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DAMAGES FOR BREACH OF THE IMPLIED WARRANTY OF HABITABILITY IN ILLINOIS—A REALISTIC APPROACH

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In the 1972 landmark case of *Jack Spring, Inc. v. Little*,¹ the Illinois Supreme Court abandoned the ancient common law rule absolving a landlord of any obligation to maintain² or repair³ residential premises, and recognized the existence of an implied warranty of habitability in all residential leases.⁴ This implied warranty imposes a duty upon the landlord of residential rental premises to substantially comply with applicable municipal building code health and safety provisions.⁵ By abandoning feudal property law and viewing the residential landlord-tenant relationship essentially as one of contract, with corresponding obligations on both parties, the *Spring* court gave to tenants' rights advocates hope that, at long last, the courts could be utilized as an effective device to help achieve decent housing and fair treatment of tenants.

While *Spring* and its progeny⁶ have firmly established the implied warranty in Illinois, the *Spring* doctrine generally has not been received sympathetically in the trial courts.⁷ As documented by a recent

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1. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

2. See *Sunasack v. Morey*, 196 Ill. 569 (1902).

3. See *Blake v. Ranous*, 25 Ill. App. 486 (1888).

4. 50 Ill. 2d at 366, 280 N.E.2d at 217.

5. *Id.*, 280 N.E.2d at 217.

6. See *Fisher v. Holt*, 52 Ill. App. 3d 164, 367 N.E.2d 370 (1977); *Jarrell v. Hartman*, 48 Ill. App. 3d 985, 363 N.E.2d 626 (1977); *South Austin Realty Ass'n v. Sombright*, 47 Ill. App. 3d 89, 361 N.E.2d 795 (1977); *Richardson v. Wilson*, 46 Ill. App. 3d 622, 361 N.E.2d 110 (1977); *Gillette v. Anderson*, 4 Ill. App. 3d 838, 282 N.E.2d 149 (1972).

7. See *Richardson v. Wilson*, 46 Ill. App. 3d 622, 361 N.E.2d 110 (1977); *South Austin Realty Ass'n v. Sombright*, 47 Ill. App. 3d 89, 361 N.E.2d 795, 798 (1977). In the Circuit Court of Cook County, despite clear precedent, trial courts have failed to enforce the implied warranty of

two year study of Eviction Court in the Circuit Court of Cook County, Illinois,⁸ breach of the implied warranty of habitability is the most often alleged defense by tenants in eviction actions,⁹ yet the trial courts repeatedly refuse to consider this defense or otherwise fail to reach the merits of warranty claims.¹⁰

Several reasons may explain the trial courts' hostility to these cases,¹¹ including an overburdened caseload for judges hearing evictions,¹² the built-in conflict presented in such cases between human and property interests,¹³ the long standing practice and role of Eviction Court,¹⁴ and the lack of familiarity with the conditions of the housing involved.¹⁵ Beyond these reasons, an additional explanation for this anomalous result may be the lack of standards and guidelines as to how the court should determine the amount of damages suffered by the tenant as a result of the breach of warranty.¹⁶ The complete lack of

habitability established in *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972). See note 11 *infra*.

8. Judgment Landlord: A Study of Eviction Court in Chicago (J. Birnbaum, N. Collins, A. Fusco, Jr., Coordinators, S. Mansfield, Editor, 1978) [hereinafter cited as Judgment Landlord]. This study, a joint project sponsored by The Legal Assistance Foundation of Chicago, The National Lawyers Guild, Chicago Chapter and The Chicago Council of Lawyers, was released on April 7, 1978.

9. *Id.* at 11-12, 42.

10. *Id.* at 44-45.

11. Data collected in Judgment Landlord, *supra* note 8, emphatically demonstrates that despite clear Illinois law, tenants do not prevail on the merits of an implied warranty of habitability defense in the Eviction Court in Chicago. Tenants raised implied warranty of habitability defenses in 41.1% (179 of 435) of the contested cases, and these defenses constituted 29.1% (179 of 615) of the total number of defenses raised by tenants. *Id.* at 44. Despite the fact that the habitability defense was the most frequently raised defense, no tenant prevailed on the merits of the defense. On the other hand, landlords were awarded summary possession in 93.3% (167 of 179) of these cases. *Id.* at 44-45. While 2.2% (4 of 179) of these cases were involuntarily dismissed, all of the involuntary dismissals were based on other defenses, such as improper notice, rather than on the merits of the habitability defense. *Id.* at 45. The remaining 4.5% (8 of 179) of these cases were disposed of by other means. *Id.*

12. As noted in Judgment Landlord, *supra* note 8, at 1, in 1977, 64,748 lawsuits seeking eviction orders were filed in the Cook County Circuit Court, First Municipal District (City of Chicago) alone. Eviction actions constitute 26.6% of all suits filed in the First Municipal District, yet only two courtrooms hear eviction cases in Chicago. *Id.* at 2. The total time devoted to eviction cases in these courtrooms is approximately 3 1/2 hours per day during which time an average of 210 cases are set for call. *Id.* at 3. Data collected by observers indicated that the average amount of time devoted by the court to a contested eviction was approximately two minutes. *Id.* at 9.

13. See Hon. Leonard Cohen, *Urban Housing Court and Landlord-Tenant Justice: National Models and Expenses*, Report of the ABA Special Committee on Housing and Urban Development Law, at 26 (Sept. 1977).

14. See Judgment Landlord, *supra* note 8, at 114-21.

15. See Mosier & Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J.L. REF. 8, 63 (1973).

16. It is important to note that the promulgation of clear standards for the proper measure of damages in implied warranty of habitability cases will not, in and of itself, resolve the problems regarding the treatment of these cases in the Eviction Courts. These cases in particular and eviction cases in general may no longer be treated as summary proceedings. *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972). Without substantial changes in the manner in which evic-

clear standards for the Illinois courts makes the task of calculating and proving with certainty the amount of damages in these cases a difficult one.¹⁷

This article will address the problem created by the lack of clear standards for determining the proper measure of damages for breach of the implied warranty of habitability. The first portion of this article will review the historical development of the implied warranty of habitability in Illinois, analyzing *Spring* and its progeny. Second, this article will discuss and critically evaluate the measures adopted in other jurisdictions for determining damages. Finally, the authors will propose a new measure of damages for breach of the warranty of habitability in Illinois—the loss of use to the tenant.

HISTORICAL DEVELOPMENT OF THE IMPLIED WARRANTY OF HABITABILITY IN ILLINOIS: *JACK SPRING, INC. v. LITTLE* AND ITS PROGENY

By adopting the implied warranty of habitability in *Jack Spring, Inc. v. Little*,¹⁸ the Illinois Supreme Court fundamentally changed its view of the nature of the landlord-tenant relationship. The court quoted extensively from the seminal opinion of the United States Court of Appeals for the District of Columbia in *Javins v. First National Realty Corp.*,¹⁹ and traced the old common law rule that a landlord has no obligation to maintain or repair the premises to agrarian notions of a lease as an interest in land.²⁰ The court rejected these assumptions as

tion cases are presently handled, the promulgation of clear standards for the proper measure of damages, as advanced in this article, will have little practical meaning. Necessary changes include, but are not limited to the following: (1) separate courtrooms should be established for the trial of warranty of habitability cases and other complex fact cases; (2) judges assigned to hear such cases should be specially trained; (3) comprehensive rules of practice and procedure for eviction cases should be created; and (4) a trial manual for eviction judges should be developed. These and a number of other reforms were proposed in Judgment Landlord, *supra* note 8, at 121-30, and were substantially endorsed in the *Report of the Chicago Bar Association Special Committee on Forcible Entry and Detainer Court*, at 4-6. This latter report was released on June 21, 1978, and copies are available from the Chicago Bar Association.

17. The absence of complete certainty of the amount of damages is not a bar to recovery in Illinois. *Illinois Power Co. v. Champaign Asphalt Co.*, 19 Ill. App. 3d 74, 310 N.E.2d 463, 469 (1974); *Tri-County Grain Terminal Co. v. Swift & Co.*, 118 Ill. App. 2d 313, 254 N.E.2d 311 (1969). The Illinois courts, in this regard, have adopted generally accepted principles of evidence. *See MCCORMICK, DAMAGES* § 27 (1935); 5 CORBIN, CONTRACTS § 1020 (1950 & Supp. 1971). For a more detailed discussion, *see* text accompanying notes 100-03 *infra*.

18. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

19. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

20. The *Javins* court stated:

The common law rule absolving the lessor of all obligation to repair originated in the early Middle Ages. Such a rule was perhaps well suited to an agrarian economy; the land was more important than whatever small living structure was included in the leasehold, and the tenant farmer was fully capable of making repairs himself. These histori-

inapplicable to contemporary housing patterns,²¹ and held that "included in the contracts, both oral and written, governing the tenancies of the defendants in the multiple unit dwellings occupied by them is an implied warranty of habitability which is fulfilled by substantial compliance with the pertinent provisions of the Chicago Building Code."²² For the first time,²³ the court imposed upon the landlord-tenant rela-

cal facts were the basis on which the common law constructed its rule; they also provided the necessary prerequisites for its application.

