartment building was only a licensee vis-a-vis the landlord (though the lodger might be considered an invitee vis-a-vis the tenant). The lodger had sustained injuries due to a defect in the staircase retained in the possession and control of the landlord. The lodger was unable to recover unless he could prove that the defect in the stair was something in the nature of a trap, or a concealed danger, or something which the landlord knew or ought to have known and which was not apparent to the person who was using the staircase. On the facts, the House of Lords held that the defect was not a concealed danger and it was perfectly apparent to the lodger.[78]

Another point to note in respect of the *Cunard* case is contained in the dictum of Talbot, J.:

> Again, there is no doubt that if this guttering had overhung the street in the condition proved in the case before us, and had fallen on someone passing below and injured him, that person would have had an action against the defendants on the principle of *Tarry* v. *Ashton.* (1) What is that principle? It is in our opinion . . . anyone in occupation and control of something hung over a place, in which people may be expected lawfully

74. **Id.** at p. 558.
75. **Supra** note 72 at p. 337 per Stable J.
76. **Ibid.** Compare to **Shirwell** v. **Hackwood Estates Co. Ltd.**, [1938] 2 All E.R. 1 (C.A.) where an overhanging branch from a tree on the landlord's property adjoining the tenant's land, fell fatally injuring the tenant's workman. It was held that the condition of the tree at the date of the accident (i.e., dead) was substantially the same as at the beginning of the lease, per Greer L.J. at p. 8. Lord Justice Greer conveniently ignored the aspect of position when considering the term "condition".
77. [1923] A.C. 74, 92 L.J. K. B. 50 (H.L.).
78. See also **Jacobs** v. **London County Council** [1950], 1 All E.R. 737. See E. K. Williams, **supra** note 33 at p. 377 and the cases cited at pp. 382-386. All members of the tenant's family, his visitors, guests, lodgers, customers, or employees are mere licensees of the landlord. Such people are also strangers to the contract between the landlord and the tenant. The landlord's liability with respect to these people using the means of access in his control has been based on negligence and occupier's liability, totally apart from contract. See **supra** note 34(2).

> to be, is bound to take reasonable care that it does not fall and injure them. This seems to us to be both law and justice; and, as we have already said, it is in our opinion immaterial whether in such a case the plaintiff is in the place where he is injured as one of the King's subjects entitled to use the highway, or in the exercise of any other legal right.[79]

Thus, it is arguable that a tenant, in his status "as one of the King's subjects entitled to use the highway," may have a cause of action against the landlord in nuisance (public) where injury occurs on a public sidewalk adjoining the landlord's property, such injury being due to a defect in the non demised part.[80] In *Hagen* v. *Goldfarb et al*[81] the landlord was held liable for failing to cover the ice on the public sidewalk with sufficient salt and for failing when he became or should have become

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79. **Supra** note 70 at p. 562.

80. a) In **Wilchick** v. **Marks & Silverstone** [1934] 2 K.B. 56, a damaged third party was held (by Goddard, J.) to have a direct right of action against the landlord. He was not limited to a right against the occupier even where the landlords had not covenanted to do repairs, but had reserved a right to enter and do the repairs if they thought fit.

b) In **Mint** v. **Good**, [1950] 2 All E.R. 1159 (C.A.), it was held that in the absence of evidence or an express stipulation to the contrary, a term would be implied, in an agreement for a weekly tenancy, that the premises let would be kept in a reasonable and habitable condition by the landlord and that he would have the **right to enter and effect the necessary repairs**. "The occupier's duty to passers-by is to **see that the structure is as safe as reasonable care can make it** — a duty which is as high as the duty which an occupier owes to people who pay to come on his premises" per Denning, L.J., at p. 1165 (emphasis added).

If one compares this duty to passers-by, to the two types of duties owed by landlords to tenants (regarding the means of access) as stated by Kelly, J.A., in **Sinclair** v. **Hudson Coal and Fuel Oil Ltd.** (supra note 18), one is driven to the conclusion that the duty under the law of nuisance to passers-by on the highway is far superior to the contractual duty to tenants respecting the means of access; the duty to tenants might be higher or lower depending on the tenant's use at the time of the injury (**supra** note 18 at p. 488). However, the duty owed to passers-by on the public highway will always be the higher duty.

It must be kept in mind, though, that, as well as other differences, **Sinclair** involved an icy sidewalk, while **Mint** v. **Good** dealt with the collapse of a wall on a public footpath, injuring the plaintiff, a third party. Of course, it is possible for snow and ice to constitute a public nuisance for which the landlord will be held responsible: **Hagen** v. **Goldfarb et al** (1961), 28 D.L.R. (2d) 746 (N.S.S.C.), and for which a property owner will be held responsible: **Taylor et al** v. **Robinson et al**, [1933] 3 D.L.R. 73 (Ont. C.A.). In **Mint** v. **Good** the wall separated the forecourt of two houses (owned by the same landlord) from the public highway (footpath). At p. 1165-1166, Lord Denning stated:

> "The law of England has always taken particular care to protect those who use a highway. It puts on the occupier of adjoining premises a special responsibility for the structures which he keeps beside the highway. If those structures fall into disrepair so as to be a potential danger to passers-by, they become a nuisance, and, what is more, a public nuisance, and the **occupier is liable to anyone using the highway who is injured by reason of the disrepair.** It is no answer for him to say that he and his servants took reasonable care, for, even if he has employed a competent independent contractor to repair the structure, and has every reason for supposing it to be safe, the occupier is still liable if the independent contractor did the work badly: see **Tarry** v. **Ashton** ((1876), 1 Q.B.D. 314)." (emphasis added) . . .
>
> "He is not liable for latent defects which could not be discovered by reasonable care on the part of anyone, nor for acts of trespassers of which he neither knew nor ought to have known: see **Barker** v. **Herbert** ([1911] 2 K.B. 633); but he is liable when structures fall into dangerous disrepair, because there must be some fault on the part of someone for that to happen and he is responsible for it to persons using the highway, even though he was not actually at fault himself. That principle was laid down in this court in **Wringe** v. **Cohen** (3) ([1939] 4 All E.R. 243), where it is to be noted that the principle is confined to 'premises on a highway'.
>
> The question in this case is whether the owner, as well as the occupier is under a like duty to passers-by. I think he is."

81. (1961), 28 D.L.R. (2d) 746 (N.S.S.C.). Plaintiff was a third party (i.e. not a tenant).

aware of the danger[82] to fix the roof whose condition facilitated the formation of the ice, and in nuisance for the disrepair of the building resulting in injury to a member of the public using the adjoining sidewalk. Currie, J., held that the tenant had nothing to do with the repair to the outside of the premises and consequently could not be held liable.[83] The most striking characteristic of the landlord's liability in nuisance is stated by Currie, J. at p. 758:

> *Prosser on Torts,* 2nd ed., s. 80, p. 465 says:
>
> In general a lessor of land is not subject to liability during the term of the lease for harm caused to the lessee, or to others upon the land or outside of it, by the condition of the premises or the activities of the lessee. To this rule the courts have developed a number of exceptions: [I shall quote three of these.]
>
> He may be liable to those outside of the premises for the continuance of conditions unreasonably dangerous to them *existing at the time of the transfer,* or for unreasonably dangerous activities of the lessee contemplated by the lease. (emphasis added)[84]

Note that this duty under nuisance is really much greater than the contractual duty owed by a landlord to a tenant in respect of the means of access retained in the control of the landlord. The landlord will be liable in nuisance for defects existing at the commencement of the letting, whereas he will not be liable in contract to a tenant for injury resulting from defects in the means of access which were visible when the letting commenced.[85]

In any event, it is submitted that for a case to be regarded as one actionable in nuisance,[86] the tenant must not be on the demised premises at the time of the injury;[87] and the nuisance must be in the nature of a

82. Note that in **Wringe v. Cohen** [1940] 1 K.B. 229, the Court of Appeal held that a landlord who has contracted to repair is liable in nuisance to a third party for non-repair even though he had no notice of non-repair at the time when the damage occurred. See Glanville Williams, 'The Duties of Non-Occupiers in Respect of Dangerous Premises' (1942), 5 Mod. L. Rev. 194 at p. 212. The law as laid down in **Wringe v. Cohen** was applied in **Mint v. Good** (**supra** note 80(b) at p. 1158 per Somervell L.J.) and it was immaterial whether or not the landlord had knowledge of the danger of the wall collapsing.

