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Landlord's Tort Liability

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I. [9.1] SCOPE OF CHAPTER

This chapter first analyzes personal injury (and, by analogy, property damage) actions by tenants or visitors against landlords. It next discusses landlord liability for criminal acts on the premises by third parties. Finally, it reviews the torts of infliction of emotional harm, retaliatory eviction, and trespass.

II. PERSONAL INJURIES

A. [9.2] Scope of Subchapter

This subchapter encompasses the rights and remedies available to tenants and visitors for personal injuries they suffer on demised premises. The same principles of liability will apply to actions seeking recovery for property damage.

Tort actions for personal injuries exist when the essential elements of duty, breach of duty, proximate cause, and damages are present. The concept of duty is analyzed in the framework of the “general rule” and various “exceptions” that have been developed in Illinois. Proximate cause is covered in the context of case decisions involving landlord-tenant or analogous relationships. In addition, the concept of comparative negligence is reviewed. The element of damages is omitted because it is not unique to landlord-tenant situations, and the rules common to other tort actions apply.

B. General Rule

1. [9.3] Duty

In all tort actions involving personal injury, the analysis begins with the requirement of the existence of a duty. Duty may be created by statute, contract, or common law principle. Whether a duty exists in any case is a question of law for the court. *Fancil v. Q.S.E. Foods, Inc.*, 60 Ill.2d 552, 328 N.E.2d 538 (1975). *See also Wadycki v. Vanev Foods Co.*, 208 Ill.App.3d 492, 567 N.E.2d 423, 153 Ill.Dec. 465 (1st Dist. 1990).

In landlord-tenant situations, the duty to users of the premises falls generally on the party having the right to possession and control of the part of the premises where the injury occurs. *Seago v. Roy*, 97 Ill.App.3d 6, 424 N.E.2d 640, 53 Ill.Dec. 849 (3d Dist. 1981).

The problem for the injured tenant is that in many cases the tenant is the party in physical possession and control of the part of the premises where the injury occurs. The very notion of a tenancy is a conveyance from the landlord to the tenant of possession and control of at least a portion of the entire premises. The right of the tenant to possess and control the dwelling unit is normally superior to the landlord's. If the landlord does enter the leased premises to make repairs (*e.g.*, under a provision in a lease), such action alone does not give the landlord control for purposes of liability to the tenant. Thus, the general rule often operates against the tenant who is responsible for keeping and maintaining leased premises in a reasonably safe condition.

Possession and control being the general test of duty, tenants injured on the leased premises often have no cause of action against the landlord in the absence of special circumstances. *Cuthbert v. Stempin*, 78 Ill.App.3d 562, 396 N.E.2d 1197, 33 Ill.Dec. 473 (1st Dist. 1979). Fortunately for the injured tenant, the application of the general rule of landlord non-liability is subject to numerous exceptions. *See* §§9.5 – 9.14.

2. [9.4] Scope of Duty

The duty of the party having possession and control of the premises is to exercise reasonable care to maintain the premises in a reasonably safe condition. *Finesilver v. Caporusso*, 1 Ill.App.3d 450, 274 N.E.2d 905 (1st Dist. 1971). The duty extends only to maintaining the premises to prevent injuries that are reasonably foreseeable. *Trotter v. Chicago Housing Authority*, 163 Ill.App.3d 398, 516 N.E.2d 684, 114 Ill.Dec. 529 (1st Dist. 1987). In tort actions, issues of whether a duty has been breached, of proximate cause, and of damages are generally questions of fact. *Ney v. Yellow Cab*, 2 Ill.2d 74, 117 N.E.2d 74 (1954).

In order to breach the duty, the person in control must have actual or constructive knowledge of the defective condition that caused the injury. *Kostecki v. Pavlis*, 140 Ill.App.3d 176, 488 N.E.2d 644, 94 Ill.Dec. 645 (1st Dist. 1986). However, if a defect could be discovered by a reasonable inspection, the person with control will be liable even for an undetected defect — particularly when the premises are old or decrepit. *Lulay v. South Side Trust & Savings Bank of Peoria*, 4 Ill.App.3d 483, 280 N.E.2d 802 (3d Dist. 1972). The characterization of the defective conditions found upon inspection may be critical in determining whether there was in fact actual or constructive knowledge. In *Duncan v. United States*, 734 F.Supp. 824 (N.D.Ill. 1990), the court upheld a landowner's motion for summary judgment on the basis that there was insufficient evidence to find the landlord had actual or constructive knowledge of the existence of defective steps and rails even though the landlord had a report that mentioned the defective conditions. The court focused on the fact that the report did not describe the conditions as "hazardous" or as requiring "urgent repairs."

Reasonable care implies, at a minimum, the obligation to maintain the premises so that they do not unnecessarily deteriorate, to make reasonable inspections to discover defective conditions, to repair defects, and to warn potential users adequately between the dates of discovery and repair. The extent of the duty is determined by the character and nature of the premises and the age, location, and frequency of use of the particular area where an injury occurs. *Thien v. City of Belleville*, 331 Ill.App. 337, 73 N.E.2d 452 (4th Dist. 1947); *Carlin v. City of Chicago*, 262 Ill. 564, 104 N.E. 905 (1914).

When a tenant agrees to maintain and repair the demised premises but the repairs needed are considered structural (e.g., a new heating unit), the landlord has the responsibility for making the repair. *Kaufman v. Shoe Corporation of America*, 24 Ill.App.2d 431, 164 N.E.2d 617 (3d Dist. 1960). Whether a repair is structural turns on whether the repair is so extraordinary or unforeseeable that the parties did not contemplate it and whether the repair benefits the landlord more than the tenant. Falling plaster has been held to be nonstructural and, therefore, the tenant's responsibility. *Baxter v. Illinois Police Federation*, 63 Ill.App.3d 819, 380 N.E.2d 832, 20 Ill.Dec. 623 (1st Dist. 1978). However, another court has held that whether falling plaster in a tenant's apartment is structural is a fact question that depends on the parties' intentions and their pattern of conduct. *Campbell v. Harrison*, 16 Ill.App.3d 570, 306 N.E.2d 643 (1st Dist. 1973). Structural defects normally include defects in floors, joists, rafters, walls, partition studs, supporting columns, and foundations. *Cerniglia v. Farris*, 160 Ill.App.3d 568, 514 N.E.2d 792, 113 Ill.Dec. 10 (4th Dist. 1987).

Although the limits of the duty still remain at the standard level of reasonable care, its parameters seem to be enlarging in favor of injured persons. Questions of whether any inspection was performed, whether it was adequate, whether it was performed at reasonable intervals, whether the defective condition was discovered, whether it reasonably could have been discovered, whether a warning was given, whether that warning was adequate to communicate the danger effectively, whether any repairs were undertaken, and whether the delay between discovery and repair was unreasonable are generally sufficient to justify submission of the question of breach of duty to the fact finder. *Lulay v. South Side Trust & Savings Bank of Peoria*, *supra*.

At common law, the duty owed by landlords or tenants to visitors to their properties depended on whether the visitors were considered licensees, invitees, or trespassers, and whether the injuries occurred in common areas of the property. *Hiller v. Harsh*, 100 Ill.App.3d 332, 426 N.E.2d 960, 55 Ill.Dec. 635 (1st Dist. 1981). Since 1984, these distinctions have been clarified by statute.

The duty now owed by a landlord or a tenant to lawful visitors to the premises is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them. 740 ILCS 130/2. If a visitor to the premises is considered a trespasser, the duty is to refrain from wilful and wanton misconduct. *Shiroma v. Itano*, 10 Ill.App.2d 428, 135 N.E.2d 123 (1st Dist. 1956).

C. [9.5] Exceptions

The landlord is not totally insulated from recovery for injuries sustained by tenants or third parties as a result of defects in the demised premises. There are multiple exceptions that allow for recovery from the landlord. *Gilbreath v. Greenwalt*, 88 Ill.App.3d 308, 410 N.E.2d 539, 43 Ill.Dec. 539 (3d Dist. 1980).

1. [9.6] Common Areas

When the landlord maintains control of part of the premises for the common use of several tenants, the landlord has the duty to exercise reasonable care to keep these areas in a reasonably safe condition. *Williams v. Alfred N. Koplín & Co.*, 114 Ill.App.3d 482, 448 N.E.2d 1042, 70 Ill.Dec. 164 (2d Dist. 1983). This exception is a restatement of the general rule that duty stems from possession and control.

The examination of most standard form leases will reveal various provisions that set forth the landlord's reservation of control over the customary common areas such as stairways, hallways, foyers, walkways, basements, laundry areas, etc. In the absence of such provisions, it requires little imagination to demonstrate which areas of the premises were intended to be retained by the owner for use in common by more than a single tenant.

In the determination of whether an area in question is a common area, difficult questions arise when the portion of the premises in question lies outside the four walls of the tenant's apartment but is apparently provided for the exclusive use of the injured tenant. For example, if the third-floor tenant in a three-story building is injured by a fall on a torn carpet between the first and second floors, it would be difficult for the landlord to contend that the staircase was intended to serve only the third-floor tenant and hence was not a common area. On the other hand, if the same tenant had incurred the same injury on the stairs located between the second and third floors, the owners could reasonably claim that the tenant was in exclusive possession and control of that portion of the stairs. *Manns v. Stein*, 99 Ill.App.2d 398, 241 N.E.2d 691 (1st Dist. 1968).