Court decisions in the late 1800's began to recognize that the factual assumptions of the common law were no longer accurate in some cases. For example, the common law, since it assumed that the land was the most important part of the leasehold, required a tenant to pay rent even if any building on the land was destroyed. Faced with such a rule and the ludicrous results it produced, in 1863 the New York Court of Appeals declined to hold that an upper story tenant was obliged to continue paying rent after his apartment building burned down. The court simply pointed out that the urban tenant had no interest in the land, only in the attached building.

Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 363-64, 280 N.E.2d 208, 215-16 (1972) (quoting *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077-78 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

21. Citing *Ingalls v. Hobbs*, 156 Mass. 348, 349-50, 31 N.E. 286-87 (1892), and *Javins v. First Nat'l Realty Corp.*, 426 F.2d 1071, 1078-79 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970), the court noted:

[S]ome courts began some time ago to question the common law's assumptions that the land was the most important feature of a leasehold and that the tenant could feasibly make any necessary repairs himself. Where those assumptions no longer reflect contemporary housing patterns, the courts have created exceptions to the general rule that landlords have no duty to keep their premises in repair

Our approach to the common law of landlord and tenant ought to be aided by principles derived from the consumer protection cases referred to above. In a lease contract, a tenant seeks to purchase from his landlord shelter for a specified period of time. The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his building. Moreover, the tenant must rely upon the skill and bona fides of his landlord at least as much as a car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant's position corresponds precisely with the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose.

Since a lease contract specifies a particular period of time during which the tenant has a right to use his apartment for shelter, he may legitimately expect that the apartment will be fit for habitation for the time period for which it is rented.

50 Ill. 2d at 364-65, 280 N.E.2d at 216 (citations omitted).

22. *Id.* at 366, 280 N.E.2d at 217. The party asserting a breach of the implied warranty of habitability must make out a two-step prima facie case. First, the party must prove the existence of the conditions which give rise to a breach of the warranty during the relevant period of time. This may be done by tenant or other testimony as to the actual conditions of the premises at issue. See notes 117-21 *infra* and accompanying text. The party asserting breach also must prove that there exists an implied warranty and that the premises by virtue of these defects are either not in substantial compliance with the provisions of the applicable building code, or where no such code exists, that habitability of the premises has been diminished.

Second, the party must prove damages. This requires evidence of the nature and severity of the defects, their duration, their effect on safety, health and sanitation and how each interfered with the tenant's use and enjoyment of the premises. See text accompanying notes 96-116 *infra*. Once the prima facie case is presented, of course, the landlord may offer rebuttal evidence.

23. An implied warranty to comply with all local building code regulations was no stranger to Illinois law prior to the *Spring* case. It had been long settled law that in contracts to purchase real property there exists an implied warranty of compliance with the building code. See *Schiro v. W.E. Gould & Co.*, 18 Ill. 2d 538, 165 N.E.2d 286 (1960) (and cases cited therein). However, not until the *Spring* case was an analogy drawn to the landlord-tenant relationship.

tionship an affirmative obligation for a landlord to repair and maintain residential premises.²⁴

The *Spring* court explained the policy reasons underlying the modern landlord's obligation:

Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in a house suitable for occupation. Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the 'jack-of-all-trades' farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property.²⁵

Applying the warranty doctrine to the particular facts of the case,²⁶ the *Spring* court held that breach of the implied warranty of habitability may be raised as an affirmative defense by a tenant in an eviction action based upon non-payment of rent²⁷ and that the breach of warranty is germane to the question of whether the rent claimed by the landlord was due and owing.²⁸ The court held that the tenant was enti-

24. The implication of the *Spring* case for forcible detainer actions is that such cases, at least to the extent that breach of warranty of habitability is alleged, may no longer be treated in summary fashion. The evidentiary requisites of establishing a prima facie case, see note 22 *supra*, and the expanded interpretation of the germaneness requirement of section 5 of the Forcible Entry and Detainer Act, ILL. REV. STAT. ch. 57, § 5 (1977), *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208, 217 (1972), see note 28 *infra*, bring into play the same rules of procedure, evidence and trial practice attendant to other civil actions.

25. 50 Ill. 2d at 364, 280 N.E.2d at 216 (quoting *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078-79 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970)). The court went on to analogize this obligation and the tenant's right to expect compliance with it to a consumer goods warranty.

26. The *Spring* case was a forcible detainer action for non-payment of rent. As an affirmative defense to the landlord's action, defendant Little alleged that the landlord had promised to make repairs, that there were many structural defects in the building, that the building department had sued the owner to enforce the building code, that Little was unable to find other housing, and that the Department of Public Aid was withholding rent payments for other welfare recipient occupants of the building. *Id.* at 353, 280 N.E.2d at 210.

27. *Id.* at 366, 280 N.E.2d at 217.

28. The Illinois Forcible Entry and Detainer Act, enacted in 1874, codified the common law, providing that "matters not germane to the distinctive purpose of the [eviction] proceedings shall [not] be introduced." ILL. REV. STAT. ch. 57 (1977). In 1937, section 5 was amended to allow a claim for rent to be joined with a claim for possession. 1937 Ill. Laws § 1, at 611. Until the late 1960's, the Illinois appellate courts generally confirmed that there was only one defense germane to the merits of an eviction suit for non-payment of rent: that the tenant had in fact paid the rent claimed to be due and owing.

Early in this decade, the Illinois courts began to construe the germaneness limitation of the

tled "to prove that damages suffered as the result of the plaintiffs' breach of warranty equalled or exceeded the rent claimed to be due,"²⁹ and that the sole and decisive issue was "whether the tenants owe the landlords rent which is due and remains unpaid."³⁰

While the *Spring* decision firmly established the warranty of habitability in residential leases, it left for future resolution many questions regarding applicability, scope and utilization of the new doctrine.³¹ Subsequent decisions of the Illinois appellate courts have addressed some of these questions, including affirmative use of breach,³² notice to the landlord,³³ applicability to a two-flat,³⁴ waiver of warranty in a lease provision³⁵ and applicability of warranty where the landlord does not seek a money claim for rent.³⁶ The *Spring* decision and its progeny all share a common problem in that while they agree and affirm that "a tenant may recoup for damages"³⁷ suffered as a result of a landlord's breach of warranty, all are silent on the question of the measure of damages to be applied once a breach has been established. Moreover, all have failed to set forth any guidelines or standards as to how these damages are to be calculated or proved by the tenant.³⁸ This article

Act more broadly, first finding that the tenant could raise race discrimination and other equitable defenses in an eviction action. *Rosewood Corp. v. Fisher*, 46 Ill. 2d 249, 263 N.E.2d 833 (1970), cert. denied & appeal dismissed sub nom. *Burton v. American Nat'l Bank & Tr. Co.*, 401 U.S. 928 (1970); *Marine Park Assoc. v. Johnson*, 1 Ill. App. 3d 464, 274 N.E.2d 645 (1971). *Spring* further altered Illinois law by establishing an implied warranty of habitability for leased residential premises, the breach of which was made a germane defense to evictions based upon non-payment of rent. The *Spring* doctrine has been reaffirmed and expanded by the Illinois courts in many subsequent cases. See cases cited at note 6 *supra*.

The legislature established another important defense to eviction. ILL. REV. STAT. ch. 80, § 71 (1977) bars a landlord from terminating a tenant's lease in retaliation for a complaint to authorities about building or health code violations. See *Clore v. Fredman*, 59 Ill. 2d 20, 319 N.E.2d 18 (1974).

29. 50 Ill. 2d at 359, 280 N.E.2d at 213.

30. *Id.*, 280 N.E.2d at 213.

31. See Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444 (1974) [hereinafter cited as Moskowitz] for an excellent general discussion of the warranty doctrine.

32. *Gillette v. Anderson*, 4 Ill. App. 3d 838, 282 N.E.2d 149 (1972).

33. *Jarrell v. Hartman*, 48 Ill. App. 3d 985, 363 N.E.2d 626 (1977).

34. *South Austin Realty Ass'n v. Sombright*, 47 Ill. App. 3d 89, 361 N.E.2d 795 (1977).

35. *Id.*

36. *Richardson v. Wilson*, 46 Ill. App. 3d 622, 361 N.E.2d 110 (1977).

37. 50 Ill. 2d at 359, 280 N.E.2d at 213.