83. **Supra** note 81 at p. 759. Ergo, the outside wall was not part of the rented premises.

84. Note also at p. 759.
"If the lessor retains control of a part of the premises which the tenant is permitted to use, **he may be liable to the tenant** or a third person for his failure to exercise reasonable care to keep that part of the premises in safe condition. Prosser says [pp. 471-2] in this condition:
"It (the duty of reasonable care) extends also to those outside of the premises who may be injured as a result of their condition. It is entirely possible that as to any of these plaintiffs the landlord may be liable where the tenant is not" . . . **The obligation is one of reasonable care only, and the lessor is not liable where no injury to anyone was reasonably to be anticipated, or the condition was not discoverable by reasonable inspection."** (emphasis added).

85. **Supra** note 5. See also E. K. Williams, **supra** note 33 at p. 376.

86. I am, of course, excluding a private nuisance as mentioned in **supra** note 73.

87. (a) See E. K. Williams, supra note 33, at p. 395 and at p. 393 note "the distinction which in law exists between the liability of the occupier of property to an adjoining owner and his invitees or licensees and the liability of such an owner to his tenants of part of his estate and his invitees or licensees." However, in **Crown Diamond Paint Co. Ltd. v. Acadia Holding Realty Ltd.** [1952] 2 D.L.R. 541 (S.C.C.), Rand, J., (Rinfret, C.J.C., concurring) held that a landlord was liable in nuisance for water damage to plaintiff's goods, due to water seeping through the wall of the landlord's adjoining premises. See pp. 543-549.
(b) Also, for the tenant to have an action in nuisance, it is submitted that he can-

public nuisance with the tenant exercising his rights in his public status at the time the injury occurs, in other words, the tenant must be using the public sidewalk. It seems anomalous that a tenant should be precluded from recovery merely because he suffered his injury before walking onto the public sidewalk, while on the means of access retained in the landlord's control because such defect was in existence at the commencement of the letting, — whereas had the same injury occurred on the public sidewalk, he might have recovered.

> No doubt it is difficult for a layman to understand why, if he is walking along the road and slips into an excavation at the side, he should be entitled to recover, whereas if he slips into the excavation as he is endeavouring to get on the road he is not.[88]

IV. *The Effect of City By-Laws*

It is essential to consider the role of by-laws, and the effect that they might have in determining the liability of a landlord in any given situation. Do breaches of building by-laws give a tenant a cause of action? Prior to the enactment of S.98(1), the case law had been divided on the issue.

For instance, in *Wilson* v. *Institute of Applied Art Limited*[89] breach of a city by-law requiring stairways, exits and passageways in office buildings to be lighted and providing penalties for breaches of the by-law did not make the landlord liable in damages when he failed to light as required. Similarly, in *Gustin* v. *Williams*,[90] where a city ordinance required a landlord to maintain all parts of a building in a safe and sanitary condition, it did not establish a duty of care contravening the common-law rule that there is no liability to the tenant for the defective condition of the demised premises; the court held that change from the common-law position must come from the Legislature or reinterpreta-

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not even be on the means of access retained in the landlord's control at the time of the injury. If he is, then, (1) his action will take its form in negligence as in **Taylor v. Liverpool Corporation (supra note 72)**, but only if injury results from a defective portion in the control of the landlord, and only if the condition of the defective portion (and position) has changed since the commencement of letting . . . or (2), if the position of the defective portion retained in the landlord's control (which has caused the injury) has not changed since the commencement of the letting, but its condition has, then the tenant's action will be framed in contract. (Note that even where the condition has not changed since the time of letting, the landlord will be liable in contract where there is a concealed trap in the means of access. See **Lewis v. Leighside Holdings Ltd.**, supra note 43). The whole situation is summed up in Part 5A, infra.

88. **Howard and Wife v. Walker and Lake (Trustees) and Crisp**, [1947] 1 K.B. 860, per Lord Goddard at pp. 866-867. The plaintiff was injured due to a faulty condition of the pavement in front of a store. It was held that since the plaintiff received his injury not as he took his first step off the sidewalk into the store but, rather, as he took his last step on the way out of the store premises, he was not injured in his capacity as a person still in the exercise of his public right.
See R. J. Gray, 'Tort Liability of Landlords' (1965), L.S.U.C. Special Lectures p. 271 et seq.
The fact that the occupier has so arranged part of his premises as to mislead people into believing that it is part of the highway as in **Jacobs v. London County Council** [1950] 1 All E.R. 737; [1950] A.C. 361 where the forecourt was left as a continuation of the street, imposes no special duty on the landlord.

89. [1941] 2 W.W.R. 360 (Alta.). In **Devine v. London Housing Society, Ltd.** [1950] 2 All E.R. 1173, it was held that the landlord is not under a duty to maintain a reasonable standard of lighting on a staircase.

90. (1967), 62 Cal. Rptr. 838 (App. Dept. Superior Ct. Los Angeles).

tions by the highest appellate courts.[91] And in *Buxton* v. *Carriss*,[92] where a hotel guest died as a result of a defective gas burner, and there existed a Vancouver city by-law requiring that all gas appliances installed in the premises be maintained in safe working condition, the British Columbia Court of Appeal held that the by-law did no more than repeat the duty at common law. The court further held that the jury's reference to the by-law was superfluous. In his dissenting opinion, Mr. Justice Davey felt that the by-law did not create a private right of action; he believed that the trial judge erred in directing the jury that a breach of the by-law would support a verdict for the plaintiff. But, on the other hand, he also felt that the by-law was admissable to show the standard of reasonableness upon which the jury might act when considering the duty owed by the defendant invitor to his invitee.[93]

In Canada, the question as to whether or not a breach of a city by-law gives a tenant a cause of action for damages is dependent not on what the city council intended; but rather, on whether the council is given (a) the power to impose "statutory duties" by the Act creating the council, "breach of which would be a private wrong conferring a right of action for damages resulting from it,"[94] as opposed to (b) a power which merely gives the council power to impose public duties enforceable only by public remedies.[95] The problem is stated by Mr. Justice Davey:

91. **Id.** at p. 840.
92. **Supra** note 49.
93. **Supra** note 49, at pp. 768-772.
94. **Supra** note 49 at p. 770, per Davey, J.A.
95. **Ibid.** It is relevant to note s.740 in "The Municipal Act", S.M. 1970, C. 100. (Note that S.3(2) & 3(3) of the "Municipal Act" does not apply to the City of Winnipeg. Residents in Winnipeg must look to "The City of Winnipeg Act" S.M. 1971, c. 105).