Factors that should be considered in determining whether an area is a common area include actual usage, maintenance (*Smith v. Rengel*, 97 Ill.App.3d 204, 422 N.E.2d 1146, 52 Ill.Dec. 937 (4th Dist. 1981)), illumination (*Gula v. Gawel*, 71 Ill.App.2d 174, 218 N.E.2d 42 (1st Dist. 1966)), the terms of the lease, and subsequent repairs (*Campagna v. Cozzi*, 59 Ill.App.2d 208, 207 N.E.2d 739 (1st Dist. 1965)). Also see *Annot.*, 65 A.L.R.3d 14 (1975).

Negligent maintenance of the common area may occasionally give rise to an action by the tenant against the landlord for injuries sustained within the dwelling unit. In *Mangan v. F. C. Pilgrim & Co.*, 32 Ill.App.3d 563, 336 N.E.2d 374 (1st Dist. 1975), the tenant was injured in a fall caused by the

frightful discovery of a mouse in her apartment. The rodent's presence was caused by the landlord's negligent maintenance of common areas of the building under his control. Liability was imposed on the landlord because the presence of the rodents gave rise to a variety of reasonably foreseeable risks of harm, including injuries to tenants in their apartments. However, when equipment in a tenant's apartment is part of one of the common systems of the building (steam pipes for heat) and is not defective, the landlord is not liable for injuries sustained by a tenant who does not take reasonable precautions to prevent injury within an apartment. *Hubbard v. Chicago Housing Authority*, 138 Ill.App.3d 1013, 487 N.E.2d 20, 93 Ill.Dec. 576 (1st Dist. 1985). *Accord, Trotter v. Chicago Housing Authority*, 163 Ill.App.3d 398, 516 N.E.2d 684, 114 Ill.Dec. 529 (1st Dist. 1987). The courts have refused to attach liability to a landlord when a reasonably unforeseeable tenant's act is an intervening force that breaks the causal connection between the landlord's alleged negligent maintenance and the injury to the tenant. *Moreno v. Balmoral Racing Club, Inc.*, 217 Ill.App.3d 365, 577 N.E.2d 179, 160 Ill.Dec. 303 (3d Dist. 1991).

Repairs to demised premises by landlords do not necessarily convert such areas into common areas. In *Seago v. Roy*, 97 Ill.App.3d 6, 424 N.E.2d 640, 53 Ill.Dec. 849 (3d Dist. 1981), the landlord made only minimal repairs to a stairway of which tenant had exclusive use, and the appellate court stated:

Merely because a landlord makes minor repairs or cosmetic changes to rental property, he does not thereby become accountable to fix areas under the tenant's control or assume liability from consequent injuries that occur in those areas. A duty is an affirmative obligation to act or refrain from acting so as to avoid creating an unreasonable risk of harm to another. Where a party's conduct, as opposed to his express agreement, is the premise for imposing such a duty, the acts or omissions giving rise to the conduct must be substantial and clearly delineated. 424 N.E.2d at 642.

Single repairs by landlords have been held insufficient to establish the landlord's control over demised premises. *Thorson v. Aronson*, 122 Ill.App.2d 156, 258 N.E.2d 33 (2d Dist. 1970).

The long-recognized public policy prohibition against evidence of subsequent repairs yields when control is in issue. In such a situation, the tenant may offer evidence of repairs or precautions taken by the landlord, either prior or subsequent to the occurrence, for the limited purpose of tending to show control of the premises and to show whose duty it was to make the repairs. *Campagna v. Cozzi*, *supra*; *Kuhn v. General Parking Corp.*, 98 Ill.App.3d 570, 424 N.E.2d 941, 54 Ill.Dec. 191 (1st Dist. 1981). Rules of relevance still apply to such evidence. In *Savka v. Smith*, 58 Ill.App.3d 12, 373 N.E.2d 1051, 15 Ill.Dec. 579 (3d Dist. 1978), evidence of the lessor's alteration of the stairways four years after the injury was excluded as too remote in time to establish that the landlord retained control of the stairways.

2. [9.7] Latent Defects

When the landlord transfers the right to possession and control of demised premises to a tenant and the landlord has knowledge of a defect that is not readily apparent to the tenant, the owner has a duty to disclose the defect to the tenant at the time of the letting. *Wanland v. Beavers*, 130 Ill.App.3d 731, 474 N.E.2d 1327, 86 Ill.Dec. 130 (1st Dist. 1985). If the tenant learns of the defect and is later injured because of it, the landlord is not liable. *Roseman v. Wilde*, 106 Ill.App.2d 93, 245 N.E.2d 644 (1st Dist. 1969). If the defect could be discovered by a tenant upon reasonable inspection, the landlord is not liable for injuries caused by it. *Cerniglia v. Farris*, 160 Ill.App.3d 568, 514 N.E.2d 792, 113 Ill.Dec. 10 (4th Dist. 1987).

In *Anderson v. Cosmopolitan National Bank*, 54 Ill.2d 504, 301 N.E.2d 296 (1973), a case involving the sale of real property, the court held that when a vendor either actively conceals or fails to reveal a dangerous latent condition to the vendee, the tortious liability of the vendor continues until the vendee actually discovers the condition and has had an opportunity to remedy it. See RESTATEMENT (SECOND) OF TORTS §352 (1965).

Landlords must exercise reasonable care and are required to conduct reasonable inspections of premises they rent to discover defects. *Lulay v. South Side Trust & Savings Bank of Peoria*, 4 Ill.App.3d 483, 280 N.E.2d 802 (3d Dist. 1972). The landlord's knowledge of a defect can be constructive, as when a defective condition exists for a long period of time. *Villarreal v. Lederman*, 93 Ill.App.3d 976, 418 N.E.2d 81, 49 Ill.Dec. 437 (1st Dist. 1981). Liability will most likely attach to a landlord when upon reasonable inspection the defects discovered are found to be "hazardous" or in need of "urgent repairs" and the landlord fails to correct the defects. *Duncan v. United States*, 734 F.Supp. 824 (N.D.Ill. 1990). However, for the landlord to be liable, the defect must exist at the time of the original leasing. *Wagner v. Kepler*, 411 Ill. 368, 104 N.E.2d 231 (1951).

Under the latent defect theory, the tenant is placed in the awkward position of trying to prove, on the one hand, that the defect was of such a nature and existed for such a period of time that the owner knew or should have known of it, while at the same time a reasonable inspection by the tenant could not have discovered it. This theory has been established effectively in cases involving the presence of sewer gas (*Sunasack v. Morey*, 196 Ill. 569, 63 N.E. 1039 (1902)), rotted flooring (*Hamilton v. Baugh*, 335 Ill.App. 346, 82 N.E.2d 196 (4th Dist. 1948)), and inadequate drainage for flood control (*Wanland, supra*).

3. [9.8] Negligent Repairs

A landlord who undertakes repairs can assume a duty when none previously existed. The duty to use ordinary care in making repairs exists whether the landlord is fulfilling a contractual obligation under a covenant to repair or performing the activities gratuitously. *Roesler v. Liberty National Bank*, 2 Ill.App.2d 54, 118 N.E.2d 621 (1st Dist. 1954).

The application of this exception occurs most frequently in cases involving snow and ice. In the absence of any affirmative promise on the part of the owner, no duty exists to remove a natural accumulation of snow and ice from the common areas of the premises. *Chisolm v. Stephens*, 47 Ill.App.3d 999, 365 N.E.2d 80, 7 Ill.Dec. 795 (1st Dist. 1977). However, when the landlord agrees under the lease to remove snow or attempts voluntarily to do so, the landlord must exercise ordinary care. *Tressler v. Winfield Village Cooperative, Inc.*, 134 Ill.App.3d 578, 481 N.E.2d 75, 89 Ill.Dec. 723 (4th Dist. 1985); *Williams v. Alfred N. Koplín & Co.*, 114 Ill.App.3d 482, 448 N.E.2d 1042, 70 Ill.Dec. 164 (2d Dist. 1983). When an owner attempts to remove a natural accumulation of snow and in so doing creates an unnatural hazardous condition, the owner may be held liable for consequent injuries.

A single act of repair voluntarily but negligently performed can be actionable, but the single repair must clearly be the cause of injury. *Roesler, supra*. When a landlord hires an independent contractor to make repairs and fails to exercise reasonable care in selecting the independent contractor, liability may attach. *Huber v. Seaton*, 165 Ill.App.3d 445, 519 N.E.2d 73, 116 Ill.Dec. 483 (2d Dist. 1988).

For a discussion of how repairs may cause a portion of demised premises to be considered common areas under the landlord's control, see §9.6.