38. Although breach of warranty may be raised in several ways, a uniform measure of damages applicable to all is necessary. If the landlord sues the tenant for eviction for non-payment of rent, the tenant may defeat such claim by assertion of facts constituting a breach of the implied warranty. *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972). The tenant may also counterclaim for damages for breach. *Fisher v. Holt*, 52 Ill. App. 3d 164, 367 N.E.2d 370 (1977), or seek an order to repair the premises, *South Austin Realty Ass'n v. Sombright*, 47 Ill. App. 3d 89, 361 N.E.2d 795 (1977). The tenant also may sue affirmatively for compliance or damages. *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Jarrell v. Hartman*, 48 Ill. App. 3d 985, 363 N.E.2d 626 (1977). Although the tenant remains liable to the landlord for the "rent so long as

will focus on the problem of determining damages and offer a solution.³⁹

While the Illinois decisions after *Spring* all concur that a tenant is entitled to a set-off against rent for damages suffered due to breach of the implied warranty,⁴⁰ or that the tenant may counterclaim,⁴¹ or sue affirmatively for damages,⁴² none of these cases provide any standards to assist the court in determining the "reasonable value" of the premises in their defective condition.⁴³ To resolve this problem one first must consider the measures of damages applied by courts in other jurisdictions.

the tenant retains possession of the premises," *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 367, 280 N.E.2d 208, 217 (1972), the liability for the premises is limited to "the reasonable value of her possession" in the defective condition. *South Austin Realty Ass'n v. Sombright*, 47 Ill. App. 3d 89, 361 N.E.2d 795 (1977). No guidelines have been provided to determine this reasonable value. See text accompanying note 43 *infra*. These cases have resolved certain issues related to proof of breach of warranty claims: (a) notice to the landlord, (b) rent withholding, and (c) the dispositive effect of proving damages for the breach.

39. It is not the intent of the authors to address the other problems raised or left unanswered by the *Spring* court. It would appear, however, that the court's great reliance on the Chicago Building Code, which proclaims itself "applicable to occupancy for residential purposes of *any building*," Chicago Municipal Code § 78-11.1 (emphasis added), would make the doctrine applicable to single-family dwellings and multi-unit apartments alike. No Illinois courts have yet addressed the issue, although several other jurisdictions, recognizing that all such buildings are covered by housing codes and that tenants residing therein face the same hardships as other urban apartment dwellers, have applied the doctrine to single family houses. See *Lemle v. Breeden*, 51 Hawaii 426, 427, 462 P.2d 470, 471 (1969); *Mease v. Fox*, 200 N.W.2d 791, 792 (Iowa 1972); *Steele v. Latimer*, 214 Kan. 329, 331, 521 P.2d 304, 306 (1974); *Glyco v. Schultz*, 35 Ohio Misc. 25, 26, 289 N.E.2d 919, 925 (1972); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160, 166 (1973); *Pines v. Persson*, 14 Wis. 2d 590, 591, 111 N.W.2d 409, 412 (1961). This result is logically sound and consistent with the broad policy behind the warranty as a means of insuring effective code compliance.

40. *South Austin Realty Ass'n v. Sombright*, 47 Ill. App. 3d 89, 361 N.E.2d 795 (1977); *Richardson v. Wilson*, 46 Ill. App. 3d 622, 361 N.E.2d 110 (1977).

41. *Fisher v. Holt*, 52 Ill. App. 3d 164, 367 N.E.2d 370 (1977), *relying on* *Peoria Housing Auth. v. Sanders*, 54 Ill. 2d 478, 298 N.E.2d 173 (1973).

42. *Jarrell v. Hartman*, 48 Ill. App. 3d 985, 363 N.E.2d 626 (1977). See also *Gillette v. Anderson*, 4 Ill. App. 3d 838, 282 N.E.2d 149 (1972).

43. The Illinois appellate courts have been presented with several opportunities to address the question of the proper measure of damages, but in each instance they have failed to reach the issue. In *Gillette v. Anderson*, 4 Ill. App. 3d 838, 282 N.E.2d 149 (1972), the Appellate Court of Illinois for the Second District reversed a lower court order striking a complaint seeking damages for breach of the implied warranty for failure to state a claim. The complaint had alleged damages of \$60 per month for each month since inception of the tenancy. The court reversed the trial court without comment as to the amount of damages.

In *Fisher v. Holt*, 52 Ill. App. 3d 164, 367 N.E.2d 370 (1977), a forcible detainer action wherein the defendant counterclaimed for \$1125 in damages for breach of warranty, the Appellate Court of Illinois for the First District reversed the trial court's dismissal of the counterclaim. However, the appellate court limited its discussion to whether the counterclaim was procedurally and substantively adequate. Finding it adequate, the court reversed without comment as to the amount of damages from the breach.

MEASURES OF DAMAGES ADOPTED IN OTHER JURISDICTIONS

Although the warranty of habitability has been recognized by judicial decision or statute in thirty-nine states,⁴⁴ the question of the proper measure of damages generally has been ignored. Illinois is not alone in failing to provide standards for the determination of damages upon proof of breach. Those jurisdictions that have addressed the question of the proper measure of damages may be categorized under two approaches: the market value theory⁴⁵ and the percentage reduction of use theory.⁴⁶ The objective of both theories is to establish the reason-

44. (Alaska) ALASKA STAT. §§ 34.03, 34.03.160, 34.03.180 (1974); (Arizona) ARIZ. REV. STAT. ANN. §§ 33-1324, 33-1361 (1974); (California) CAL. CIV. CODE §§ 1941, 1942 (West 1974); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); (Connecticut) CONN. GEN. STAT. ANN. §§ 24-47 (1960); *Todd v. May*, 6 Conn. Cir. Ct. 731, 316 A.2d 793 (1973); (Delaware) DEL. CODE ANN. tit. 25, § 5503 (1974); (District of Columbia) *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); (Florida) FLA. STAT. ANN. §§ 83.51, 83.56 (Supp. 1977); (Georgia) GA. CODE ANN., tit. 61, ch. 111-12 (Cum. Supp. 1976); *Givens v. Gray*, 126 Ga. App. 309, 190 S.E.2d 607 (1972); *Stack v. Harris*, 111 Ga. 149 (1906); (Hawaii) HAW. REV. STAT. § 521-42 (Supp. 1974); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); (Idaho) IDAHO CODE § 6-316 (1977); (Illinois) *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); (Iowa) *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); (Kansas) *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); (Kentucky) KY. REV. STAT. ANN. § 383.595, 383.625 (Baldwin Supp. 1974); (Maine) ME. REV. STAT. ANN. tit. 14, § 6021 (Supp. 1974); (Maryland) MD. REAL PROP. CODE ANN. § 8-211 (Cum. Supp. 1975), superceded in their respective jurisdictions by Baltimore City Public Local Laws, §§ 9-9, 9-10, 9-14.1 (eff. July 1, 1971), and Montgomery County Code, Fair Landlord-Tenant Relations, ch. 93A (Nov. 21, 1972); (Massachusetts) MASS. GEN. LAWS ANN. ch. 239, § 8A (West Supp. 1974); *Boston Housing Auth. v. Hemingway*, 293 N.E.2d 831 (Mass. App. 1973); (Michigan) MICH. COMP. LAWS ANN. § 554.139 (Supp. 1974); *Rome v. Walker*, 38 Mich. App. 458, 196 N.W.2d 850 (1972); (Minnesota) MINN. STAT. § 504.18 (1974), *applied in* *Fritz v. Warthen*, 298 Minn. 54, 213 N.W.2d 339 (1973); (Missouri) *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973); (Nebraska) NEB. REV. STAT. §§ 76-1419, 76-1425 (Cum. Supp. 1974); (Nevada) NEV. REV. STAT. tit. 10, ch. 118A, §§ 290, 360 (1977); (New Hampshire) *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); (New Jersey) *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); (New Mexico) N.M. STAT. § 70-7-1 (1975); (New York) N.Y. REAL PROP. LAW § 235-b (McKinney 1975); (North Carolina) N.C. GEN. STAT. § 42-42 (Supp. 1977); (North Dakota) N.D. CENT. CODE § 47-16-13.1 (1977); (Ohio) OHIO REV. CODE ANN. §§ 5321.04, 5321.07 (Page Supp. 1974); (Oregon) OR. REV. STAT. §§ 91.770, 91.800-815 (1974); (Pennsylvania) *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974) (Interpretation and application of this case are presently subject to controversy in Pennsylvania. *But see* *Pugh v. Holmes*, 384 A.2d 1234 (Pa. Super. 1978), which recognizes common law warranty of habitability at the superior court level. Appeal is pending.); (Rhode Island) R.I. GEN. LAWS, § 34-18-16 (1968); (Tennessee) TENN. CODE ANN. § 53-5501 (Cum. Supp. 1974) (applies to major cities only); (Texas) *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978); (Vermont) VT. STAT. ANN. tit. 12, § 4859 (1972); (Virginia) VA. CODE ANN. §§ 55-248.13, 55-248.25 (Cum. Supp. 1975); (Washington) WASH. REV. CODE ANN. § 59.18.060 (Supp. 1974), enacted after judicial implication of warranty of habitability in *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973); (West Virginia) H.B. 1368 (passed March 11, 1978; effective date, June 11, 1978) (sets out landlord obligation but does not provide remedy for breach); (Wisconsin) *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); *but see* *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970), *Michalek v. LeGrand*, 77 Wis. 2d 520, 253 N.W.2d 505 (1977).

45. *See* *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Boston Housing Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973).