Consider the result of S.740 of "The Municipal Act" in light of the following statement of Isley, J. at pp. 219-220 in **Commerford et al v. Board of School Commissioners of Halifax** [1950] 2 D.L.R. 207 (N.S.S.C.) quoting from Prof. Thayer in 27 Harv. L. Rev. 317 at pp. 331-3:

"But in the ordinary case the court cannot overlook the fact that the legislature **chose to omit** any provision for a private remedy. This omission of a perfectly familiar provision cannot be treated as accidental, and adding such a clause by implication means putting a different burden on the defendant from that which the legislature saw fit to impose. Important as it is to give full effect to what the legislature has said, reading the statute in the light of common-law principles, it is not less important to keep within the bounds fixed by the legislature, and not lightly enter upon the field of extension by implication, even though it be reasonable implication."

With respect to S.306(o) of the "Vancouver Charter", S.B.C. 1953, c. 55, requiring proper maintenance of gas appliances, Mr. Justice Davey stated, at p. 771 of **Buxton v. Carriss:**

"Clear and unambiguous language, wanting to respect of S.306(o), would, I think, be required to confer an extraordinary authority so far removed from the apparent purpose of the Act permitting the Council to create new causes of action that would interfere with private rights and duties under general provincial law as between invitor and invitee, or in other well-known legal relationships."

It is submitted that a similar conclusion could be reached with regard to relevant sections in "The Municipal Act". See for example:

Adoption of building standards, etc.

295(2) The council of any municipality may pass by-laws not inconsistent with any Act of the Legislature, or the regulations made thereunder to prescribe, regulate, and enforce standards

and consider, in view of **Wilson v. Institute of Applied Art Limited** (**supra** note 90):

By-laws.

295(3) The council of any municipality may pass by-laws, . . . (j) for regulat-

> Respondent submits that such (a private) action does lie. Little purpose will be served by canvassing the authorities on this sometimes difficult problem; they were fully discussed by the House of Lords in *Cutler* v. *Wandsworth Stadium Ltd.* [1949] 1 All E.R. 544. In *Orpen* v. *Roberts et al.* [1925] 1 D.L.R. 1101 at p. 1106, S.C.R. 364 at p. 370, Duff J. stated the approach to that question in this way: "But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty."[96]

In many jurisdictions in the United States, the intent of city councils have similarly been held to be irrelevant; by-laws in themselves, apart from statutes do not create civil liability.[97] There, as in Canada, courts have also been reluctant (in the absence of express authorization) to hold that statutes confer on city councils the power to create "statutory" duties, breach of which will create civil liability.[98] However, this is not a universal rule. Some jurisdictions will go so far as to allow a jury to be instructed that breach of a housing statute may be taken into consideration as a standard of reasonableness in determining owner liability.[99] Other jurisdictions have gone much further, holding evidence of violation of a housing code to be evidence of negligence per se; in effect, holding that a housing code establishes a standard of care,[100] even where the housing code is just a city ordinance. For example, *Gula* v. *Gawel*,[101] a decision of the Appellate Court of Illinois, involved an action against a

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ing the lighting of entrances to elevators, courts, and corridors in apartment, tenement, and business blocks and buildings.

Note that all the subsections in S.295(3) are merely regulatory in nature. The same is true of S.298 which allows municipalities' councils to pass by-laws for proper standards in dwellings and other structures. None of these sections contain provision for a private remedy. On the contrary, the remedies, like those in S.298(3) provide only for fines and other public remedies.

96. **Supra** note 49 at p. 770.

97. a) For example, **supra** note 90.
b) See 'Legal Remedies for Housing Code Violations', Research Report, No. 14. Prepared for the consideration of The National Commission of Urban Problems, Washington, D.C., 1968, Chapter 13, especially pp. 115-116 and cases cited therein.

98. **Supra** note 97(b).

99. **Whetzel v. Jess Fisher Management Co.** (1960) 282 F. 2d 943 (U.S. App., D.C.).

100. **Altz v. Lieberson** (1922), 134 N.E. 703 (N.Y. Ct. Appeals).
Mr. Justice Bazelon took note of the **Altz** decision in **Whetzel v. Jess Fisher Management Co. (supra)** at p. 945:
'That case (**Altz**) also involved a tenant injured by a falling ceiling. Judge Cardozo, writing for the New York Court of Appeals, held that the New York Tenement House Law, which provided the "every tenement house and all the parts thereof shall be kept in good repair", thus "changed the ancient rule" and imposed upon landlords a duty that "extends to all whom there was a purpose to protect". That statute did not specify who had the duty of repair; nor did it speak of tort liability. It only authorized penalties in criminal enforcement proceedings.(5) Nevertheless, the court held that:
The Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by anyone. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers.'
(5) New York Tenement House Act, New York Sess. Laws 1909, ch. 99 s. 124.
(Note the distinction in the requirement of notice when the part is retained in the landlord's control, and when the duty is one to **keep in** repair. Notice is not required in these 2 latter situations, **supra** note 31; **supra** note 32; **supra** note 33.)

101. (1966), 218 N.E. 2d 42.

landlord for injuries sustained in a fall on a stairway. The plaintiff and her husband were month-to-month tenants under an oral lease. Although the plaintiff was unsuccessful in her attempt to prove that the landlord had breached the housing code, nevertheless, Mr. Justice Dempsey determined that the Chicago Housing Code was clearly a public safety measure.[102] He held that violation of a city ordinance is prima facie evidence of negligence if the ordinance is designed for protection of human life and property. If the plaintiff falls within the class of persons which the ordinance was designed to protect and if the violation is the proximate cause of the injury, the plaintiff will have a cause of action.[103, 104]

If such a view were to have been adopted in Canada, then clearly there might have been very little need for sections in "The Landlord and Tenant Act" like S.98(1) (2).[105] However, there has been a reluctance

102. **Id.** at p. 46.

"The provisions of the Housing Code concern themselves to a large extent with the condition of premises leased to tenants, and the condition of such premises has an obvious connection with the health and safety of the tenant-occupant. A tenant is clearly within the class of persons designed to be benefitted and protected by the Code. Further, the Housing Code represents a significant change from common law standards. **At common law, there was no prohibition against letting a tumble-down house.** (1 Tiffany, Landlord and Tenant, sec. 86 at 557 (1910); **Koenigshofer v. Shumate**, Ill. App., 216 N.E. 2d 195 (1966)." (emphasis added).

and at pp. 46-47:

The Housing Code thus establishes a duty of care based upon contemporary conditions, values and norms of conduct in this community. We must assume that the ordinance reflects the collective judgment of the community as to the existence of potentially harmful conditions and what duties with respect to those conditions are expected by reasonable men in this community from both landlord and tenant. "The law of torts can only be out of joint with community standards if it ignores the existence of such duties." **Whetzel v. Jess Fisher Management Co.**, 108 U.S. App. D.C. 385, 282 F. 2d 943 (1960) at 946.