4. Covenant To Repair

a. [9.9] Express Covenant To Repair

Historically, the contractual obligation of the landlord arising out of a covenant to repair would not be a sufficient basis for tort liability when the repairs are not made and an injury results (*Soibel v. Oconto Co.*, 299 Ill.App. 518, 20 N.E.2d 309 (1st Dist. 1939)), especially when a covenant provides the landlord with the option to repair but places primary maintenance responsibility on the tenant (*Bielarczyk v. Happy Press Lounge, Inc.*, 91 Ill.App.3d 577, 414 N.E.2d 1161, 47 Ill.Dec. 45 (1st Dist. 1980)).

In 1975, the Illinois appellate court took a giant step in expanding the tort liability of landlords arising from covenants to repair. In *Looger v. Reynolds*, 25 Ill.App.3d 1042, 324 N.E.2d 238 (3d Dist. 1975), a guest of the tenant alleged that the landlord specifically undertook an obligation to repair a defective porch that caused the guest's injury. The court found that the allegations stated a cause of action and went on to adopt the RESTATEMENT (SECOND) OF TORTS §357 (1965), as the prevailing rule:

A lessor . . . is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if

(a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and

(b) the disrepair creates an unreasonable risk . . ., and

(c) the lessor fails to exercise reasonable care to perform his contract.

The implications of Illinois courts adopting the RESTATEMENT approach were explored further in *Dial v. Mihalic*, 107 Ill.App.3d 855, 438 N.E.2d 546, 63 Ill.Dec. 615 (1st Dist. 1982). In *Dial*, the plaintiff, while standing in the kitchen of another tenant's apartment, fell backwards and sustained injuries after being startled by the unexpected opening of a faulty oven door on an electric stove supplied by the landlord. The plaintiff contended that by virtue of an express covenant to maintain "gas and/or electric appliances" the landlord expressly assumed a duty to maintain the stove in the host-tenant's apartment. In addition to adopting the RESTATEMENT rule in deciding that the landlord had assumed a duty under the covenant, the court found that under §357

1. liability may exist for a condition of disrepair arising after the lessee has taken possession;
2. liability is not limited to agreements to make specific repairs but also extends to a general covenant in the lease to keep the land in repair; and
3. liability can arise regardless of whether the defect exists in the demised premises or the common areas.

If a landlord promises to make a repair not required under the rental agreement, the commitment must be supported by adequate consideration. Thus, a gratuitous written or oral promise to repair made by a landlord after execution of the lease is unenforceable unless some new, separate form of consideration is given. *Shehy v. Bober*, 78 Ill.App.3d 1061, 398 N.E.2d 80, 34 Ill.Dec. 405 (1st Dist. 1979).

A covenant to repair is also subject to the parol evidence rule because of its contractual nature. An oral covenant made prior to or contemporaneous with the lease has been held inadmissible and unenforceable. *Cuthbert v. Stempin*, 78 Ill.App.3d 562, 396 N.E.2d 1197, 33 Ill.Dec. 473 (1st Dist. 1979). However, a strong argument can be made that a prior oral promise to repair is admissible if it is not inconsistent with and does not vary the terms of the rental agreement. *Newco Laundromat Co. v. ALD, Inc.*, 16 Ill.App.2d 494, 148 N.E.2d 820 (1st Dist. 1958).

b. [9.10] Implied Covenant To Repair

A covenant to repair may be established by implication based on a landlord's prior course of conduct. In *Jones v. Chicago Housing Authority*, 59 Ill.App.3d 138, 376 N.E.2d 26, 17 Ill.Dec. 133 (1st Dist. 1978), a tenant's child was injured when he fell from a window in the rented apartment. The tenant had requested repair of a broken window latch by the landlord twice before the occurrence. There was also evidence of a consistent prior history of the landlord's responding to tenants' requests for repairs. The court held that the failure to repair on this occasion constituted a breach of the landlord's implied covenant to repair as established by the course of prior conduct.

5. [9.11] Doctrine of Foreseeable Consequences — Duty to Children

If a child is injured on the demised premises, special rules of negligence may apply to provide a vehicle for recovery of tort damages. If it is foreseeable that children may come on a property and be exposed to danger or unreasonable risk of harm, the person in possession and control must use reasonable care for their safety. *Kahn v. James Burton Co.*, 5 Ill.2d 614, 126 N.E.2d 836 (1955). However, to be actionable, the condition must be one in which the dangers are not likely to be appreciated by children. *Corcoran v. Village of Libertyville*, 73 Ill.2d 316, 383 N.E.2d 177, 22 Ill.Dec. 701 (1978). See also *Colls v. City of Chicago*, 212 Ill.App.3d 904, 571 N.E.2d 951, 156 Ill.Dec. 971 (1st Dist. 1991).

The doctrine of foreseeable consequences enunciated by the Illinois Supreme Court in the landmark *Kahn* case replaced the common law doctrine of attractive nuisance. *Kahn* requires four elements to establish liability:

- a. the owner's knowledge that young children frequent the area;
- b. the existence of a defective or dangerous condition;
- c. the likelihood that the condition will cause injury because of the inability of children to appreciate the risk;
- d. a slight the expense of remedying or guarding against injury compared to the risk of harm to the children. *Niemann v. Vermilion County Housing Authority*, 101 Ill.App.3d 735, 428 N.E.2d 706, 57 Ill.Dec. 156 (4th Dist. 1981).

The import of the *Kahn* decision is that it

- a. rejected the implication in the attractive nuisance doctrine that the dangerous condition had to lure children into trespassing on the premises;
- b. obviated the common law distinctions of trespasser, licensee, and invitee as relating to children injured on the premises of another;

- c. established the foreseeability of harm to children (and not the attractiveness of the condition) as the cornerstone of liability; and
- d. brought Illinois law into harmony with RESTATEMENT (SECOND) OF TORTS §339 (1965). *Corcoran v. Village of Libertyville, supra*.

The *Kahn* rule has been applied narrowly in landlord-tenant relationships. In *Geiger v. Fisher*, 104 Ill.App.2d 6, 244 N.E.2d 848 (3d Dist. 1968), the court held that a natural condition such as a river embankment was not a dangerous condition under *Kahn*. A metal stake found in a large sandpile in the landlord's parking lot was held to not create an inherently dangerous condition creating a foreseeable risk to children within the meaning of *Kahn*. *Cole v. Housing Authority of LaSalle County*, 68 Ill.App.3d 66, 385 N.E.2d 382, 24 Ill.Dec. 470 (3d Dist. 1979). In *Neimann v. Vermilion County Housing Authority, supra*, the court held that if a condition is not inherently dangerous (e.g., debris, including sticks, that was piled in the common area for a long period of time), *Kahn* applies only if additional circumstances exist that render the condition dangerous to children.

In two cases, tenants were successful in recovering damages for injuries to their children under the *Kahn* theory: *Smith v. Springman Lumber Co.*, 41 Ill.App.2d 403, 191 N.E.2d 256 (4th Dist. 1963); *Drell v. American National Bank & Trust Co.*, 57 Ill.App.2d 129, 207 N.E.2d 101 (1st Dist. 1965). Both of these cases involved tenants' children being injured while playing near tanks exterior to their dwelling units. However, the court in *Almendarez v. Keller*, 207 Ill.App.3d 756, 566 N.E.2d 441, 152 Ill.Dec. 754 (1st Dist. 1990), distinguished *Kahn* by stating that it would not consider the liability of a landlord for injuries that occur on the leased premises and therefore did not impute liability on a landlord for injuries sustained by a tenant's employee on the leased premises.

Tenants or their guests who seek to recover under the *Kahn* doctrine should proceed carefully. The dangerousness of the condition under the totality of circumstances, the foreseeability of the possible harm, the particular risk and attractiveness to children, the defendant's knowledge of the condition, and the cost to repair the condition should be addressed in pleading and proof. See *Deibert v. Bauer Brothers Construction Co.*, 141 Ill.2d 430, 566 N.E.2d 239, 152 Ill.Dec. 552 (1990).

6. [9.12] Nuisance

Another exception to the general rule that a landlord is not liable for injuries sustained by a tenant or a visitor occurs when the defect causing the harm is considered a nuisance. *Gilbreath v. Greenwalt*, 88 Ill.App.3d 308, 410 N.E.2d 539, 43 Ill.Dec. 539 (3d Dist. 1980). A nuisance may exist when, at the inception of a lease, a latent defect existed and the landlord actively concealed it. *Id.* Also, certain municipal codes regulating building maintenance declare unlawful conditions to be public nuisances, and tort liability can spring from these violations. *Turner v. Thompson*, 102 Ill.App.3d 838, 430 N.E.2d 157, 58 Ill.Dec. 215 (1st Dist. 1981). If a tort claim is grounded in nuisance, the plaintiff's own negligence is generally not a consideration in the case. *Id.* Nevertheless, nuisance theory has not been widely used by tenants or their guests to seek tort recovery from landlords. If a tenant or guest seeks recovery under a nuisance theory, general principles of tort law should be thoroughly researched to identify the necessary elements of the tort.