46. *See* *Green v. Superior Court*, 10 Cal. 3d 616, 639 n.24, 517 P.2d 1168, 1183 n.24, 111 Cal. Rptr. 704 (1974); *McKenna v. Begin*, 362 N.E.2d 548 (Mass. App. 1977); *Housing Auth. v. Scott*, 137 N.J. Super. 110, 348 A.2d 195 (1975); *Timber Ridge Town House v. Dietz*, 133 N.J. Super.

able rental value of the premises in their defective condition. Thus, both theories are variations on the same theme—difference in value.

The market value theory, prevalent in earlier warranty of habitability cases, is “measured by the difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy by the tenant in the unsafe or unsanitary condition.”⁴⁷ The theoretical and practical difficulties of applying the market value theory⁴⁸ explain the trend in an increasing number of jurisdictions to adopt the percentage reduction of use approach,⁴⁹ which attempts to measure the actual loss suffered by the tenant. This approach is described in the leading case of *McKenna v. Begin*.⁵⁰ In that case the court stated:

[The tenant’s] rent is to be reduced by a percentage reflecting the diminution in the value of the use and enjoyment of the leased premises by reason of the existence of defects which gave rise to the breach of warranty of habitability.

Pursuing this method, the trial court on remand is to assess the major code violations and determine the percentage by which the use and enjoyment of the apartment has been diminished by the existence of those violations. The Court is to determine the percentage reduction factor applicable to each major violation, total the percentages to arrive at an aggregate percentage reduction factor, and then assess as damages that percentage of [the tenant’s] weekly rent for each of the weeks during which the defects remained unrepaired.⁵¹

Fair Market Value Approach

The fair market value theory originated in cases involving injury to real property. This approach is appropriate for those areas of the

577, 338 A.2d 21 (1975); *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 485-86, 268 A.2d 556, 561-62 (1970); *Park West Mgt. Corp. v. Mitchell*, 62 App. Div. 2d 291, 404 N.Y.S.2d 115 (1978); *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (1973); *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 335, 323 N.Y.S.2d 363 (1971); *Panos v. Cruz*, No. 938-028 (County Ct. Milw. Co., Wis., Mar. 3, 1978). Other courts merely have assigned a monetary amount to indicate the diminution. *Samuelson v. Quinones*, 119 N.J. Super. 338, 291 A.2d 580 (1972); *Whitehouse Estates, Inc. v. Thomson*, 87 Misc.2d 813, 386 N.Y.S.2d 733 (1976); *Steinberg v. Carreras*, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (1973), *rev'd on other grounds*, 77 Misc. 2d 774, 357 N.Y.S.2d 369 (1974); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (1972); *Derr v. Gangemi*, No. 2310, Ct. of Common Pleas, Philadelphia (June 21, 1974).

47. *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972). A slightly different formula applying the same theory was utilized by a Massachusetts court in *Boston Housing Auth. v. Hemingway*, 293 N.E.2d 831 (Mass. App. 1973). In that case the court stated, “The tenant’s claim or counterclaim for damages based upon this breach would be the difference between the value of the dwelling as warranted (the rent agreed on may be evidence of this value) and the value of the dwelling as it exists in its defective condition.” *Id.* at 845.

48. See text accompanying notes 52-76 *infra*.

49. See note 46 *supra* for cases adopting some form of percentage reduction.

50. 362 N.E.2d 548 (Mass. App. 1977).

51. *Id.* at 552 (citations omitted).

law for which it was created, notably eminent domain cases, because the damage measured in those cases is the equity of the lessee in the lease.⁵² However, in implied warranty cases, the damage measured is the tenant's loss of use and enjoyment of the premises due to their deteriorated condition. Thus, the market value approach is not a fair measure of damages in the warranty context because it does not measure the tenant's loss of use.⁵³ Furthermore, use of the market value approach as a means to determine damages for breach of warranty is inconsistent with the broad public policy of inducing code compliance, which is the foundation for the implied warranty of habitability.⁵⁴

The Fair Market Value Theory Is Inconsistent with the Purpose of Implied Warranty of Habitability

The fair market value theory is fundamentally inappropriate to warranty of habitability cases because it measures damages by attempting to determine what price deteriorated housing (leased in violation of the implied warranty and other applicable law) would bring when offered on the open market. This theory is premised upon the fiction of a willing lessor and lessee bargaining in a voluntary transaction, and its

52. *People ex rel. Korzen v. American Airlines, Inc.*, 39 Ill. 2d 11, 233 N.E.2d 568 (1967). See discussion therein at 571-72 concerning condemnation cases. The majority of these condemnation cases concern commercial matters. It is important to note that the commercial context is inapposite to warranty of habitability since the warranty does not extend to commercial properties. See *Germania Fed. Sav. & Loan v. Jacoby*, 23 Ill. App. 3d 145, 318 N.E.2d 734 (1974).

53. *McKenna v. Begin*, 362 N.E.2d 548 (Mass. App. 1977); *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (1970). See *Teller v. McCoy*, No. CC900 (W. Va. Feb. 21, 1979), in which the Supreme Court of Appeals of West Virginia adopted a modified fair market value theory. The court stated:

We feel that neither [the fair market theory nor the percentage reduction of use] approach should be the exclusive mode of assessing damages in such cases. Of the two, the "difference in value approach" (fair market value theory) is far more widely accepted and we adopt it, in part, as the measure of damages in cases involving the breach of the implied warranty of habitability. But, money damages so assessed, while appropriate in the commercial cases, are inadequate in most residential landlord-tenant tenant [sic] cases, since the residential tenant who endures a breach of the warranty of habitability normally does not actually lose only money. The typical residential tenant rents a dwelling for shelter, not profit. When the warranty is breached, he loses, instead, such intangibles as the ability to take a bath or use hot water as frequently as he would like, he may be forced to worry about the health of his children endangered by rats, roaches, or other undesirable pests, or he may be denied the use of certain rooms in the apartment because there is odor, severe water leakage, or no heat

. . . . [W]e hold that when the warranty of habitability is breached, the tenant's damages are measured by the difference between the fair market value of the premises if they had been as warranted and the fair rental value of the premises as they were during the occupancy by the tenant in the unsafe and unsanitary condition. However, the tenant may additionally recover damages for annoyance and inconvenience proven to have resulted from the breach.

Id. at 31-32.

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

operation virtually immunizes a landlord from damages necessary to enforce the implied warranty and compensate the tenant.

In implied warranty of habitability cases, the market value theory would determine the amount of damages by subtracting the fair rental value of the premises in their defective condition from the contract rent.⁵⁵ Fair rental value generally is determined by use of a survey method.⁵⁶ In condemnation proceedings, where the fair market value theory is used as the measure of damages, the fair rental value of the property is commonly derived from a survey of the rentals for comparable property in the vicinity at or about the time of taking. This value establishes the "going rents" in the vicinity and inferentially what the lessee could expect to receive upon the assignment of the lease.⁵⁷ By analogy, the fair rental value of premises in implied warranty of habitability cases would be determined by a survey of the rental rate of other comparable deteriorated housing in the same vicinity.

Prior to the adoption of the warranty of habitability in Illinois, enforcement of effective code compliance was limited due to the inequality of bargaining position of landlord and tenant.⁵⁸ This inequality arose from a market structure in which an inelastic demand for habitable premises far exceeded the supply.⁵⁹ By adopting the warranty of habitability, the Supreme Court of Illinois established minimum standards of habitability for all residential rental property and held that landlords who failed to comply with this standard were subject to damages.⁶⁰ The tenant who had been forced to bargain for and live in deteriorated housing was to be compensated by damages for breach of the landlord's warranty.

Landlords who continue to rent substandard housing in violation of the implied warranty of habitability, in effect, have created an illegal

55. See note 47 *supra* and note 65 *infra* for cases applying the market value theory.

56. J. Horgen & W. Edgar, *Leasehold Valuation Problems in Eminent Domain*, 4 S.F.L. Rev. 1, 8 (1969) [hereinafter cited as Horgen & Edgar].

57. *Id.* Fair rental value also may be established by use of the income capitalization method. However, this approach also would require a survey of comparable properties to determine the market value and the expected rate of return for such properties. (This method generally is utilized in commercial income-producing properties.) Hence, income capitalization is subject to the same criticism as the survey method. See text accompanying notes 58-64 *infra*.

58. "The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing . . . [L]andlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power . . ." *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (Footnotes omitted).

59. *Id.*

60. *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 359, 280 N.E.2d 208, 213 (1972).

“black market”⁶¹ in deteriorated housing. Utilization of the fair market value theory reinforces and perpetuates this “black market.” Existence of the implied warranty of habitability has not altered the fact that there continues to be a shortage of habitable housing.⁶² In this overcrowded market, tenants are forced to pay high rents for uninhabitable housing. The problem is exacerbated by the fact that most eviction cases involving warranty defenses concern residences in poor neighborhoods⁶³ where deteriorated housing is concentrated.

Under these circumstances, a survey of the rents charged for similar units in deteriorated condition in the same vicinity would demonstrate that the average rental charge for surveyed units (the “going rents” or “fair rental value”) closely approximated the contract rent of the tenant alleging the breach. Application of the fair market value theory frequently would result in the anomaly that a tenant who had proved breach of the warranty of habitability would be denied recovery in damages because the contract rent was equal to the rent other landlords received for their nearby deteriorated housing.