103. **Ibid.**

104. A further point to note is the factors which Dempsey, J., stated are to be taken into consideration when determining whether the tenant or the landlord is in control of the stairs; at p. 45:

"We do not consider (**Moore v. Lowery**, 342 Ill. App. 239, 96 N.E. 2d 382 (1951)) as holding that a stairway leading only to the second floor is a part of the demised premises of the second floor tenant as a matter of law. Where a stairway leads, the use to which it is put and by whom, are factors to be considered **by the trier of fact along with the intention** of the parties, the terms of their lease, the **responsibility** for repairs, maintenance and illumination and all other factors which tend to show control in either the landlord or the tenant." (emphasis added)

105. For example, in **Gula v. Gawel**, the housing code itself covered the duties listed in S.98(1), and (2).

At p. 46:

"The Code imposes the obligation upon the landlord to refrain from letting or holding out to another for occupancy any dwelling (defined as "any building which is wholly or partly used or intended to be used for living or sleeping by human occupants") or family unit (defined as "a room or group of rooms used or intended to be used as a housekeeping unit for living, sleeping, cooking and eating") which does not meet with the standards set out by the Code. Likewise, at common law, there was no duty upon the tenant to keep the premises in any particular condition — his duty was to use the premises in such a way as not substantially to injure them so that the estate would revert to the landlord undeteriorated by his willful or negligent conduct, **in other words, to avoid waste.** 45 A.L.R., Tenant's Covenant to Repair, 12, 13 (1926). Section 78-18.1(a) of the Code places upon the tenant the duty to 'keep that part of the family unit which he occupies and controls in a clean, sanitary **and safe condition'.**"

As far as means of access is concerned see p. 47:

"**In defining these standards of** care, section 78-14.6 requires every public stairway in a dwelling to be adequately lighted at all times . . .

Section 78.17.5 imposes a general requirement that every stairway shall be to adopt such a view, the main reason being due, in large part, to such judicial reasoning as that of Mr. Justice Duff in *Orpen* v. *Roberts*,[106] quoting from the reasons of Meredith, C.J.:

> "It is legitimate to observe that this construction if it were to prevail, would be an unfortunate construction. As Meredith, C.J., said, in *Tompkins* v. *Brockville Rink Co.*, 31 O.R., at p. 130, when one considers the different kinds of acts and conduct which municipal councils in Ontario are by statute permitted to prohibit or to regulate, and the multiplicity of duties they have authority to impose upon property owners and others within their jurisdiction, one is rather 'startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the nonperformance of it'."[107]

The probable effect of S.98(1) will be to require the landlord to comply with health and safety standards, including any housing standards required by law, independently of his duty to provide and maintain the "rented premises" in a good state of repair. In other words, though the duty to keep in repair extends only to the "rented premises," compliance with housing standards extends also to "land and premises appurtenant thereto."[108] Assuming that S.98(1) does in fact require compliance with all building by-laws, and not merely building by-laws with respect to the "rented premises", then all building by-laws may have been elevated to the status of statutory duties for the purpose of S.98(1). If by-laws are held to be statutory duties for the purpose of S.98(1), and if there can

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kept in safe condition and repair, and its subsections establish specific standards . . .

Section 78.17.5(f) requires the riser height and the tread width of each flight of stairs to be uniform."

Now consider some of the relevant sections regarding the exterior means of access in "The Metropolitan Corporation of Greater Winnipeg By-Law No. 711" — see **Appendix A.** Following the **Gula** decision, where a landlord failed, say, to to provide a nonskid finish on exit stairs (S.3.4.3.1), or if he failed to maintain it (S.1.6.4.), he would be in violation of the city by-law, and such a violation could be held to be prima facie evidence of negligence, as the city by-law is designed for protection of human life and property (preamble, S.1.3, and S.1.6). The plaintiff tenant, as occupant, would fall within the class of persons which the ordinance was designed to protect. If the violation is the proximate cause of the injury, the plaintiff tenant would have a cause of action.

Note: S.1.6.1.1. specifically states "cause damage or injury to **any** person or property" (emphasis added). The class of protected persons is, arguably, much larger than a class composed only of tenants.

106. [1925] 1 D.L.R. 1101 (S.C.C.).

107. Id. at p. 1106.
Note also **Hagen v. Goldfarb et al. Supra** note 81 at p. 756 per Currie, J., and **Commerford et al v. Bd. of School Com'rs of Halifax**, [1950] 2 D.L.R. 207. (N.S.S.C.).

108. Note that whereas the repairing obligation of S.98(1) in "The Landlord and Tenant Act" deals with the "rented premises", the power given by S.295 and S.298 of "The Municipal Act" to municipal councils to pass by-laws deals with "dwellings" and it would also include the exterior means of access retained in the control of the landlord:

DIVISION IV
BUILDINGS, ZONING, EXCAVATIONS, CHILDREN
Subdivision 1
CONSTRUCTION, PRESERVATION, SAFETY MEASURES, BUILDING REGULATIONS, UNSIGHTLY PREMISES

Definitions

295(1) In this Subdivision

(b) "dwelling" means a building or structure, or part of a building or structure, occupied, or capable of being occupied, in whole or in part, for the purposes of human habitation, and includes the land and premises appurtenant thereto and all porches and sheds or other out buildings, and all steps, fences, or erections thereon or therein.

be a claim for damages for breach of these duties,[108A] then that claim is no longer in essence, a claim for negligence;[109] it does not involve a standard of duty which is conclusively fixed by statute; it is a specific common law right.[110]

V. *Summary and Conclusions*

A. *The Position at Common Law*

In summing up the tenant's position at Common Law, one might say that a tenant not only takes his means of access as he finds it, but in addition, he also takes his chances of recovery *where* he finds it. When using the means of access retained in the control of the landlord, the tenant's rights are essentially contractual (the landlord's duty of keeping the means of access reasonably safe might be higher or lower depending on the use being made of the premises by the tenant at the time of the injury). But where a tenant suffers injury on the public sidewalk in front of the premises due to the state of disrepair (of parts in the landlord's control), then his action may be in nuisance, for he is exercising his rights in his public status; he is off the demised premises; and his action in (public) nuisance is not in conflict with the principles in *Cavalier* v. *Pope*.[111A] Unlike the action in contract, in the action of (public) nuisance, the tenant will not be precluded from recovery where the disrepair existed at the commencement of the tenancy. *Cavalier* v. *Pope* may also be inapplicable where a defective part retained in the control of the landlord falls and injures the tenant while the tenant is using the means of access which is also in the landlord's control. In circumstances such as these, *Taylor* v. *Liverpool Corporation*[111B] will operate; the ordinary rules of negligence will be applicable; and even a member of the tenant's family who is not a party to the contract can recover, even though such person would not be able to recover in other circumstances by virtue of *Cameron* v. *Young*.[111C]

108A. See **infra**, Part 5.2.

109. See M. R. Gorsky, 'The Landlord and Tenant Amendment Act, 1968-69 — Some Problems of Statutory Interpretation' (1970), LSUC Special Lectures 439, pp. 465-476. See, for example Lord Wright's statement in **London Passenger Transport Board** v. **Upson** [1949] A.C. 155 at p. 168:

> A claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction. It is not a claim in negligence in the strict or ordinary sense . . .

In regard to a right of action based on a breach of a statutory duty see Gorsky, **supra**, at pp. 458-459, and also **Fahey** v. **Jephcott** (1901), 2 D.L.R. 449 (Ont. C.A.).