7. [9.13] Violation of Statute or Ordinance

The violation of an ordinance is prima facie evidence of negligence if the ordinance is designed for the protection of human life or property. If an injured person falls within the class of persons the ordinance is designed to protect, and if the violation is the proximate cause of the injury, tort recovery should be available. *Enis v. Ba-Call Building Corp.*, 639 F.2d 359 (7th Cir. 1980). See also *Moreno v.*

Balmoral Racing Club, Inc., 217 Ill.App.3d 365, 577 N.E.2d 179, 160 Ill.Dec. 303 (3d Dist. 1991); *Bybee v. O'Hagen*, 243 Ill.App.3d 49, 612 N.E.2d 99, 183 Ill.Dec. 842 (4th Dist. 1993). Of course, the condition causing the injury must be in violation of the applicable code to be actionable. *Gula v. Gawel*, 71 Ill.App.2d 174, 218 N.E.2d 42, 46 (1st Dist. 1966).

In *Mangan v. F. C. Pilgrim & Co.*, 32 Ill.App.3d 563, 336 N.E.2d 374 (1st Dist. 1975), a landlord's failure to prevent rodent infestation as required by local law was held to be a basis for a finding of negligence in favor of a tenant who was injured when she fell after a mouse jumped out of her oven. Under this theory, the injured party must not only be within the class of persons the ordinance protects, but the harm to the plaintiff must be the type that the ordinance seeks to prevent. In *Mangan*, the harm the tenant suffered was found to be the kind that the ordinance was intended to prevent because the presence of rodents gave rise to numerous foreseeable dangers. However, in *Kostecki v. Pavlis*, 140 Ill.App.3d 176, 488 N.E.2d 644, 94 Ill.Dec. 645 (1st Dist. 1986), the court held that laws relating to the condition of doors to promote fire safety could not support a finding of liability on the landlord's part when the injury occurred in a nonemergency situation. In *Ding v. Kraemer*, 59 Ill.App.3d 1042, 376 N.E.2d 266, 17 Ill.Dec. 267 (1st Dist. 1978), the tenant, injured as the result of a gas explosion in her apartment, alleged that the landlord had failed to comply with a local ordinance that required that stoves be positioned on noncombustible surfaces. The court held that the ordinance was intended to prevent heat from the stove from coming in contact with combustible surfaces, thereby preventing fires, not gas explosions. Hence, the violation of the ordinance was not held to be a proximate cause of the plaintiff's injury. Similarly, the court in *Moreno v. Balmoral Racing Club, Inc.*, *supra*, did not hold a landlord liable for the death of a tenant who died of carbon monoxide poisoning after attempting to heat his apartment by operating a charcoal grill indoors without ventilation when the landlord breached his statutory duty to provide heat to the tenant's apartment. The court held that the tenant's act was not reasonably foreseeable and was an intervening cause that broke the causal connection between the wrong consisting of the landlord's statutory violation and the tenant's injury.

In *Shehy v. Bober*, 78 Ill.App.3d 1061, 398 N.E.2d 80, 34 Ill.Dec. 405 (1st Dist. 1979), the plaintiff claimed that defendant's violation of a local law requiring that all windows be secured by hardware was the proximate cause of plaintiff's death (four-year-old fell out of a third-floor apartment window). The court held that in cases in which alleged negligence is based on ordinance violations, the issues of whether the plaintiff is within the class sought to be protected by the law, whether the injury is the kind which the law seeks to prevent, and proximate cause are questions to be resolved by the trier of fact.

The purpose of the statute is an important consideration in determining whether it creates a cause of action and whether its violation is evidence of negligence. In *Magnotti v. Hughes*, 57 Ill.App.3d 1000, 373 N.E.2d 801, 15 Ill.Dec. 455 (5th Dist. 1978), the plaintiff, whose daughter died as a result of a fire of undetermined origin, argued that the Illinois fire safety statute imposed a duty on the landlord not to allow the property to become susceptible to fire. The court held that the real purpose of the statute was to impose a duty on the state Department of Law Enforcement to adopt rules to protect the public from hazards of fire. Since the plaintiff failed to plead any such rules or violations thereof, the court held that a cause of action could not be predicated merely on such a general and vague standard.

The following statutes and ordinances are examples of statutes available to plead an action in negligence for statutory violations:

Illinois Statutes

- a. 425 ILCS 25/9 (duty of owner as to fire hazards);
- b. 65 ILCS 5/11-30-4 (construction of buildings and fire escapes);
- c. 65 ILCS 5/11-30-6 (lighting of stairs, vestibules, etc.);
- d. 410 ILCS 45/1, *et seq.* (Lead Poisoning Prevention Act).

Chicago Municipal Code

- a. Section 13-124-350 (safety glazing materials);
- b. Section 7-4-020 (removal of lead-based paint);
- c. Section 13-196-450 (lighting of stairs);
- d. Section 13-160-300(a), 13-160-300(b) (tread and risers of stairs);
- e. Section 13-160-320 (handrails on stairways);
- f. Section 13-160-300(d) (winding staircases);
- g. Section 13-164-010, *et seq.* (security devices in residential buildings).

Federal Statutes

- a. 42 U.S.C. §§4821, *et seq.* (Lead-Based Paint Poisoning Prevention Act)
- b. 24 C.F.R. §35.1, *et seq.* (Lead-Based Paint Poisoning Prevention in Certain Residential Structures).

8. [9.14] Implied Warranty of Habitability

In *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 280 N.E.2d 208 (1972), the Illinois Supreme Court recognized the existence of an implied warranty of habitability in the rental of apartments in multiple unit buildings. The *Jack Spring* court held that implied in such rental agreements was a duty on the landlord to maintain the units in compliance with local building codes. A landlord who failed to do so was liable to the tenant for contract damages (*i.e.*, reduced rental value).

Since *Jack Spring*, plaintiffs have made repeated attempts to extend the landlord's liability for breach of the warranty of habitability to include recovery in tort for personal injuries. To date, these attempts have failed. The leading case is *Dapkunas v. Cagle*, 42 Ill.App.3d 644, 356 N.E.2d 575, 1 Ill.Dec. 387 (5th Dist. 1976), in which the court rejected a claim of breach of the warranty of habitability by a tenant for injuries sustained in a fall from the back steps of the premises. The *Dapkunas* court found that the Illinois Supreme Court did not intend to change existing personal injury law when it decided *Jack Spring*. A series of decisions have followed the *Dapkunas* reasoning. *Abram v. Litman*, 150 Ill.App.3d 174, 501 N.E.2d 370, 103 Ill.Dec. 349 (4th Dist. 1986); *Webster v. Heim*, 80 Ill.App.3d 315, 399 N.E.2d 690, 35 Ill.Dec. 624 (3d Dist. 1980); *Beese v. National Bank of Albany Park*, 82 Ill.App.3d 932, 403 N.E.2d 595, 38 Ill.Dec. 364 (1st Dist. 1980); *Auburn v. Amoco Oil Co.*, 106 Ill.App.3d 60, 435 N.E.2d 780, 61 Ill.Dec. 939 (4th Dist. 1982).

The issue of whether tort remedies are available for breach of the implied warranty of habitability has not been expressly addressed by the Illinois Supreme Court. In *Pole Realty Co. v. Sorrells*, 84 Ill.2d 178, 417 N.E.2d 1297, 49 Ill.Dec. 283 (1981), the court indicated some willingness to extend recovery for breach of the warranty of habitability beyond contractual damages. The tenant in *Pole* filed a counterclaim for damages due to physical and emotional injuries caused by the landlord's breach of the warranty. The court found that the warranty applied to single-family residences and without discussion remanded the tenant's tort counterclaims for a hearing on the merits.

Relying on the implicit approval of such a claim in *Pole Realty*, the tenant in *Auburn v. Amoco Oil Co.*, *supra*, brought suit grounded in breach of the warranty of habitability for injuries suffered from an explosion in the furnace within his rented home. The court rejected this claim, relying on *Dapkunas*, and concluded that it was not bound by *Pole Realty* because the Illinois Supreme Court did not decide the propriety of the tort counterclaims on the merits.

In 1985, the Illinois Supreme Court laid a foundation that should serve as a basis for recovery for tort injuries due to a breach of the implied warranty of habitability in landlord-tenant cases. In *Glaoe v. Trinkle*, 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985), the court held that the implied warranty existed in all residential rental agreements in Illinois regardless of whether the landlord was required to comply with a local building code. The court found that the landlord's duty under the implied warranty of habitability sprang not only from the contractual principles enunciated in *Jack Spring* but also from the expectation of habitability implicit in every residential rental agreement. This expectation of habitability concept should serve as a sufficient basis for the recovery of tort damages when the expectation is not met by the landlord.

In other jurisdictions, decisions recognizing the implied warranty of habitability have been followed by decisions allowing tort damages to be awarded when the warranty is breached. *Rivera v. Selfon Home Repairs & Improvements Co.*, 294 Pa.Super. 41, 439 A.2d 739 (1982); *Crowell v. McCaffrey*, 377 Mass. 443, 386 N.E.2d 1256 (1979); *Duke v. Clark*, 267 N.W.2d 63 (1978). Courts have allowed tenants to recover consequential and incidental damages for the tenants' discomfort and annoyance arising from a landlord's breach of the warranty (*Thomas v. Goudreault*, 163 Ariz. 159, 786 P.2d 1010, 1016 (1989)) and for emotional distress for breach of the warranty (*Simon v. Solomon*, 385 Mass. 91, 431 N.E.2d 556 (1982); *Dorgan v. Loukas*, 19 Mass.App. 959, 473 N.E.2d 1151, 1153 (1985)). See also Jean C. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 Wis.L.Rev. 19; RESTATEMENT (SECOND) OF PROPERTY, *Landlord and Tenant*, §17.6 (1977); Susan Etta Keller, *Does the Roof Have to Cave in?: The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress*, 9 Cardozo L.Rev. 1663 (1988). Keller argues that a breach of the landlord's duty should per se be treated as intentional infliction of emotional distress.