The anomalous and undesirable result of the fair market value theory in operation arises from its fundamental factual misconception of the rental housing structure in overcrowded, decaying urban areas. The premise of the theory is that a willing lessee will bargain and pay a willing lessor, in a voluntary transaction, for the right to use and occupy the premises.⁶⁴ In fact, there is no “fair market” for housing in

61. 84 HARV. L. REV. 729 (1971). The author states:

[I]t seems questionable whether in assessing damages in this situation cognizance should be taken of a ‘fair’ market value of noncomplying housing — such a market could be regarded as an illegal ‘black market’ existing only by violation of law. Landlords should not be allowed to benefit from the high prices which tenants may be willing to pay for housing maintained in violation of law.

Id. at 737.

62. For example, the City of Chicago, in its May 1976 Housing Assistance Plan filed as part of the Community Development Block Grant application, stated that “approximately 121,200 units or 10.9% of the total [dwelling units in the City] are in need of such extensive repair that they must be considered dilapidated or substandard.” The *Annual Housing Survey: 1975*, Table B2, prepared by the Bureau of the Census and Office of Policy Development and Research of the Department of Housing and Urban Development, stated that 163,100 renter-occupied dwelling units (27 percent of all renter-occupied dwelling units) had structural deficiencies.

An additional measure of the inability of tenants to find decent affordable housing can be seen in the following: 43 percent of all renters and 53 percent of all black renters are paying more than 25 percent of their income for rent. *Annual Housing Survey: 1975*, Tables B-2, B-6.

63. Judgment Landlord, *supra* note 8, at Appendix 7-8, 30-34. The file study of contested and randomly selected cases indicated that evictions tend to occur most often in geographical areas where income levels are low and where high concentrations of minority social groups reside.

64. *Korzen v. American Airlines, Inc.*, 39 Ill. 2d 11, 233 N.E.2d 568 (1967). The inapplicability of the “willing lessor and lessee” assumption to the residential premises market flows directly from the different value to the lessee of leasehold premises in the commercial and residential markets. In commercial leaseholds, the premises are a capital investment from which the lessee expects a monetary return. Such leaseholds have an economic value to the tenant. In contrast, the

these areas because the model of a voluntary, bargained-for transaction between a willing lessee and a willing lessor—the characteristic of a true market—is a fiction. Rather, the tenant has no real alternative but to rent whatever premises are available, irrespective of the conditions, at whatever rent is demanded. The result of the fiction employed by the fair market value theory, then, is an artificially inflated “going rent” which potentially reduces a tenant’s damages to zero. Adoption of the fair market theory in Illinois, which would minimize any real economic sanction for the landlord’s failure to maintain habitable premises, would accordingly subvert the purpose of the implied warranty of habitability.

The Market Value Theory Requirement of Expert Testimony Eviscerates the Effectiveness of Warranty of Habitability

Most courts that have adopted the market value theory of damages for breach of warranty of habitability have concluded that the value of the premises as warranted is the contract rent.⁶⁵ Use of the fair market value theory requires that the court establish the fair rental value of the premises in their defective condition,⁶⁶ the proof of which would seem to require expert testimony under Illinois law.

Because Illinois courts have required expert testimony as to fair rental value in condemnation proceedings,⁶⁷ it is logical to assume that expert testimony would be required in warranty of habitability cases applying the market value theory. The average tenant presumably would fail to qualify as an expert witness to testify as to value.⁶⁸ Therefore, in order to receive more than nominal damages, the tenant might

residential lessee does not lease the premises with the expectation of an economic return. The value of residential premises to the tenant is its use as a dwelling unit, a social rather than economic value. *See also* note 52 *supra*.

65. *King v. Moorehead*, 495 S.W.2d 65, 76 (Mo. App. 1973); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248, 252 (1971); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919, 926 (1972). One court has indicated that the contract rent is evidence of the value of the premises as warranted. *Boston Housing Auth. v. Hemingway*, 293 N.E.2d 831, 845 (Mass. App. 1973).

66. *See* note 47 *supra* and accompanying text.

67. *See* Department of Pub. Works & Bldgs. v. Blackberry Union Cemetery, 32 Ill. App. 3d 62, 335 N.E.2d 577 (1975). The Illinois appellate court explained that the proper measure of damages to be awarded to a leaseholder of property subject to condemnation is the fair market value of the leasehold interest minus the actual rent paid. The court then rejected as incompetent the lessee’s testimony as to the fair market value of the leasehold, basing the ruling, in part, on its finding that the lessee “was in no way qualified as an expert.” *Id.* at 65, 335 N.E.2d at 580.

68. The general rule regarding competency of persons to testify as to the value of real property was announced by the Supreme Court of Illinois in *Department of Pub. Works & Bldgs. v. Oberlaender*, 42 Ill. 2d 410, 247 N.E.2d 888 (1969), a condemnation action:

It is recognized in Illinois that any person acquainted with a particular property may testify as to its value even though he is not engaged in the buying and selling of similar properties in that locality. A witness is competent to testify as to the value of real property if it appears that he has some peculiar means of forming an intelligent and correct

be required to provide expert testimony. The cost of providing the expert witness would be prohibitive, of course, in light of the generally small amounts of money at issue in warranty of habitability cases and the high incidence of low income tenants involved in eviction actions.⁶⁹

In *Steinberg v. Carreras*,⁷⁰ a New York court recognized that "[t]he economic realities of proceedings involving residential tenants make it unlikely that such testimony would be readily available to tenants in the usual cases."⁷¹ Several courts that have addressed the question of expert witnesses under the fair market value theory have rejected this theory as a measure of damages partly because of the prohibitive expense of expert testimony. In *Academy Spires, Inc. v. Brown*,⁷² a New Jersey court stated: "Certainly, if tenant were required to bear the cost of producing an expert witness, the effectiveness of the relief . . . would be diminished."⁷³

judgment as to the value of the land in question beyond what is presumed to be possessed by men generally.

Id. at 414, 247 N.E.2d at 891 (citations omitted).

69. Judgment Landlord, *supra* note 8, at Appendix A-30, 31.

70. 74 Misc. 2d 32, 344 N.Y.S.2d 136 (1973), *rev'd on other grounds*, 77 Misc. 2d 774, 357 N.Y.S.2d 369 (1974).

71. *Id.* at 38, 344 N.Y.S.2d at 144. The New York Supreme Court reversed the trial court's award of damages based on the tenant's testimony of the condition of the premises for "lack of adequate proof of the reduced value of the apartments." *Steinberg v. Carreras*, 77 Misc. 2d 774, 357 N.Y.S.2d 369, 370 (1974). N.Y. REAL PROP. LAW, § 235-b (McKinney 1975) created a warranty of habitability in all residential leases. The combination of the Supreme Court ruling in the *Steinberg* case and section 235-b produced odd results. At least two New York City Civil Court judges felt constrained to award only nominal damages in light of *Steinberg*, where there is no expert testimony regarding value and the tenant's testimony is limited to the condition of the premises. *Popach v. D'Aguilar*, 173 N.Y.L.J. No. 103, p.11 (N.Y. City Housing Ct. 1975) (Lederman, J.); *Jeremias v. Amoroso*, 173 N.Y.L.J. No. 99, p.19 (N.Y. City Civ. Ct. 1975) (Lederman, J.); *Groner v. Lakeview Mgt. Corp.*, 83 Misc. 2d 932, 373 N.Y.S.2d 807 (1975) (Blyn, J.). *Accord*, *Kekllas v. Saddy*, 389 N.Y.S.2d 756 (1976). *Contra*, *B.L.H. Realty Corp. v. Cruz*, 87 Misc. 2d 258, 383 N.Y.S.2d 781 (1975). *See also* *Goldner v. Doknovitch*, 88 Misc. 2d 88, 388 N.Y.S.2d 504 (1976) (nominal damages awarded where there is no testimony by tenant or any witness as to reduced value). In response to this paradox, two New York courts have awarded punitive damages, which require no proof of amount, in an amount equal to the amount of rent claimed in the complaint. *Kipsborough Realty Corp. v. Goldbetter*, 367 N.Y.S.2d 916 (1975); *Barasch v. Goldbetter*, 173 N.Y.L.J. No. 72, p.17 (N.Y. City Civ. Ct. 1975). While the remedy of punitive damages certainly eliminates the tenant's proof problem, it would not suffice in those cases where the landlord's breach is not the willful and wanton variety required. Moreover, as a matter of legal principle, punitive damages are not a substitute for actual damages.

Judge Blyn accurately summarized the situation in *Groner v. Lakeview Mgt. Corp.*, 83 Misc. 2d 932, 373 N.Y.S.2d 807 (1975): "The decision by the Appellate Term (in *Steinberg v. Carreras*) renders meaningless the opinion of this court that the claimant may sue in an affirmative manner in a claim of breach of warranty of habitability for damages for such breach." *Id.* at 810.