110. See Gorsky, **supra**, at p. 466, for two statements from **Lochgelly Iron & Coal Co. Ltd.** v. **McMullan**, [1934] A.C. 1 adopted by Cartwright, J. in **Sterling Trust Corporation et al** v. **Postma and Little** (1965), 48 D.L.R. (2d) 423 at p. 429.

111A. **Supra** note 68. The argument is even stronger now that the landlord is also under a duty to repair even the rented premises by virtue of S.98(1).

111B. **Supra** note 72.

111C. **Supra** note 69.

B. *The Scope and Nature of S.98(1) as a Statutory Repairing Obligation; Some Observations and Recommendations:*

1. First, the duty is to keep *in* repair and *fit* for human habitation. This should lead to a reconsideration of the decision in *Dunster* v. *Hollis*[112] where the statutory (contractual) duty on the landlord was only that of fitness for human habitation. There, Lush J., held that it would be stretching the Act to say that the landlord was under an obligation to keep the steps in repair whether he could or could not know that they were defective.[113] If the courts in Manitoba extend the obligation of repairing the "rented premises" to parts appurtenant to the rented premises, then it is conceivable that even though the rented premises are fit for human habitation, the landlord will still be in breach of his statutory duty if the steps are in a defective state of repair.

It is submitted, that since the requirement of compliance with housing standards is not restricted to just the rented premises, then housing standards relating to means of access (exterior and interior), which are retained in the control of the landlord will also be within the scope of S.98(1), as will all other housing standards relating to "land and premises appurtenant thereto".[113A] But if such is not the case, then a special amendment should be introduced whereby the means of access retained in the landlord's control (exterior and interior) can be under the protection of S.98(1) which remains, "notwithstanding that any state of non repair existed to the knowledge of the tenant before the tenancy agreement was entered into". Since S.98(1) prevents the tenant's knowledge from being used as a waiver against him in respect of the condition of the rented premises, then there is no logical reason why this should not similarly be prevented in respect of the condition of the means of access retained in the landlord's control.[113B]

2. Secondly, breach of the statutory duty to repair will probably give rise to a cause of action for personal injuries and property damage.[114]

112. **Supra** note 22.
113. **Supra** note 30.
113A. See S. 295(1)(b) of "The Municipal Act".
113B. If S.98(1) had expressly included the word "exterior" where a tenant rents a whole dwelling, the word "exterior" would have included the exterior steps and path. See **Brown v. Liverpool Corporation** [1969] 3 All E.R. 1345 (C.A.).
The point arises on S.32 of the Housing Act 1961 (9 & 10 Eliz. II, C. 65) which provides:

> "Repairing obligations in short leases of dwelling house. (1) In any lease of a dwelling house, being a lease to which this section applies, there shall be implied a covenant by the lessor. (a) to keep in repair the structure and exterior of the dwelling house (including drains, gutters and external pipes) . . . (5) In this and the next following section the following expressions have the meanings hereby respectively assigned to them, that is to say: — 'lease' includes an underlease, an agreement for a lease or underlease, and any other tenancy, but does not include a mortgage, and 'covenant', 'demise' and 'term' shall be construed accordingly; 'lease of a dwelling house' means a lease whereby a building or part of a building is let wholly or mainly as a private dwelling and 'the dwelling house' means that building or part of a building; . . ."

114. Personal injury: **Walker and Wife v. Hobbs & Co. supra** note 7; **Treadway v. Mackin** (1904), 91 L.T. 310; Property damage: **Pembery v. Lamdin,** [1940] 2 All E.R. 434; **Bishop v. Consolidated London Properties, Ltd.,** [1933] L.J.K.B. 257.

It will be necessary for the plaintiff to show (1) that the defendant committed a breach of the statutory duty and (2) that the breach was a "causative factor" of the resulting injury.[115] In deciding whether there in fact is a cause of action under a specific statute, a court is mainly concerned with three or four key factors. Mr. Justice Schroeder, of the Ontario Court of Appeal, set out these factors in *Stewart* v. *Park Manor Motors Ltd.*:[116]

> An examination of the authorities makes it clear that in the determination of this question it ought to be considered whether the action is brought in respect of the kind of harm which the statute was intended to prevent, if the person bringing the action is one of the class which the statute was designed to protect, and if the special remedy provided by the statute is adequate for the protection of the person injured.[117]

Perhaps counsel for a landlord might argue that inasmuch as the statute creates a right not recognized at common law and at the same time provides a remedy for its enforcement, that is (1) termination of the tenancy agreement under S.98(3), and also (2), procedure for affecting repairs through the rentalsman under S.119, the statute has enacted and defined a procedure which is exclusive and has ousted the jurisdiction of the civil courts to grant damages for breaches of S.98(1) which result in personal injury or damage to property.[118]

Are these two remedies, in effect, the only remedies of which a tenant can avail himself? It is submitted that this question should be answered in the negative. Firstly, with regard to S.119, it should be pointed out that the language of S.119(1) is permissive: "the tenant may notify the rentalsman" of the landlord's refusal to make repairs. This would imply that such a remedy is not to be regarded as exclusive. The very nature of S.119 lends itself to be regarded as a remedy which is only in addition to any other remedy which the tenant might have. Secondly, the argument that termination of the tenancy agreement is the only other remedy available should also fail for reasons analogous to those stated by Lord Coleridge, C.J., in *Walker and Wife* v. *Hobbs & Co.*:

> It is admitted that this part of a house was not reasonably fit for habitation, and that the condition was not fulfilled. It is contended by the defendants that the word "condition" in this Act is to be construed according to the strict common law meaning of the term, and that it only means that the tenant may, at his option, repudiate the contract of tenancy if the condition is not fulfilled; but that it does not imply any promise by the landlord to the tenant. The term "condition" might have that limited meaning in some Acts, but it would be utterly irrational so to construe it in this Act.

115. See Gorsky, **supra** note 109, at p. 467, and especially the cases cited in footnote 95: See **Schofield et al v. Town of Oakville et al.** (1968), 69 D.L.R. (2d) 441 per McGillivray, J.A. at 444 referring to **Sterling Trust Corp. et al v. Postma and Little**, [1965] S.C.R. 324 at 329-330; (1965), 48 D.L.R. (2d) 423 at 429.

116. (1967), 66 D.L.R. (2d) 143 (Ont. C.A.).

117. **Id.** at p. 148. See **Dorosh v. Brentwood Chair & Table Mfg. Co.**, [1939] 3 D.L.R. 344, 47 Man. R. 133, [1939] 2 W.W.R. 150 (Man. C.A.) where a deliberate omission of an earlier provision was held to take away the right to sue in a civil court.

118. For a summary of the principles involved see the judgment of Schroeder, J.A., **supra** note 116 at pp. 147-148.

> *The object of the Act was to provide the working classes with reasonably fit and proper dwellings, and therefore to bind the landlords to provide such dwellings. It would not afford much protection to the tenant if his only remedy was to give up his tenancy, and turn out after he had been injured by the improper condition of the dwelling.* The reasonable interpretation of the Act is that it imports a promise by the landlord to the tenant that the dwelling is reasonably fit for habitation, upon which promise, if it is broken, the tenant can sue.[119] (emphasis added)

3. Where a landlord is under a covenant to repair parts retained in his control, he is liable to the tenant for breach of the covenant notwithstanding the fact that he has not received notice of disrepair.[120] Lack of notice of disrepair is also not a defence for the landlord where he has covenanted "to *keep* in repair" as opposed to merely contracting "to repair".[121] The duty of the landlord in S.98(1) is to provide and *maintain* the rented premises "*in* a good state of repair".