In post-*Glaoe* decisions, Illinois appellate courts have refused to allow tort damages to be awarded when the implied warranty of habitability has been breached. In a narrow decision in *Abram v. Litman*, *supra*, the court relied on pre-*Glaoe* precedent to support its position denying tort damages and pointed out that the Illinois Supreme Court did not explicitly authorize tort remedies in *Glaoe*. The *Abram* court virtually invited the Supreme Court to decide the issue. In a dissenting opinion, Justice Buckley argued that *Glaoe* opens the door to tort remedies for breach of the implied warranty of habitability. *Trotter v. Chicago Housing Authority*, 163 Ill.App.3d 398, 516 N.E.2d 684, 114 Ill.Dec. 529 (1st Dist. 1987). Given the progression in recent Illinois Supreme Court decisions, it is likely that the court will eventually find that tort damages are available when the warranty of habitability has been breached. See James L. DeAno, *The Implied Warranty of Habitability: A Case for the Recovery of Damages for Personal Injuries*, 71 Ill.B.J. 532 (1983).

D. [9.15] Notice

The landlord's duty to use ordinary care to keep the premises in a reasonably safe condition is breached only when it can be shown that the landlord had actual or constructive knowledge of the unsafe condition prior to the occurrence. *Kostecki v. Pavlis*, 140 Ill.App.3d 176, 488 N.E.2d 644, 94 Ill.Dec. 645 (1st Dist. 1986). In actions against a public landowner, the general rule is that constructive notice is present when a defective condition exists for such a length of time that public authorities, by the exercise of reasonable care and diligence, should have known of the condition. *Baker v. Granite City*, 75 Ill.App.3d 157, 394 N.E.2d 33, 31 Ill.Dec. 117 (5th Dist. 1979). Constructive notice is a question of fact. *Id.*

If a defect could be discovered by a reasonable inspection, the person who is in control can be held to have constructive knowledge. *Lulay v. South Side Trust & Savings Bank of Peoria*, 4 Ill.App.3d 483, 280 N.E.2d 802 (3d Dist. 1972). The general condition of the premises may heighten the duty to inspect. *Id.* If a defective condition exists for a long period of time, constructive knowledge of the defect can be imputed to the owner. *Villareal v. Lederman*, 93 Ill.App.3d 976, 418 N.E.2d 81, 49 Ill.Dec. 437 (1st Dist. 1981). Illinois courts have also imputed knowledge when it can be shown that the landlord has performed some maintenance or repair on the condition. *Garshon v. Aaron*, 330 Ill.App. 540, 71 N.E.2d 799 (1st Dist. 1947).

In the preparation and trial of a premises liability case against a landlord, actual knowledge may be difficult to prove on the basis of a voluntary admission by the landlord. Testimony by the tenant that the tenant did advise the landlord of the existence of the condition provides evidence of actual knowledge and is perhaps the most frequent source of the plaintiff's proof. *Page v. Ginsberg*, 345 Ill.App. 68, 102 N.E.2d 165 (1st Dist. 1951). In situations that involve objects on the premises or defective conditions that were created by the activities of the owner, the owner should be charged with actual knowledge. *Donoho v. O'Connell's, Inc.*, 13 Ill.2d 113, 148 N.E.2d 434 (1958).

Ordinarily, the length of time during which a defective condition exists prior to the injury is the most important factor in determining whether the lessor knew or should have known of its existence. For example, in *Kahler v. Marchi*, 307 Ill.App. 23, 29 N.E.2d 854 (1st Dist. 1940), when a light in a vestibule hallway went out within one hour of an accident, the lack of notice of the condition insulated the landlord from liability.

Evidence of prior similar occurrences is ordinarily admissible to show notice of the condition, provided the condition was common to the prior occurrences. The leading cases on the subject of admissibility of prior similar occurrences in Illinois are *Moore v. Bloomington, Decatur & Champaign R.R.*, 295 Ill. 63, 128 N.E. 721 (1920), and *Budek v. Chicago*, 279 Ill.App. 410 (1st Dist. 1935). In *Germann v. Huston*, 302 Ill.App. 38, 23 N.E.2d 371 (1st Dist. 1939), a minor plaintiff's testimony was objected to that would have shown that ropes left hanging from the roof of defendant's building had been used by youngsters prior to the occurrence and had resulted in several accidents. Overruling the trial court, the appellate court ruled that such evidence was clearly admissible to show the defendant's knowledge of the danger and the condition or cause common to such independent occurrences.

In expanding the concept of notice under landlord-tenant law, the First District held that a cause of action predicated on a breach of a covenant to repair does not require written notice of the defect and that oral notice is sufficient. *Dial v. Mihalic*, 107 Ill.App.3d 855, 438 N.E.2d 546, 63 Ill.Dec. 615 (1st Dist. 1982). If a cause of action against a landlord is premised on the breach of the implied warranty of habitability, the tenant must notify the landlord of the defects and the landlord must fail to

repair them after a reasonable time. *Glasoe v. Trinkle*, 107 Ill.2d 1, 479 N.E.2d 915, 88 Ill.Dec. 895 (1985). However, *Glasoe* has been interpreted to not require actual notification by the tenant to the landlord if the defect is latent and the landlord has constructive knowledge of its existence. *Abram v. Litman*, 150 Ill.App.3d 174, 501 N.E.2d 370, 103 Ill.Dec. 349 (4th Dist. 1986).

E. [9.16] Comparative Negligence

The Illinois Supreme Court in the landmark case of *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), abandoned the doctrine of contributory negligence and joined the majority of states in adopting a comparative negligence standard for assessing liability in tort cases. The court in *Alvis* adopted a pure form of comparative negligence in which the plaintiff's recovery is reduced by a percentage of the plaintiff's own contributory fault. The Illinois legislature adopted a modified form of comparative negligence in which a plaintiff whose contributory fault exceeds 50 percent of the proximate cause of the injury for which recovery is sought is barred from recovering damages. 735 ILCS 5/2-1116. This statutory development certainly increases the importance of the comparative negligence issue in tort liability cases.

Illinois courts have been slow to address comparative negligence issues in the landlord-tenant context. Pre-*Alvis* decisions provide guidance on how courts will assess a tenant's own negligence in determining whether tort damages can be awarded for injuries suffered because of a landlord's negligent maintenance of property.

A tenant who has knowledge of a dangerous condition has an obligation to use reasonable precaution to avoid it. In *Pamler v. Byrd*, 131 Ill.App. 495 (1st Dist. 1907), a tenant was contributorily negligent as a matter of law when the tenant knew that a railing was loose and leaned on it anyway. Similarly, when a tenant knew of the existence of a hole in a carpet and had tripped on it the day before the injury and avoidance of the condition was not at all difficult, the tenant was negligent as a matter of law. *Fonyo v. Chicago Title & Trust Co.*, 296 Ill.App. 227, 16 N.E.2d 192 (1st Dist. 1938). However, the tenant's knowledge of a dangerous condition alone is not sufficient to establish contributory negligence (*Morehead v. Mayron*, 3 Ill.App.3d 425, 279 N.E.2d 473 (1st Dist. 1972)), especially when the tenant may have few options other than pursuing a route through a known dangerous condition (*Cuthbert v. Stempin*, 78 Ill.App.3d 562, 396 N.E.2d 1197, 33 Ill.Dec. 473 (1st Dist. 1979)). The issue of the plaintiff's negligence is a question to be determined by the fact finder. *Kuhn v. General Parking Corp.*, 98 Ill.App.3d 570, 424 N.E.2d 941, 54 Ill.Dec. 191 (1st Dist. 1981). Courts have enunciated the test for a plaintiff's contributory negligence as "reasonableness of conduct." *Wheeler v. Roselawn Memory Gardens*, 188 Ill.App.3d 193, 543 N.E.2d 1328, 135 Ill.Dec. 581 (5th Dist. 1989).

The rules of contributory negligence applicable to minors in other fields of tort liability apply with equal force in the landlord-tenant setting. A child below the age of 7 is conclusively presumed incapable of contributory fault. *Crutchfield v. Meyer*, 414 Ill. 210, 111 N.E.2d 142 (1953); *Crawford v. Orner & Shayne, Inc.*, 331 Ill.App. 568, 73 N.E.2d 615 (1st Dist. 1947). Children between the ages of 7 and 14 enjoy a rebuttable presumption that they are incapable of contributory negligence. The presumption can be rebutted by a showing that the child had the mental capacity and experience to act negligently. *American National Bank & Trust Co. v. Pennsylvania R.R.*, 52 Ill.App.2d 406, 202 N.E.2d 79 (1st Dist. 1964). The child is required to exercise that measure of care that a child of the same age, intelligence, capacity, and experience would exercise under similar circumstances. *Madison v. Reuben*, 128 Ill.App.2d 11, 262 N.E.2d 794 (1st Dist. 1970). When the age of a minor exceeds 14 years, no presumption exists, and in determining the question of due care the factors of age, experience, intelligence, and capacity must be considered. *Skaggs v. Junis*, 27 Ill.App.2d 251, 169 N.E.2d 684 (2d Dist. 1960).