In 1976, section 235-b was amended to eliminate the expert testimony requirement. Finally, the Appellate Division of the Supreme Court, First Department, the same court that decided the *Steinberg* case, upheld the validity of the 1976 amendment and dispensed with the expert testimony rule. *Park West Mgt. Corp. v. Mitchell*, 62 App. Div. 2d 291, 404 N.Y.S.2d 115 (1978).

72. 111 N.J. Super. 477, 268 A.2d 556 (1970).

73. *Id.* at 487, 268 A.2d at 562. *See also* *Teller v. McCoy*, No. CC900 (W. Va. Feb. 21, 1979) 84 HARV. L. REV. 729, 737 (1971).

Even assuming that in an implied warranty of habitability case expert testimony would be economically justified, or otherwise deemed necessary, the probative value of such testimony is questionable. As one commentator has remarked on the question of traditional leasehold valuation:

Establishing a valuation for a leasehold is one of the most difficult and complicated problems that an expert appraiser is called upon to solve. Even for the realtor who has been appraising real estate of all kinds for many years it presents some of the most perplexing questions ever encountered in the valuation field.⁷⁴

The valuation of substandard housing required in warranty of habitability cases is similarly very perplexing and the probative value of expert testimony in this context is doubtful.⁷⁵ Two courts that have addressed the issue have rejected use of the market value theory partly because of the inadequacy of expert testimony on the value of the defective premises.⁷⁶

Percentage Reduction in Use Approach

In implied warranty cases, the injury suffered by the tenant is the diminution in the right of use and enjoyment of the premises due to their deteriorated condition. Consequently, a direct measure of the actual injury to the tenant is required. The percentage reduction in use approach is more appropriate than the market value theory to measure this diminution in value.⁷⁷

Percentage reduction of use may be defined as a reduction in the rent by a percentage reflecting the diminution in the value of the use and enjoyment of the leased premises due to the defective conditions.⁷⁸ The trial court would determine the percentage by which the use and enjoyment of the premises has been diminished by each violation, total the percentages, and assess as damages the aggregate percentage figure applied to the periodic rent for all rental periods in which the violations existed.⁷⁹

74. S. McMICHAEL, *THE APPRAISAL JOURNAL* 495 (Oct. 1947), cited in Horgen & Edgar, *supra* note 56, at 2.

75. See text accompanying notes 52-64 *supra*.

76. In *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (1970), the court stated: "I am dubious that use of expert testimony could add to either accuracy or certainty." *Id.* at 487, 268 A.2d at 562. And in *Steinberg v. Carreras*, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (1973), *rev'd on other grounds*, 77 Misc. 2d 774, 357 N.Y.S.2d 369 (1974), the judge remarked: "I seriously doubt that statistical information about the value of apartments operated in violation of law is available in a form that permits meaningful expert testimony." *Id.* at 38, 344 N.Y.S.2d at 144.

77. *Contra, Moskowitz*, *supra* note 31, at 1469-70.

78. *McKenna v. Begin*, 362 N.E.2d 548, 552 (Mass. App. 1977).

79. *Id.* at 553. The percentage reduction in use measure, though not new to the Illinois courts, has not been explicitly accepted. In *Fisher v. Holt*, 52 Ill. App. 3d 164, 367 N.E.2d 370

In marked contrast to the market value theory, the basic premise behind percentage reduction is uniquely adapted to warranty of habitability cases. Damages under this method are directly related to the injury suffered by the tenant living in deteriorated housing. The percentage reduction in use approach also has the distinct advantage of not requiring expert testimony to establish loss of value,⁸⁰ thereby greatly simplifying the task of the court and relieving the tenant of an undue burden.⁸¹ Testimony of the tenants as to not only the factual existence of the violations but also the effect of their daily living provides the best evidence available to the court to guide its determination of an award of damages.⁸²

However, application of the percentage reduction theory as a measure of damages is inappropriate to breach of implied warranty of habitability cases. While the theoretical basis of the percentage reduction theory is sound in that it attempts to measure the loss of use to the tenant, the articulated methods of applying this theory as espoused in particular cases⁸³ all appear deficient.

The clearest method of application was set forth by the court in *McKenna v. Begin*,⁸⁴ wherein each violation was assigned a percentage, and the total reduction in rent was determined by the sum of the aggregate defects. Each percentage was to be determined by consideration of factors "including but not limited to the nature, duration and seriousness of defects and whether they may endanger or impair the health, safety or well being of the occupants."⁸⁵ This method of determining damages, if applied literally, creates serious problems. It requires the trier of fact to affix artificial mathematical values, not easily

(1977) the tenant alleged that she had been damaged in the amount of \$1,125.00, an amount equal to 50 percent of her rent for each of the 18 months of her tenancy. The appellate court declined the invitation to furnish guidelines as to the factors considered relevant to the amount of damages (Appellant's Brief at 28) but reversed the dismissal of her counterclaim and remanded to the trial court.

80. *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556, 562 (1970). See also *McKenna v. Begin*, 362 N.E.2d 548, 553 (Mass. App. 1977), in which the court indicated that the evidence already presented to the trial court, which did not include expert testimony as to the tenant's loss of use, was sufficient for the computation of damages.

81. In *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (1970), the New Jersey court held that there was no need for expert testimony. *Id.* at 487, 268 A.2d at 562. In *McKenna v. Begin*, 362 N.E.2d 548 (Mass. App. 1977), and *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974), both of which adopt the percentage reduction of use theory, the testimony upon which the awards were based did not include expert testimony.

82. *Park West Mgt. Corp. v. Mitchell*, 62 App. Div. 2d 291, 404 N.Y.S. 2d 115 (1978).

83. See *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *McKenna v. Begin*, 362 N.E.2d 548 (Mass. App. 1977); *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (1970).

84. 362 N.E.2d 548 (Mass. App. 1977). See text accompanying notes 78-79 *supra*.

85. *McKenna v. Begin*, 325 N.E.2d 587, 591 (Mass. App. 1975).

reduced to objective verification,⁸⁶ for each defect as a preliminary step in the determination of a dollar amount for damages. Moreover, assessment of the impact of each defect standing alone fails to compensate the tenant for the cumulative impact of all the defective conditions.⁸⁷

An alternative application of the same theory was presented in *Academy Spires, Inc. v. Brown*.⁸⁸ This approach assigned an arbitrary percentage for the total impact of the defects, and was devoid of standards as to how this percentage is to be determined.⁸⁹ The articulation of standards for the determination of the percentage figure would eliminate the objections to the arbitrariness of this method. However, it would not resolve the major problem of creating an artificial and unnecessary preliminary step in the determination of a damage amount.

The percentage reduction theory is to be preferred over a market value approach to determine damages for breach of warranty of habitability. However, all the methods of application of this theory contain the same critical flaw — the requirement that the trier of fact engage in the unnecessary, cumbersome, and artificial process of assigning objectively unverifiable percentages for the defects.

A REALISTIC ALTERNATIVE: LOSS OF USE TO THE TENANT

Because the real injury suffered by a tenant for breach of the implied warranty of habitability is the diminution in the healthful use and

86. See Moskovitz, *supra* note 31, at 1469. The lack of objective verification underlies Professor Moskovitz's criticism of percentage reduction in use theory:

. . . [I]t is highly questionable whether the percentage reduction of use approach can ever result in a figure which is objectively justifiable, even as an estimate. Any real attempt to prove percentage reduction in use must consider the time and floor space affected by the defects, assuming this data is available from the tenant. But this is only the beginning, for some *weight* must be attributed to each affected facility. If there is no hot water in the bathroom, the tenant cannot use the bath, but he can use the sink some of the time and the toilet all the time. Also, he may use the toilet more than the sink, the sink more than the bath—all of which, it would seem, is crucial to determining the percentage reduction in use of the bathroom. Moreover, after this is decided, it must be determined how much this reduces the use of the premises as a whole. Should this be done according to the percentage of floor space taken up by the bathroom, even if the tenant uses the bathroom more than other parts of the premises? (Is a storeroom or closet in use even when the tenant is not there but his belongings are?) And this process must be repeated for each defect. The problems with this analysis are obvious.

The questions posed seem unanswerable if viewed as calling for objectively verifiable answers.

87. For example, electrical wiring defects resulting in loss of lights in an apartment would be assigned a certain percentage loss factor. Similarly, the presence of rodents in the same apartment also would be assigned a percentage loss factor, as would holes in the floors. However, the sum of the percentage loss factors would not correspond to the virtual total loss of use of the apartment due to dark, rat-infested rooms with holes in the floors, for tenants with young children.

88. 111 N.J. Super. 477, 268 A.2d 556 (1970).