4. The statutory duty to repair cannot be contracted out of by virtue of the S.82 prohibition against any contrary agreements or waivers, and by virtue of S.118(2)(b) which declares that terms or conditions in tenancy agreements that contravene any of the provisions of the Act are void. However, exculpatory and indemnity clauses whose ultimate effect is to relieve the landlord from tort liability for his failure to comply with S.98(1) are not expressly excluded by the Act.[122] Lamont suggests that landlords can contract out of tortious liability arising from non repair.[123]

119. (a) **Supra** note 7 at pp. 459-460. See also **Cunningham** v. **Moore** [1972] 3 O.R. 369 (Scott, C.C.J.) affirmed on appeal [1973] 1 O.R. 357 (Holland, J.).
(b) Note that the statutory repairing obligations in England are only contractual in nature: "they are stated to be an implied condition in every lease to which the statutes apply" — Gorsky, **supra** note 109 at p. 472. See also **Ryall** v. **Kidwell** [1913] 3 K.B. 135 (C.A.).
(c) In respect of allowing a tenant to pursue alternative remedies for a breach of a statute, consider the statement of Lord Reading, C.J., at pp. 139-140:
"It may be that [the Legislature] thought that the [working class] tenant might be rather careless and would not take the trouble to enforce it, or that the costs would be too heavy for a working man to incur . . . Parliament thought that it was necessary to give some other remedy . . . All those provisions are means given by the Legislature for the purpose of enabling the tenant to obtain the benefit . . . [of] the statute."

120. **Bishop** v. **Consolidated London Properties Ltd.**, **supra** note 31; **Melles & Co.** v. **Holme**, supra note 32.

121. See **supra** note 33. But note that the courts have extended the requirement of notice to a case where the landlord has the right to enter and inspect the premises: **Morgan** v. **Liverpool Corporation**, [1927] 2 K.B. 131; approved in **McCarrick** v. **Liverpool Corporation**, [1947] A.C. 219.

122. Where the landlord is a public housing authority such an exculpatory clause might be declared invalid as being contrary to public policy. See **Thomas** v. **Housing Authority of the City of Bremerton** (1967), 426 P. (2d) 836 (Supreme Ct. of Wash.) per Finley, C.J.; and by way of explanation see: 'Landlord-Tenant — Exculpatory Clauses: Exculpation Contrary to Public Policy Where Landlord is Public Housing Authority' (1969), 44 Washington L. Rev. 498.
The clause provided:
The Management shall not be responsible for loss or damage to property, nor injury to persons, occurring [sic] in or about the demised premises, by reason of any . . . condition [or] defect . . . in said demised premises or the property of which the premises are a part, nor for the acts, omissions or negligence of other persons or Tenants in and about the said property . . .
The remainder of the clause contained an agreement by which the tenant agreed to indemnify the landlord from liability for injury to others on the demised premises. **Thomas v. Housing Authority of the City of Bremerton**, 71 Wn. 2d 69, 70, 426 P. 2d 836, 837 (1967).
However, see J. S. Key, 'Landlord and Tenant — Exculpatory Provisions in A Lease Affecting Landlord's Liability for Defects in Common Walkway' (1962-3), 15 Ala. L. Rev. 266, and also: 'Real Property — Exculpatory Clause in a Lease Not Invalid as Against Public Policy' (1962), 22 Maryland L. Rev. pp. 256-257.

123. **Supra** note 2 at p. 29.

Gorsky, on the other hand, is of the opinion that the tenant cannot waive his right to damages in this regard;[124] firstly, because the modern tendency is to make the statutory provision protect tenants from landlords irrespective of any agreement between the parties: "the movement is from contract to status."[125] Secondly, Gorsky argues that if a landlord can exclude liability in tort, then what cannot be done directly would be done indirectly through the use of exculpatory clauses:

> By permitting exclusion of liability for personal injury or property damage the courts would be saying that only one effective head of damages would remain for breach of the statutory duty. And, if this is possible, why should it not also be possible to exclude liability for all damage by employing the same argument.[126]

That the landlord should not be able to contract out of tort liability is a principle which is readily discernible if one looks at the nature of the duty in S.98(1). It is possible to determine this nature by comparing S.98(1) to the repairing obligations in the English statutes.[127] In England, the statutory warranty as to fitness has been held to be a promise introduced into the contract of lease which would otherwise not be implied;[128] the language of those statutes clearly made the warranty only a condition of a contract.[129]

> It would not have been necessary to import a condition into the contract; Parliament could have said — as it has said in the Factory and Workshop Act, 1901, and in many other statutes — that the landlord shall keep the premises in repair, and if so there would have been an obligation imposed upon him by statute.[130]

It is submitted that S.98(1), by its language, imposes this latter kind of an obligation, that is, a statutory one.[130A] Since the duty is statutory as opposed to merely a purely contractual one, it is arguably not a duty which the landlord should be allowed to contract out of; even in respect of his liability in tort. It is further submitted that some express protection regarding this latter aspect could be injected into the Act. To allow the landlord to add an exemption clause for tort liability would, in effect, be allowing the tenant to sign away his rights under the Act. There is a way of preserving some form of freedom of contract and still protect the interests of the tenant. One example is found in S.9 of the English

124. **Supra** note 109, at p. 476.
125. **Ibid.** (from Megarry and Wade, **Real Property** 1967 at p. 707, S.4).
126. **Supra** note 109 at p. 476.
127. The "Housing of the Working Classes Act" (1890), 53 & 54 Vict., C. 70, S.5; and subsequently incorporated into the "Housing Town Planning, Etc. Act" (1909), 9 Edw. VII, c.44, s.14; and then the "Housing Act" (1936), 26 Geo. V & Edw. VIII, c. 51, s.2 as amended and now the "Housing Act" (1957), 5 & Eliz. II, c.56, s. 6, and the "Housing Act" (1961), 9 & 10 Eliz. II, c. 65, s. 32 and also see Millner, M.A., **Negligence in Modern Law**, Butterworths, London, 1957, p. 46.
128. **Supra** note 109 at p. 472, **Ryall v. Kidwell**, [1913] 3 K.B. 135 at p. 139 per Lord Reading, C.J.
129. **Ryall v. Kidwell, supra** at p. 140.
130. Lord Reading, C.J. at p. 141 of **Ryall v. Kidwell, supra.**
130A. To the extent that the duties also appear in the Standard Residential Tenancy Agreement they also become contractual duties.

Landlord and Tenant Act of 1927.[131] That Act dealt with the payment of compensation for improvements and goodwill to tenants of premises used for business purposes or, alternatively, the grant of a new lease. The section reads, in part, as follows:

> this act shall apply notwithstanding any contract to the contrary . . . provided that if on the hearing of a claim or application under this part of this act it appears to the tribunal that a contract . . . so far as it deprives any person of any right under this part of this act, was made for adequate consideration, the tribunal shall in determining the matter give effect thereto.