F. [9.17] Proximate Cause

The concept of proximate cause does not warrant extended attention in a discussion of landlord-tenant law since the rules common to all tort actions apply. If the injury is the natural and probable result of the breach of duty complained of and is one that an ordinary person would regard as foreseeable, then proximate cause exists. *Fugate v. Sears, Roebuck & Co.*, 12 Ill.App.3d 656, 299 N.E.2d 108 (1st Dist. 1973). When unforeseen circumstances beyond the landlord's control, such as rain, cause the injury, no proximate cause exists. *Murphy v. Messerschmidt*, 41 Ill.App.3d 659, 355 N.E.2d 78 (5th Dist. 1976).

In personal injury cases in which liability is grounded on a statute or ordinance violation, issues of whether a plaintiff comes within the special class of persons intended to be protected by the statute or ordinance and whether the injury is of the kind the law is intended to prevent have been discussed in terms of proximate cause.

In *Ding v. Kraemer*, 59 Ill.App.3d 1042, 376 N.E.2d 266, 17 Ill.Dec. 267 (1st Dist. 1978), a gas explosion that resulted when the tenant attempted to relight the pilot light in her stove was held not to be a reasonably foreseeable result of the violation of a local ordinance that required that a stove be placed on noncombustible supports. The court in *Ding* found that the ordinance was intended to prevent heat from the stove from igniting surrounding material, thereby preventing fires. Since the ordinance was not designed to protect against gas explosions, the court reasoned that its violation was not the proximate cause of the injuries to the plaintiff. However, in *Mangan v. F. C. Pilgrim & Co.*, 32 Ill.App.3d 563, 336 N.E.2d 374 (1st Dist. 1975), the plaintiff, an elderly tenant, received permanent injuries as a result of a fall after being frightened by a mouse in her oven. In analyzing the issue of proximate cause, the court found that the landlord had breached his duty under the local rodent infestation ordinance by failing to rid the building of rodents. The court further determined that the plaintiff was intended to be protected by the ordinance and the injury was of the type generally intended to be prevented. The court concluded its analysis of proximate cause by finding that the presence of rodents in a building gave rise to numerous foreseeable events, including the injury suffered by the plaintiff. Similarly, in *Enis v. Ba-Call Building Corp.*, 639 F.2d 359 (7th Cir. 1980), tenants in an unheated apartment boiled water in kettles as an alternative heat source due to a utility shutoff by the landlord. The boiling water spilled on two children, resulting in serious injuries. The landlord conceded that the tenants lived in unheated apartments in violation of a local ordinance and that it was foreseeable that they would use boiling water as an alternative heat source, but it disputed the foreseeability of the plaintiffs' injuries from such alternative means of heat. The court held that the utility shutoff, in violation of the local public safety ordinance, was prima facie evidence of negligence. The court further held that the trier of fact must determine whether the injuries were reasonably foreseeable from the violation of the ordinance, and the case should not have been decided on a motion to dismiss. Finally, the court held that proximate cause could exist even if the precise injury complained of was not foreseeable.

In another case involving an undisputed issue of a landlord failing to provide heat to a tenant's apartment, the landlord was found not liable in tort when the tenant died of carbon monoxide asphyxiation when he attempted to use a charcoal grill to provide heat. *Moreno v. Balmoral Racing Club, Inc.*, 217 Ill.App.3d 365, 577 N.E.2d 179, 160 Ill.Dec. 303 (3d Dist. 1991). The court found that since a charcoal grill is not intended to be used indoors, the tenant's act was an intervening force, not reasonably foreseeable, and therefore broke the causal link between the landlord's alleged ordinance violation of failing to provide heat to tenant's apartment and the tenant's death of carbon monoxide poisoning. *Id.*

G. [9.18] Exculpatory Clause in Lease

The existence of a written lease as the basis of the landlord-tenant relationship should immediately suggest the presence of a clause in the fine print of the lease waiving the landlord's tort liability. Since 1971, such exculpatory clauses have been invalidated by statute. 765 ILCS 705/1. This statute does not create an independent duty of care on the part of the landlord. Its effect is that if a landlord has a common law duty of care (see §§9.5 – 9.14), then that duty cannot be waived by an exculpatory clause. *Wright v. Mr. Quick, Inc.*, 109 Ill.2d 236, 486 N.E.2d 908, 93 Ill.Dec. 375 (1985). *Accord, Giger v. Mobil Oil Corp.*, 823 F.2d 181 (7th Cir. 1987).

H. [9.19] Land Trustees/Managers

In this chapter, the term “landlord” has denoted the owner of the building in which the tenants reside. However, the terms are not necessarily synonymous. In Illinois, where the use of the land trust is prevalent, it is common to see pleadings addressed against the land trustee as the sole defendant. It is important to note that although the land trustee may be the titleholder of record, its interest in the premises is generally limited to nominal title. The standard trust agreement provides for the retention of the right of possession and control in the beneficiaries of the trust, and potential liability runs to persons in possession and control of the demised premises. The beneficiaries and the trustee are separate and distinct entities, and neither is the agent of the other. *Koehler v. Southmoor Bank & Trust Co.*, 40 Ill.App.2d 195, 189 N.E.2d 22 (1st Dist. 1963); *Robinson v. Chicago National Bank*, 32 Ill.App.2d 55, 176 N.E.2d 659 (1st Dist. 1961). Since the land trustee typically does not retain possession and control of the premises, the trustee is not liable for tort injuries occurring on the premises. *Fields v. 6125 Indiana Avenue Apartments, Inc.*, 47 Ill.App.2d 55, 196 N.E.2d 485 (1st Dist. 1964).

Attorneys representing parties who have been injured in leased premises must proceed carefully if ownership is concealed in a land trust. The trustee can be sued and will be required to reveal through discovery the identity of the beneficiaries who retain possession and control. These beneficiaries must be added promptly as defendants and must be served appropriately. Failure to add and serve the defendants within the applicable statute of limitations may provide a sound defense to the beneficiaries. *Robinson v. Chicago National Bank, supra*; *Fields v. 6125 Indiana Avenue Apartments, Inc., supra*. Counsel for the plaintiff should review the Code of Civil Procedure, 735 ILCS 5/2-616(d), when the identity of the beneficiaries of land trusts is not known. See also 765 ILCS 425/1.

Whether the person or company who actually rented the apartment to the tenant or managed the building (e.g., real estate management company) should be added as a defendant depends on an agency analysis. As a general rule, the real estate agent who actively participates in the management of rental property or who enters into a rental agreement as a landlord will be an appropriate defendant.

I. [9.20] Contract Purchasers

When a tenant rents property from a person who is purchasing the property in an installment sales arrangement (vendee), the seller of the property (vendor) is generally not liable for injuries suffered in the demised premises. *Anderson v. Cosmopolitan National Bank*, 54 Ill.2d 504, 301 N.E.2d 296 (1973).

J. Common Occurrences

1. [9.21] Snow and Ice

Under the “Massachusetts rule” the landlord has no duty to remove natural accumulations of ice and snow, whereas under the “Connecticut rule” a duty does exist. Illinois adheres to the Massachusetts rule. *Cronin v. Brownlie*, 348 Ill.App. 448, 109 N.E.2d 352 (2d Dist. 1952).

Even under the Massachusetts rule, when the accumulation of ice or snow is the result of an unnatural condition (e.g., landlord failed to repair gutter, which caused water to leak on landing and freeze), liability may attach for independent acts of negligence. *Durkin v. Lewitz*, 3 Ill.App.2d 481, 123 N.E.2d 151 (1st Dist. 1954); *Lapidus v. Hahn*, 115 Ill.App.3d 795, 450 N.E.2d 824, 71 Ill.Dec. 136 (1st Dist. 1983) (defective roof and landing caused ice to accumulate). When the landlord agrees under the lease to remove snow, a duty to do so with due care may be created. *Tressler v. Winfield Village Cooperative, Inc.*, 134 Ill.App.3d 578, 481 N.E.2d 75, 89 Ill.Dec. 723 (4th Dist. 1985). See also *Eichler v. Plitt Theatres, Inc.*, 167 Ill.App.3d 685, 521 N.E.2d 1196, 118 Ill.Dec. 503 (2d Dist. 1988).