89. See Moskovitz, *supra* note 31, at 1468-69.

enjoyment of the premises due to their defective condition,⁹⁰ a theory of damages based upon market value is a wholly inappropriate measure to make this determination.⁹¹ The alternative percentage reduction in use theory, while theoretically sound, presents difficult problems for application because it requires the trier of fact to affix to the defects at issue artificial mathematical values not easily reduced to objective verification.⁹² Rather, the courts need a direct measure of the actual injury the tenant has suffered⁹³ that would utilize traditional damage theory.⁹⁴ The loss of use to the tenant theory makes this determination of actual injury. This alternative has its theoretical roots in the percentage reduction of use cases, which have affirmed the principle that damages should be based on the tenant's actual loss.⁹⁵

The loss of use approach establishes as compensation for loss a dollar figure that is readily ascertainable by the trier of fact by applying existing contract principles. This approach may be defined as a measure of damages reflecting the tenant's loss of use and enjoyment of the leased premises due to the lessened habitability of the premises caused by defective conditions in the building.⁹⁶ The sum representing this loss of use is to be determined by considering the nature and severity of the defects, their duration, their effect on safety, health and sanitation, and how they interfered with the tenant's use and enjoyment of the premises.⁹⁷

The loss of use theory assesses, within existing contract doctrine,⁹⁸ compensation for the difference between what the tenant contracted for

90. See text accompanying notes 77-83 *supra*.

91. See text accompanying notes 52-64 *supra*.

92. See text accompanying notes 83-89 *supra*.

93. Actual injury to the tenant should be considered rather than an approach based upon injuries to the realty itself. See text accompanying notes 52-54 *supra*.

94. See text accompanying notes 98-102 *infra*.

95. See, e.g., *McKenna v. Begin*, 362 N.E.2d 548 (Mass. App. 1977), wherein the court stated, "We believe that the damages should have been calculated in a manner which more closely reflects the diminution in the value of McKenna's use and enjoyment of the premises." *Id.* at 552.

96. Conditions which have any effect on health, safety, sanitation or well-being which contribute to the tenant's loss of use give rise to damages. These conditions are not limited to violations of the building code. See note 22 *supra*.

97. The tenant who has suffered from breach of warranty of habitability has lost the benefit of full and peaceful enjoyment of his home. For instance, a tenant's ability to use and enjoy the premises for which he has bargained diminish in an apartment where bathroom facilities do not work, the heating system is inoperable, and plaster has chipped or fallen. The trier of fact must consider the totality of the conditions in light of their nature, severity, duration, and effect on the health, safety, and sanitation of the tenant, and determine their total impact on the tenant's use and enjoyment of the premises in order to arrive at a viscerally fair damage amount.

98. The standard measure of damages for breach of contract is the amount which will compensate the injured person for the loss which has been caused by the breach or which fulfillment of the contract would have prevented. See *Hirsch v. Bollmeier*, 34 Ill. App. 2d 203, 180 N.E.2d 521 (1962); 15 Ill. L. & Prac. § 145. See also *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

and what he actually got.⁹⁹ Computing the damages due to loss of use does involve some uncertainty. However, it is well settled in Illinois that damages may be established on the basis of reasonable probability,¹⁰⁰ and that recovery of damages may not be denied because the amount is difficult to prove.¹⁰¹ Moreover, utilization of the loss of use theory is entirely consistent with universally accepted principles of evidence that allow proof of damage amounts without precision.¹⁰² The loss of use theory also is consistent with a long line of Illinois decisions awarding damages where the amount of damages was far less certain than in breach of warranty of habitability cases.¹⁰³

99. By entering into a lease agreement for residential premises in Illinois, a landlord contracts to furnish the tenant with an apartment in habitable condition, which may be evaluated by the degree of the landlord's compliance with applicable building codes. *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 366, 280 N.E.2d 208, 217 (1972). The tenant-lessee, in turn, contracts for an interest in full use and enjoyment of the dwelling. *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556, 562 (1970); *McKenna v. Begin*, 362 N.E.2d 548 (Mass. App. 1977). The loss of use theory presumes that the landlord contracted, in return for the agreed-upon rent, to provide a habitable apartment which meets code specifications. *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972). See note 21 *supra*. The value of the apartment in habitable condition must be presumed to be fixed by the lease agreement as the rental amount. See *Schiro v. Gould*, 18 Ill. 2d 538, 165 N.E.2d 286 (1960).

100. *Illinois Power Co. v. Champaign Asphalt Co.*, 19 Ill. App. 3d 74, 310 N.E.2d 463, 469 (1974).

101. *Tri-County Grain Terminal Co. v. Swift & Co.*, 118 Ill. App. 2d 313, 254 N.E.2d 311 (1969). See also 15 AM. JUR. *Damages*, § 23 (1938), which states:

[I]t is now generally held that the uncertainty which prevents a recovery is uncertainty as to the fact of the damage and not as to its amount and that where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery. This view has been sustained where, from the nature of the case, the extent of injury and the amount of damage are not capable of exact and accurate proof. Under such circumstances all that can be required is that the evidence with such certainty as the nature of the particular case may permit lay a foundation which will enable the trier of fact to make a fair and reasonable estimate.

Id.

102. *MCCORMICK, DAMAGES* § 27 (1935) states:

There are various modifications of the rule of certainty. They enable the courts, while holding up a high standard of certainty as an ideal, to avoid harsh applications of it. Among them are: a) if the fact of damage is proved with certainty, the extent or amount may be left to reasonable inference; . . . d) mathematical precision in fixing the exact amount is not required; e) if the best evidence of the damage of which the situation admits is furnished, this is sufficient.

Id. at 101. These principles have been cited with approval in various warranty of habitability cases adopting the percentage reduction in use measure. *Green v. Superior Court*, 10 Cal. 3d 616, 639, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974); *McKenna v. Begin*, 362 N.E.2d 548, 553 (Mass. App. 1977); *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556, 561 (1970). *Cf. Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 343 N.Y.S.2d 406, 412 (1973) (citing 5 CORBIN, CONTRACTS § 1020 (1950 & Supp. 1971)); *Whitehouse Estates, Inc. v. Thomson*, 87 Misc. 2d 813, 386 N.Y.S.2d 733, 734 (1976) (citing 5 CORBIN, CONTRACTS § 1020 (1950 & Supp. 1971)); *Park West Mgt. Corp. v. Mitchell*, 62 App. Div. 2d 291, 404 N.Y.S.2d 115, 119 (1978) (citing 5 CORBIN, CONTRACTS § 1020) (1950 & Supp. 1971)).

103. *Chicago Consolidated Traction Co. v. Schritter*, 222 Ill. 364, 78 N.E. 820 (1906) (mental suffering); *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961) (intentional infliction of emotional harm). See also *St. Louis, V., & T.H.R.R. Co. v. Halter*, 82 Ill. 208 (1876) (evidence of noise, smoke and jarring of earth admissible to show value of property where no evidence of sales of similar property available).

The determination of damages for loss of use requires an examination by the trier of fact of all existing conditions and their impact on the use and enjoyment of the premises by the tenant,¹⁰⁴ in order to determine how the tenant actually was damaged by these conditions.¹⁰⁵ In making such a determination there is no fixed rule for recovery. Rather, the amount awarded must be left to the sound discretion of the trier of fact in view of the facts of a particular case.¹⁰⁶ While no rigid rules should govern the determination of damages here, guidelines for application are necessary to assist the trier of fact in the exercise of its discretion to arrive at a fair damage amount and to assist the court in establishing an evidentiary record in such cases.

Factors to Consider in Determining Loss of Use

Loss of use should be determined by consideration of three factors: (1) the nature and severity of the defects, (2) their duration, and (3) their effect on the safety, health and well-being of the tenant. These factors should be examined to determine the total effect on the tenant's loss of use and enjoyment of the premises.¹⁰⁷

104. Utilization of a loss of use approach is not wholly without precedent in Illinois. It has long been settled law in Illinois that the measure of damages for the owner of property who suffers injury due to a nuisance is "the discomfort and the deprivation of the healthful use and comforts of his home." *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 281 N.E.2d 323 (1972); *Fairbank Co. v. Nicolai*, 167 Ill. 242, 47 N.E. 360 (1897). These nuisance cases involving temporary, continuing injury have adopted the standard of "deprivation of the healthful use" of the premises as the proper measure to determine how the tenant or landowner was actually damaged by the complained-of conditions. See *Wheat v. Freeman Coal Mining Corp.*, 23 Ill. App. 2d 14, 319 N.E.2d 290 (1974). These cases also have rejected the market value theory as the measure of damages because it does not reflect the actual loss suffered. *Id.*

Several courts in other jurisdictions have adopted this measure *de facto* by assigning a monetary amount to indicate diminution of services and use of the premises. See *Samuelson v. Quinones*, 119 N.J. Super. 338, 291 A.2d 580 (1972); *Whitehouse Estates, Inc. v. Thomson*, 87 Misc. 2d 813, 386 N.Y.S.2d 733 (1976); *Steinberg v. Carreras*, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (1973), *rev'd on other grounds*, 77 Misc. 2d 744, 357 N.Y.S.2d 369 (1974); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (1972); *Derr v. Gangemi*, No. 2310 (Ct. of Common Pleas, Philadelphia, June 21, 1974).