Bora Laskin noted this section with approval:

> In short, not only must there be some consideration for the tenant's signing away his rights under the Act, but the consideration must be adequate in the opinion of the court. The old notion that it is not for the court to make a bargain for the parties, whatever its validity, is here destroyed by a statute which, in effect, places the onus of safeguarding the interests of the tenant under the Act on the courts. The provisions of this act came under discussion in *Holt* v. *Cadogan* (1930), 169 L.T. 234, where the court pointed out that, for a contract depriving the tenant of statutory benefits to be valid within the meaning of the Act, the benefits obtained by the tenant under the contract must approximate in value the loss of rights under the Act sustained by him.[132]

It would seem that a section like S.9 of that Act could serve to protect the tenant provided that the section makes specific reference only to contracting out of liability in tort. Adequate compensation could include a promise to purchase indemnity insurance which would meet any claim by the tenant or by other persons that the landlord might be faced with. In any event, compensation should only be regarded as adequate where it served to meet the tenant's actual damages.[133, 134] Also, if the landlord's duty extends to more people than just the tenant, then there should be added an express prohibition against any form of indemnity clause which the landlord might seek to obtain from a tenant.

5. Who is protected by S.98(1)? Gorsky states:

> It can hardly be said that tenants and persons lawfully on the leased premises are not the particular and ascertainable class who might be injured as a result of the breach of the landlord's duty.[135]

131. 17 Geo. V, c. 36.
132. Bora Laskin, 'The Protection of Interests by Statute and The Problem of "Contracting Out"' (1938), 16 C.B.R. 669, at pp. 686-687.
133. For judicial support of the proposition that landlords are better able to carry the burden of compensation and distribute the cost by insurance see **Mint v. Good** [1951] 1 K.B. 517 at p. 528 per Denning, L.J.
134. Respecting exculpatory clauses in general, they will be strictly construed to the point where the things relieved against must be specifically described. An attempt to relieve liability to "any person" is ineffectual against persons who are not parties to the lease: **Richardson** v. **St. James Court Apartments Ltd.** (1963), 38 D.L.R. (2d) 25, especially at p. 28. In this case, Aylen, J. held that this exculpatory clause respecting water and snow did not relieve the landlord from liability due to ice. Respecting indemnity clauses see **John Lee & Son (Grantham), Ltd. and Others** v. **Railway Executive** [1949], 2 All E.R. 581 (C.A.) (indemnity clause unsuccessful), and also **Warrelow** v. **Chandler & Braddick and Another** [1956], 3 All E.R. 305 (Lynskey, J.) (indemnity clause successful).
135. **Supra** note 109, at p. 460.
Re: "particular ascertainable class", see the statement of Lord Goddard, C.J. in

It is therefore argued that third parties will also have a right of action against the landlord. As noted in 5.4, the duty to repair in S.98(1) is more than a mere contractual term between the parties. It is important to point out that the whole of the Part IV amendments, apply not only to tenancy agreements but also to "tenancies of residential premises".[136] At the very least, the protection of S.98(1) probably extends to all occupants by virtue of S.2(h) of the Act,[137] and also by virtue of Paragraph 1 of the Standard Residential Tenancy Agreement.[138] It is submitted that the fact that S.98(1) uses the words "to the knowledge of the tenant" merely serves to take away the possibility of the landlord using the tenant's knowledge of the previous state of disrepair at the beginning of the tenancy agreement as a defence. Those words should not be taken as in any way limiting the landlord's liability to only the tenant.[139] Admittedly, if S.98(1) applies to tenancies in the broader sense and not merely tenancy agreements, it must therefore envisage a duty to persons who are permitted on the premises by the tenant. Note that S.98(1) must be read subject to 98(2); and S.98(2)(c) deals not only with the tenant, but also a person resident in his rented premises, and others permitted on the premises by him, even though S.98(2) is directed to the tenant.

> Any realistic consideration of the purposes of the warranty as to fitness as created by Section 98(1) will disclose the absurdity of permitting the landlord to take advantage of the chance selection of the persons who are to benefit from the statutory obligation. [140, 140A]

Solomon v. R. Gertzenstein, Ltd. and Others, [1954] 1 All E.R. 1008 (reversed on other grounds, [1954] 2 All E.R. 625), at p. 1012.

See also **supra** note 109, p. 460 footnote 78:

"See the statement of Atkin, L.J. in **Phillips v. Britannia Hygienic Laundry Company Limited** [1923] 2 K.B. 832 at 842 cited with approval by McRuer, C.J.H.C. (as he then was) in **Toronto-St. Catharines Transport Limited v. The City of Toronto and Canadian National Railway Company**, [1951] O.R. 333 at 341, reversed on other grounds [1952] O.R. 29: '. . . **(T)he question is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual.** The duty may be of such paramount importance that it is owed to all the public . . . It may be conferred on any one who can bring himself within the benefit of the Act, including one who cannot be otherwise specified than as a person using the highway.' (Italics in judgment of McRuer, C.J.H.C.)"

136. S. 82.

137. "tenant" includes lessee, occupant, sub-tenant, under-tenant, and his or their assigns and legal representatives.

138. Provision is made for indicating who the occupants will be (including any natural increase in the tenant's family). Quaere: Can the parties agree who is to be an occupant? Certainly that is a question of fact. If there is a particular and ascertainable class of persons protected by the Act, then mere agreement between the parties to the lease cannot alter those whom the Act seeks to protect.

139. See Gorsky **supra** note 109 at p. 474, footnote 128. See **supra** note 5. Under the common law the tenant took his means of access retained by the landlord as he found it; the landlord not being liable for defects visible at the commencement of the letting. With respect to demised premises, the landlord's duty was nil unless (1) modified by contract, (for "fraud apart there is no law against letting a tumble-down house" per Erle, C.J. at p. 240 in **Robbins v. Jones** (1863), 15 C.B.N.S. 221). See **supra** note 34(3); and (2), in the case of furnished premises there was an implied condition of the lease that the premises are fit for habitation at the commencement of the tenancy: **Smith v. Marrable** (1943), 152 E.R. 693 (Ex.).

140. Gorsky, **supra** note 109 at p. 474.

140A. S.M. 1972, C.39, S.3 amended S.98(4) which section deals with creating a nuisance or disturbance "to other residents in the building". Prior to this amendment, S.98(4) used the words: "to other tenants in the building". Now, a landlord or a "complaining resident" may lay an information before a magistrate.

It is submitted that S.98(1) could and should enable third persons, who or whose goods are lawfully on the premises to take the benefit of the landlord's covenants and statutory duties to repair. In England this has been accomplished within the limits of S.4 of the "Occupier's Liability Act"[141] in conjunction with the "Housing Act" 1957, S.6[142] and the "Housing Act" 1961, S.32.[143, 144] Furthermore, by virtue of S.3 of the "Occupier's Liability Act", where a landlord in England is bound by the terms or conditions governing the tenancy to permit persons to use the means of access retained in his control, he owes to such persons the common duty of care imposed on an occupier of premises.[145] Insofar as *Fairman* v. *Perpetual Investment Building Society*[146] and *Jacobs* v. *London County Council*[147] and similar cases decided that a landlord owed a lesser duty to a tenant's guest or lodger, those cases are no longer good law in England.[148] It is submitted that hopefully S.98(1) should serve to produce the same result in Manitoba — protecting the tenant, other occupants, the tenant's guests, and the tenant's invitees — not only in the demised premises but also on the means of access, exterior and interior, which is retained in the control of the landlord. In this regard, it is hoped that S.98(1) will, in effect, re-establish the principle that the *Fairman* case and other cases had eliminated. That principle is this:

> The tenants of the suites have a right to the use of the hallway leading to their suites . . . as a right appurtenant to their occupation, and their friends and guests have the same rights and are entitled to the same protection.[149]