If a landlord voluntarily undertakes to remove snow or ice, the landlord must exercise due care. *Sims v. Block*, 94 Ill.App.2d 215, 236 N.E.2d 572 (2d Dist. 1968); *Williams v. Alfred N. Koplín & Co.*, 114 Ill.App.3d 482, 448 N.E.2d 1042, 70 Ill.Dec. 164 (2d Dist. 1983). However, even a landlord’s removal of snow for 15 years does not obligate the removal of the next snowfall. *Chisolm v. Stephens*, 47 Ill.App.3d 999, 365 N.E.2d 80, 7 Ill.Dec. 795 (1st Dist. 1977). Also, if a landlord does not attempt to remove ice and merely sprinkles salt on it, no liability attaches. *Lewis v. W. F. Smith & Co.*, 71 Ill.App.3d 1032, 390 N.E.2d 39, 28 Ill.Dec. 57 (1st Dist. 1979). Finally, when a landlord removes a layer of snow and exposes ice on the sidewalk, the landlord is not liable for removing the ice if it accumulated naturally. *Erasmus v. Chicago Housing Authority*, 86 Ill.App.3d 142, 407 N.E.2d 1031, 41 Ill.Dec. 533 (1st Dist. 1980).

By statute, any person who maintains residential property is encouraged to remove snow and ice from the sidewalks adjoining the property and is liable only for wilful or wanton conduct causing injury. 745 ILCS 75/1, 75/2.

2. [9.22] Stairways

When analyzing liability in a routine stairway case, begin with the local building code. The violation of an ordinance is admissible on the issue of negligence, and if the purpose of the ordinance is the protection of human life, a violation is prima facie evidence of negligence. *Dini v. Naiditch*, 20 Ill.2d 406, 170 N.E.2d 881 (1960). In *Gula v. Gawel*, 71 Ill.App.2d 174, 218 N.E.2d 42 (1st Dist. 1966), the court held that the Chicago Housing Code was such a public safety measure and that tenants were within the class of protected persons. However, the *Gula* court found no violation of the code’s provisions relating to stairways.

Tenants and their guests have generally not been successful in their efforts to recover from landlords for injuries occurring on stairwells. Plaintiffs have normally failed to prove that one of the exceptions to the rule of landlord non-liability applied. *Dapkunas v. Cagle*, 42 Ill.App.3d 644, 356 N.E.2d 575, 1 Ill.Dec. 387 (5th Dist. 1976); *Cuthbert v. Stempin*, 78 Ill.App.3d 562, 396 N.E.2d 1197, 33 Ill.Dec. 473 (1st Dist. 1979); *Gilbreath v. Greenwalt*, 88 Ill.App.3d 308, 410 N.E.2d 539, 43 Ill.Dec. 539 (3d Dist. 1980). One tenant did have a cause of action on the theory of public nuisance when the stairwell conditions violated the local housing code. *Turner v. Thompson*, 102 Ill.App.3d 838, 430 N.E.2d 157, 58 Ill.Dec. 215 (1st Dist. 1981). However, the negligence claim of the tenant in *Turner* was defeated by a finding of contributory negligence by the jury.

Recovery for injuries due to defective stairs has been upheld in other cases. A worn step is a source of potential liability in stairway cases when the unevenness of the tread causes the user to lose balance and fall. *Holsman v. Darling State Street Corp.*, 6 Ill.App.2d 517, 128 N.E.2d 581 (1st Dist. 1955). Likewise, loose metal stripping (nosing) on steps may present a hazard sufficient to establish liability. *Villarreal v. Lederman*, 93 Ill.App.3d 976, 418 N.E.2d 81, 49 Ill.Dec. 437 (1st Dist. 1981). Similarly, the absence of a landing, concealed by a door that opened out onto stairs that were steep and narrow, was sufficient evidence of a dangerous condition to support liability in *Allgauer v. Le Bastille, Inc.*, 101 Ill.App.3d 978, 428 N.E.2d 1146, 57 Ill.Dec. 466 (1st Dist. 1981).

The winding or fan-type stairwell, which could be characterized as inherently dangerous, has unfortunately not been so characterized. In *Carden v. Hunt*, 1 Ill.App.3d 937, 274 N.E.2d 623 (1st Dist. 1971), the court rejected a tenant's argument that such stairwell design is inherently dangerous and held that the existence of a fan stairway alone may not be a basis of liability.

Storage on stairways of materials that impede the use of the stairs and create risk of injury may support tort recovery. In *Meiners v. Moyer*, 119 Ill.App.2d 94, 255 N.E.2d 201 (2d Dist. 1970), punitive damages were allowed when an 18-month-old child fell on some storm windows stored at the base of a hallway staircase when the stairway was also missing banisters.

3. [9.23] Slippery Floors

One of the most difficult cases for an injured person involves an injury caused by a slippery, freshly polished floor. Mere waxing and polishing resulting in a slippery floor is not actionable. *Schmidt v. Cenacle Convent*, 86 Ill.App.2d 150, 229 N.E.2d 413, 415 (2d Dist. 1967). The successful plaintiff must establish a positive act of negligence in the application of the materials, such as

- a. using an excessive quantity of material;
- b. applying the material unevenly;
- c. freshly polishing a floor without warning;
- d. treating a part of the floor and leaving another part untreated;
- e. treating a floor area where users would step onto it unexpectedly;
- f. choosing an inappropriate material; or
- g. allowing use of a floor knowing it is slippery.

In the investigation of a wax case, efforts should be made to obtain a sample of the wax that was applied and, if possible, the original container or at least the identity of the product and its source of manufacture. The investigation should also include an early effort to obtain a slip test measuring the coefficient of friction on various parts of the waxed area. A test of the sample should be undertaken, applying some of the unused wax in accordance with the manufacturer's directions to a similar floor surface and testing the sample under the same conditions under which the original floor was tested. When the test results are compared, the differential between both results may yield an inference of improper application.

If the test results are not helpful, the investigation should focus on the manufacturer's potential product liability. Compare the test results to the standards for coefficient of friction published by the

National Bureau of Standards of the U.S. Department of Commerce and the Underwriters Laboratories. The Underwriters Laboratories' minimum is 0.5 and the Bureau of Standards' minimum is 0.4 coefficient of friction. Anything less than 0.4 is unacceptably slippery. If the product wears the approval stamp of the Underwriters Laboratories, obtain its data file and reports of tests. If there is no stamp of approval, determine if one was ever sought and denied.

In preparing to conduct the tests, it is important to consider the various types of testing devices available that may be chosen — some quite sophisticated, others quite primitive. It would be a considerable waste of effort and money to conduct a test that was subject to challenge on the basis of the type of device used. The American Society for Testing and Materials (ASTM) (1916 Race St., Philadelphia, PA 19103) recommends the use of the “James Machine” for testing the static coefficient of friction of coated floor surfaces, and its data sheet, D-2047-82, sets out the specifics for a standard method of testing. Before engaging a testing laboratory in such a case, it would be prudent to inquire whether the facilities to test in accordance with ASTM standards are available to the laboratory.

4. [9.24] Windows and Screens

As a general rule, the landlord has no duty to furnish screens, and if they are furnished, they need not act as guards or be suitable for anything other than keeping insects out of the building. *Gasquoine v. Bornstein*, 10 Ill.App.2d 423, 135 N.E.2d 121 (1st Dist. 1956); *Rogers v. Sins*, 349 Ill.App. 353, 110 N.E.2d 643 (4th Dist. 1953). However, modern ordinances regulating building conditions may require that windows be maintained in a safer, more secure manner than this common law standard. If an ordinance creates a greater duty than the common law standard and a tenant or guest is injured due to the landlord's noncompliance, tort liability may exist under the theory of violation of ordinance. See §9.13.

Recovery for damages due to defective windows or screens may be available under other theories. In *Madison v. Reuben*, 128 Ill.App.2d 11, 262 N.E.2d 794 (1st Dist. 1970), a landlord who did not repair windows located in the common area and damaged in a fire was found liable for injuries suffered by a tenant because of the defects.

In *Jones v. Chicago Housing Authority*, 59 Ill.App.3d 138, 376 N.E.2d 26, 17 Ill.Dec. 133 (1st Dist. 1978), recovery was allowed when a five-year-old child fell out of a window that opened upon being touched by his head because the latch securing the window was broken. The landlord was held to have assumed a duty to repair the window since he had previously made repairs on anything reported to be in need of repair. However, in *Laster v. Chicago Housing Authority*, 104 Ill.App.3d 540, 432 N.E.2d 1185, 60 Ill.Dec. 286 (1st Dist. 1982), the court reaffirmed the common law principle of non-liability for window screens that do not act as guards and held that a mere promise to repair, absent additional consideration, does not create a duty on the landlord's part to repair defective screens.