105. At least one commentator has advanced a traditional tort damage theory based upon discomfort and annoyance as the proper measure of damages for breach of warranty. See *Moscovitz*, *supra* note 31. Such an approach is not foreclosed by prior decision in Illinois. See *Dapkunas v. Cagle*, 42 Ill. App. 3d 644, 356 N.E.2d 575 (1976); *Gula v. Gawel*, 71 Ill. App. 2d 174, 218 N.E.2d 42 (1966). Both *Gula* and *Dapkunas* appear to support the theory that a cause of action for tort damages exists in Illinois for building code violations that affect health and safety. However, the issue of recovery in tort for breach of the implied warranty is beyond the scope of this article. The proposal for damages advanced here is based upon the contractual remedy rather than tort for breach of warranty, and is not limited to violations of the building code. Moreover, a contractual analysis of breach of warranty is consistent with the threshold opinion of the Illinois Supreme Court in *Spring*.

106. *Wheat v. Freeman Coal Corp.*, 23 Ill. App. 3d 14, 319 N.E.2d 290 (1974).

107. Warranty of habitability cases involve a two-step process of proof: (1) proof of breach, and (2) proof of damages. See note 22 *supra*. Once breach has been established, some of the evidentiary matter utilized to determine breach may be relied upon for the assessment of damages.

The most important consideration in the determination of damages is the nature and severity of the conditions that gave rise to the breach and the effect of these conditions on the tenant's use of the premises. For example, the lack of heat during the winter imposes greater loss on the tenant than does chipped plaster. Similarly, total lack of heat affects a tenant's use more than inadequate heat. In examining the nature of the conditions that give rise to damages, the court must be flexible, and should not limit its inquiry to conditions that are themselves per se violations of the applicable building code.¹⁰⁸ Each case must be governed by its own facts and the result must be fair and just to the landlord as well as the tenant.¹⁰⁹ The ultimate determination lies with the trier of fact, giving different weight to conditions depending on severity, nature, and habitability.¹¹⁰

The period of time in which the conditions existed is another factor to be taken into account. Damages may be assessed for the entire period of the tenancy¹¹¹ if the conditions existed at the outset. Recovery for conditions arising after the inception of the lease may be had from the time the conditions arose.¹¹² It would certainly mitigate damages if the landlord made timely and diligent efforts to repair the conditions.¹¹³

The trier of fact also must determine the effect of these conditions on health, safety, sanitation and well-being.¹¹⁴ Corresponding weight should be given to defects that have some demonstrable adverse effect on the health, safety, sanitation or well-being of the tenant in affixing

108. See *Boston Housing Auth. v. Hemingway*, 293 N.E.2d 831 (Mass. App. 1973) (warranty of habitability applied independent of existence of building code). As a means of illustration, the following conditions, some of which are not violations of any code, have been found to give rise to damages to the tenant in warranty cases: faulty electrical wiring, *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); rotten bathroom floor and defective door, *Hinson v. Delis*, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); falling ceiling plaster, *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973); lack of bathtub and shower, *Gillette v. Anderson*, 4 Ill. App. 3d 838, 282 N.E.2d 149 (1972); inoperable air conditioner, *Whitehouse Estates, Inc. v. Thomson*, 87 Misc. 2d 813, 386 N.Y.S.2d 733 (1976).

109. *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

110. As stated by the Hawaii Supreme Court:

. . . [A] wiring defect may pose an immediate fire hazard such that a tenant cannot reasonably be expected to sleep on the premises. On the other hand, a wiring defect may be in a single non-essential circuit which can be turned off at a circuit box until repaired at some later time.

Lund v. MacArthur, 51 Hawaii 463, 462 P.2d 482, 484 (1969).

111. *Gillette v. Anderson*, 4 Ill. App. 3d 838, 282 N.E.2d 149 (1972).

112. *Jarrell v. Hartman*, 48 Ill. App. 3d 985, 363 N.E.2d 626 (1977).

113. *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

114. *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (1970); *Morbeth Realty v. Velez*, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (1973).

dollar value for loss of use.¹¹⁵ The total dollar amount awarded as damages should reflect the totality of the tenant's loss of use and enjoyment of the premises due to these conditions.¹¹⁶

Evidentiary Considerations

The determination as to how the defective conditions affected the tenant's use and enjoyment of the premises may be elicited by both documentary and testimonial evidence. Testimonial evidence might include the tenant's own testimony,¹¹⁷ or testimony from witnesses such as neighbors,¹¹⁸ disinterested third parties,¹¹⁹ building or health department inspectors,¹²⁰ or other expert witnesses. Documentary evidence to be considered might include building and health department records,¹²¹ findings or pleadings from building code compliance proceedings,¹²² photographs of the premises,¹²³ and the provisions of the

115. *McKenna v. Begin*, 362 N.E.2d 548 (Mass. App. 1977).

116. Furthermore, it should be noted that tenants may recover consequential damages, as well as damages for loss of use, due to the breach of the warranty of habitability. *Cf.* *Hoffman v. Monoco*, 330 Ill. App. 98, 69 N.E.2d 718 (1946) (consequential damages due to breach of express covenant); *O'Donnell v. Rosenthal*, 110 Ill. App. 225 (1903) (consequential damages due to breach of express covenant).

117. *Park West Mgt. v. Mitchell*, 62 App. Div. 2d 291, 404 N.Y.S.2d 115 (1978); *Whitehouse Estates, Inc. v. Thomson*, 87 Misc. 2d 813, 386 N.Y.S.2d 733 (1976). The testimony of the tenant as to how the conditions in the premises affected his use and enjoyment of the apartment is the best evidence to establish breach and damages. The tenant is the person best able to describe how the conditions have interfered with his and his family's daily peaceful enjoyment of the premises—for example, the existence of constant, annoying odors in the premises that prevent the tenant from entertaining friends or remaining in the premises.

The Illinois courts have utilized testimony by the occupant of land as to loss of use and enjoyment of premises due to conditions which constitute a nuisance to determine damages for such nuisance. For example, in *Wheat v. Freeman Coal Corp.*, 23 Ill. App. 3d 14, 319 N.E.2d 290 (1974), occupants of the land testified that coal dust and smoke from the defendant's mine were "constant, heavy and annoying, prohibiting them from doing their work at home or from opening their windows; that the dust interfered with their water supply and infected their food, clothing and furniture". *Id.* at 16, 319 N.E.2d at 293.

118. Testimony from neighbors familiar with the conditions has been a particularly effective means of proof in nuisance proceedings. *Id.*

119. *Id.*

120. The testimony of a building or health department inspector who has inspected the premises is the best corroboration of tenant testimony for proving conditions which give rise to the breach of warranty and damages.

121. Building inspection reports constitute prima facie evidence of code violations in administrative proceedings. *See* Chicago Municipal Code § 41-7. These reports have been accepted by at least one Illinois appellate court as prima facie evidence of breach of warranty of habitability. *See* *Richardson v. Wilson*, 46 Ill. App. 3d 622, 361 N.E.2d 110, 112 (1977).

The *Report of the Chicago Bar Association Special Committee on Forcible Detainer Court*, *supra* note 16, has further recommended that in warranty of habitability cases arising in eviction court, "[p]rocedures should be established to make available to the parties, at the cost of duplicating the records, the inspection reports of the Building Department of the City of Chicago on the premises in question for the preceding 12-month period." *Id.* at 6.

122. Findings by a building code compliance court that violations existed during the tenancy may be offered into evidence. *See* ILL. REV. STAT. ch. 51, § 13 (1977). If no findings have yet

applicable building code itself.

CONCLUSION

The creation of an implied warranty of habitability in Illinois radically altered the common law doctrine of *caveat emptor* for residential leases. The warranty doctrine established a tenant's right to habitable housing and consequently inspired hopes for improved code enforcement and decent housing. By providing for damages for breach of the implied warranty of habitability, the courts established a potentially effective enforcement device to induce compliance with minimum standards of habitability in residential properties. Although this remedy has been recognized in Illinois since a 1972 Illinois Supreme Court decision, and repeatedly affirmed in subsequent decisions, the Illinois courts have failed to promulgate clear standards for the determination of an award of damages for breach. This failure has rendered a potentially effective remedy a virtual nullity in relief. Moreover, the generally unsympathetic treatment of tenants by the trial courts in warranty of habitability cases has further diminished the effectiveness of the remedy.

This article has proposed a measure of damages in implied warranty of habitability cases that directly measures the tenant's loss of use and enjoyment of the premises due to the defective conditions. The proposal outlined above and the procedures advanced as standards for the determination of damages for breach of the implied warranty of habitability are intended as a model for trial application to the Illinois courts. By considering the nature, duration, and effect of the conditions on the safety, health and well-being of the tenant, and by assessing the total impact of the defects on the tenant's use and enjoyment of the premises, the court can arrive at an equitable damage award that adequately compensates the tenant in accordance with recognized contract principles.

been made in a compliance proceeding, the building department records used in preparation of that case are admissible as official public records, or perhaps as business records.

123. Pictures of the premises showing the conditions or the existing defects on the premises are admissible upon the laying of proper foundation. While photographs also will be helpful in establishing the breach, *see* note 22 *supra*, they are particularly helpful in assisting the factfinder's assessment of the impact of the violations on the tenant's use and enjoyment of the premises.