A FINAL WARNING

Perhaps it might be worthwhile to again register a caveat to the tenant's protection in S.98(1). As stated in the introduction, it would be illogical to hold the landlord to a lesser duty respecting those parts under his control, than the duty respecting parts which are not under his control (that is, the demised premises). As also stated in the introduction, to say that the S.98(1) duty to repair includes the landlord's duty in respect of the means of access retained in his control but effects no change there in the landlord's duty is clearly wrong; *for at common law the landlord is not liable to a tenant for visible defects in existence when that tenancy commenced.* If Mr. Lamont and others mean that S.98(1)

141. (1957), 5 & 6 Eliz. II, C.31.
142. 5 & 6 Eliz. II, C.56.
143. 9 & 10 Eliz. II, C.65.
144. See M. A. Milner, **Negligence in Modern Law**, Butterworths, London, 1967, p. 46. **Ryall v. Kidwell** [1913] 3 K.B. 135 (C.A.), and **Middleton v. Hall** (1912), 108 L.T. 804 in holding that the landlord is not liable to tenants, wife, and guest, do not represent the present law in England.
145. **Halsbury's Laws of England**, Vol. 23, 3rd ed. p. 573, para. 1247.
146. **Supra** note 77.
147. **Supra** note 78.
148. **Supra** note 145 footnote e.
149. **Wallich v. Great West Construction Co.** (1914), 6 W.W.R. 1404 (Man. K.B.), at p. 1406 per Macdonald, J.

excludes from its scope the means of access retained in the landlord's control, then the tenant is not protected so far as these pre-existing defects are concerned. The result in this latter case is that the tenant has greater protection in the demised premises where control is with the tenant, than on the means of access where control is with the landlord. The result is made even more anomalous when it is realized that where a tenant rents an entire residential dwelling the means of access will be part of the rented premises, and the landlord will be liable for the pre-existing defects even though the landlord is not in control here.

It is submitted that S.98(1) might require an amendment to make the landlord's duty in respect of parts he retains control just as extensive as his duty in respect of the rented premises. That is, the duty for parts retained in the landlord's control should also be extended to apply to pre-existing defects, as S.98(1) stipulates in regard to the rented premises. I say that is necessary, out of caution, and in consideration of the dicta of Mr. Justice Cardozo in *Altz* v. *Leiberson.*[150]

> "Every tenement house and all the parts thereof shall be kept in good repair." Section 102 (N.Y. Tenement House Act, N.Y. Sess. Laws 1909, ch. 99).
>
> The comprehensive sweep of this enactment admits of no exception. We are not at liberty to confine it to those parts of the building not included within the premises demised. The Legislature has said that the duty shall extend, not only to some parts, but to all. Apter words could hardly have been chosen wherewith to exclude division of responsibility between one part and another.

Section 98(1), in effect, represents the converse situation and by confining the duty to repair pre-existing defects to the rented premises, S.98(1), admits of an exception respecting pre-existing defects in the means of access retained in the landlord's control. A court would clearly be at liberty to confine the duty to the rented premises. Even if building by-laws are elevated to the status of statutory duties, there would still be a gap if a court holds that by-laws respecting only the rented premises are to be elevated to the higher status for the purpose of S.98(1).

It is therefore submitted that a further amendment is needed to fill the existing gap in the legislation. For example:

> 98(1) (A) (i) Without restricting the foregoing the landlord is also responsible for providing and maintaining parts retained in his control (both exterior and interior) including those parts which might be used in common by the tenants, in a reasonably safe condition, and for complying with health and safety standards, including any housing standards required by law and notwithstanding that any state of non-repair or defect existed to the knowledge of the tenant before the tenancy agreement was entered into.
>
> ii) The landlord's responsibility in S.98(1) and in S.98(1)(A) for complying with health and safety standards, including any housing standards required by law shall be exclusive of and in addition to:

150. **Supra note 100 at p. 704.**

a) the landlord's responsibility in S.98(1) to maintain and provide the rented premises in a good state of repair and fit for habitation during the tenancy; and

b) the landlord's responsibility in S.98(1) (A) to maintain and provide the premises retained in his control (both exterior and interior) in a reasonably safe condition.

iii) For the purpose of S.98(1) (A) (i), the question of control shall be a question of fact dependent on the circumstances of each particular case.

HAROLD J. ARKIN, LL.B.*

APPENDIX A

Excerpts from:

THE METROPOLITAN CORPORATION OF GREATER WINNIPEG
By-Law No. 711

A BY-LAW OF THE METROPOLITAN CORPORATION OF GREATER WINNIPEG TO REGULATE THE ALTERNATION, ERECTION, REPAIR, REMOVAL AND OCCUPANCY OF BUILDINGS AND THE INSTALLATION OF ELECTRICAL, PLUMBING AND DRAINAGE FACILITIES AND THEIR INSPECTION.

SECTION 1.3. SCOPE

1.3.1. This By-law shall regulate new and existing construction, including the construction, addition, alteration, repair, demolition, relocation, removal and occupancy of any new or existing construction and shall include buildings of a public utility.

SECTION 1.6. DANGEROUS AND UNSAFE CONDITIONS

1.6.1.1. Any building or structure, that is in a dangerous condition in that it is liable to fall or be set on fire, or to cause an explosion, or to cause damage or injury to any person or property, or that, in the case of a well, excavation, or opening, is not properly covered or guarded, or that, in the opinion of a Designated Officer of The Corporation is so dilapidated, out of repair, or otherwise in such condition, that it is a trap for persons or animals, shall not be allowed to remain in such a condition but shall be demolished, guarded, or put in a safe condition, to the satisfaction of the Designated Officer.

1.6.4. All buildings existing and new, and all parts thereof, shall be maintained in a safe and sanitary condition. All devices or safeguards which are required by this By-law in a building when erected, altered, or repaired, shall be maintained in good working order. The owner or his designated agent shall be responsible for the maintenance of such buildings.

SECTION 1.10. PENALTIES

1.10.1.1. Any person who contravenes or disobeys, or refuses or neglects to obey,

(1) any provisions of this By-law or any provision of any other Act that by this By-law, is made applicable to The Corporation or made applicable to proceedings taken or things done under this By-law; or

(2) any provision of any by-law, regulation, or order enacted or made by the Metropolitan Council; for which no other penalty is herein provided, is guilty of an offence and liable, on summary conviction, to a fine not exceeding one thousand dollars in the case of an individual, or, five thousand dollars in the case of a corporation, or in the case of an individual, to imprisonment for a term not exceeding six months or to both such a fine and such an imprisonment.

1.10.3. Every such person shall be deemed guilty of a separate offence for each and every day during any portion of which the breach is made or continued.

SUBSECTION 3.4.3. TYPES OF MEANS OF EGRESS FACILITIES —
Stairs and Ramps

3.4.3.1. All treads, landings and ramps shall have *a non-skid finish.*

3.4.3.4.(2) Every exist ramp or stairway shall have a handrail on at least one side, *and when 44 in. or more in width, shall have handrails on both sides.*

3.4.3.7. Treads and risers shall be so proportioned that the product of the rise and run in inches shall be not less than 70 nor more than 75; *risers shall have a maximum height of 7¾ in.* and a minimum height of 5 in.; and treads shall have a minimum width of 9 in. exclusive of nosing.

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