5. [9.25] Fire

At common law, a landowner was not required to anticipate a fire on the premises. *Dodd v. Nazarowski*, 4 Ill.App.3d 173, 280 N.E.2d 540 (1st Dist. 1972). Consequently, the ordinary means of escape from a burning building were deemed sufficient escape routes, and a landlord had no duty to provide a fire alarm system (*Galayda v. Penman*, 80 Ill.App.3d 423, 399 N.E.2d 656, 35 Ill.Dec. 590 (4th Dist. 1980)), smoke detectors, fire extinguishers (*Magnotti v. Hughes*, 57 Ill.App.3d 1000, 373 N.E.2d 801, 15 Ill.Dec. 455 (5th Dist. 1978)), fire doors, fire exits (*Webster v. Heim*, 80 Ill.App.3d 315, 399 N.E.2d 690, 35 Ill.Dec. 624 (3d Dist. 1980)), or windows that allow exit (*Dodd v.*

Nazarowski, supra). A local ordinance may create a statutory duty to provide fire prevention or escape systems. See *Bybee v. O'Hagen*, 243 Ill.App.3d 49, 612 N.E.2d 99, 183 Ill.Dec. 842 (4th Dist. 1993). In addition, state law requires fire escapes to be installed in apartment buildings of four or more stories. 425 ILCS 15/1. See also the Smoke Detector Act, 425 ILCS 60/1, *et seq.*

If a tenant or a visitor suffers an injury due to a fire caused by a landlord's poor maintenance of the building, analyze liability under the exceptions to the general rule of non-liability. See §§9.5 – 9.14. If a fire resulting in injury is caused by a landlord's actions unrelated to building maintenance (*e.g.*, landlord smoking in bed), analysis should be under general principles of negligence.

6. [9.26] Elevators

In an elevator liability case, the landlord's traditional duty of ordinary care in the maintenance of common areas is altered because of the special status of common carrier conferred on the party in control of the elevator. The party in control of an elevator occupies the status of common carrier toward passengers and, as such, has a duty to exercise the highest degree of care for the safety of the passengers. *Stewart v. Beegun*, 126 Ill.App.2d 120, 261 N.E.2d 491 (1st Dist. 1970); *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 50 N.E. 178 (1898).

The delegation of maintenance of the elevator to third parties does not abrogate the duties of the party in exclusive control of the premises. *Kopta v. Greer Shop Training, Inc.*, 327 Ill.App. 470, 64 N.E.2d 570 (1st Dist. 1946) (owner's duty); *Carson v. Weston Hotel Corp.*, 351 Ill.App. 523, 115 N.E.2d 800 (1st Dist. 1953) (tenant in exclusive control of premises was liable). An owner cannot assert a defense that the owner has relinquished control by allowing tenants to use it during periods when the regular operator is off duty. *Lotspiech v. Continental Illinois National Bank & Trust Co.*, 316 Ill.App. 482, 45 N.E.2d 530 (1st Dist. 1942).

While the owners of a building with elevators are viewed as common carriers and owe their passengers the highest degree of care, the duty owed by those who undertake to inspect and maintain the elevators is to exercise only ordinary care. *Jardine v. Rubloff*, 73 Ill.2d 31, 382 N.E.2d 232, 21 Ill.Dec. 868 (1978). A company that performs maintenance or inspections, whether gratuitous or not, may be held liable for its negligent maintenance. *Stines v. Otis Elevator Co.*, 104 Ill.App.3d 608, 432 N.E.2d 1298, 60 Ill.Dec. 399 (1st Dist. 1982).

In the preparation of an elevator liability case, the attorney should become acquainted with applicable city ordinances as well as the applicable safety code for elevators published by the American National Standards Institute (ANSI), 1430 Broadway, New York, NY 10018. The ANSI elevator safety code is the generally accepted industry standard in the field and has been adopted as such by most local municipalities in ordinance form.

Expert witnesses are also necessary in most elevator cases. Understanding the technical morass of elevator inspection and maintenance requires a Ph.D. in engineering with a minor in elevator science. Without some expert advice, an attorney has little chance to compete with the defense witnesses supplied by elevator maintenance companies and manufacturers. See also *Annot.*, 63 A.L.R.3d 893 (1975); *Annot.*, 64 A.L.R.3d 1005 (1975).

7. [9.27] Innkeepers

Whether the relationship between a property owner and resident is one of innkeeper-guest or landlord-tenant depends on the nature of the relationship. Factors such as name of residence, frequency of payment, existence of maid and linen service (*Neely v. Lott Hotels Co.*, 334 Ill.App. 91, 78 N.E.2d 659 (1st Dist. 1948)), permanence of guests, food preparation facilities, and ownership of furnishings will all be determinative of which type of relationship exists.

An innkeeper generally owes a duty to guests to use reasonable care to keep the premises safe. *Pollard v. Broadway Central Hotel Corp.*, 353 Ill. 312, 187 N.E. 487 (1933). However, with respect to protecting guests from assaults by third parties, the innkeeper owes a high degree of care. *Mrzlak v. Ettinger*, 25 Ill.App.3d 706, 323 N.E.2d 796 (1st Dist. 1975). If there is a danger in a hotel, the innkeeper owes a duty to warn guests of the danger.

A notable exception to an innkeeper's duty to exercise reasonable care was established in *Stahlin v. Hilton Hotels Corp.*, 484 F.2d 580 (7th Cir. 1973). In *Stahlin*, a federal district court (applying Illinois law) held that an innkeeper has no duty to provide any service for a guest who may be ill or injured, but if the hotel undertakes to provide such services, it must exercise ordinary care in doing so.

The innkeeper's duty to protect the property of guests is described in 740 ILCS 90/1, *et seq.* This statute provides certain limitations on the innkeeper's liability.

8. [9.28] Lead Poisoning

Recovery in a lead-based substance poisoning case can be founded on various legal principles of landlord-tenant law as set out in §§9.3 – 9.14, one of which is most widely recognized — the violation of an ordinance or statute. An example of a lead paint ordinance is §7-4-030 of the Municipal Code of Chicago, which requires owners of any rented dwelling or family unit with lead-based coating, *i.e.*, paint, to remove or cover such coatings. Tenants are held to be within the class of persons intended to be benefited by this ordinance as stated in *Gula v. Gawel*, 71 Ill.App.2d 174, 218 N.E.2d 42, 46 (1st Dist. 1966):

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.

. . . The Code imposes the obligation upon the landlord to refrain from letting or holding out to another for occupancy any dwelling . . . or family unit . . . which does not meet the standards set out by the Code. . . . The Housing Code thus establishes a duty of care based upon contemporary conditions, values and norms of conduct in this community.

The applicable statute is the Lead Poisoning Prevention Act (410 ILCS 45/1, *et seq.*), which authorizes the Department of Public Health to inspect dwellings to determine whether there is a hazard to children because of the presence of lead-based paint. The Department can request the owner to remove the paint within 30 days, and, should the owner fail to do so, the owner can be charged with a Class A misdemeanor. 410 ILCS 45/10. The Act also provides that the failure to remove lead-based substances within the prescribed period will constitute prima facie evidence of negligence in an action brought after the expiration of that 30-day period.

The Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§4821, *et seq.*, can also serve as a basis for liability in that it prohibits the use of lead-based paint in federally assisted housing. The regulations and standards implementing this Act are found in Lead-Based Paint Poisoning Prevention in Certain Residential Structures, 24 C.F.R. §35.1, *et seq.* See also HUD Notice HPMC-FHA 74-6 (1974), implementing the provision of the Act requiring that purchasers of FHA-insured homes constructed prior to 1950 be warned of the possibility of lead poisoning. *City-Wide Coalition Against Childhood Lead Paint Poisoning v. Philadelphia Housing Authority*, 356 F.Supp. 123 (E.D.Pa. 1973).

42 U.S.C. §4821 provides for demonstration and research programs to determine the nature and extent of lead-based paint poisoning in the United States, especially in urban areas; to find methods by which lead-based paints can be removed from interior and exterior surfaces; and to determine the safe level of lead in residential paint products. For a general reference on residential paint products, see 46 AM.JUR. Proof of Facts 2d, *Lead Poisoning*, p. 145 (1986).

Recovery in a lead-based paint poisoning case may be premised on the legal principle of implied warranty of habitability as established by the Illinois Supreme Court in its landmark decision in *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 280 N.E.2d 208 (1972). See §9.14 of this chapter. California courts have already held that a landlord may not be held “strictly liable on the basis of products liability for injuries to a tenant caused by a defect in a leased dwelling.” *Peterson v. Superior Court (Paribas)*, 10 Cal.4th 1185, 899 P.2d 905, 920, 43 Cal.Rptr.2d 836 (1995). The *Peterson* rule applies retroactively. *McCarthy v. Martison*, 51 Cal.App.4th 632, 59 Cal.Rptr.2d 149 (1996).

For a lead poisoning case in which a court imposed an implied warranty of habitability on the Department of Housing and Urban Development as applied to its sale of homes, see *City of Philadelphia v. Page*, 363 F.Supp. 148 (1973), *motion denied*, 373 F.Supp. 453 (E.D.Pa. 1974). See also *Annot.*, 43 A.L.R.3d 1268 (1972).

a. [9.29] *Recognizing and Developing a Lead Poisoning Case*

Lead poisoning results when excessive amounts of lead are absorbed into the body. This excessive absorption slows down many normal chemical processes in the metabolic system because the enzyme systems are inhibited. This condition of lead poisoning is known as “plumbism” or “saturnism.” Medical authorities differ as to what constitutes an excessive amount of lead in the human system. Some authorities maintain that amounts in excess of 0.08 milligrams (less than 3/100,000ths of an ounce) of the metal in 100 cubic centimeters of whole blood suggest lead poisoning. Other authorities maintain that amounts up to 0.10 milligrams per cubic centimeter of whole blood are normal.

When lead is absorbed it is generally deposited in bone, where it is retained without perceptible harm to the body. However, excessive quantities of lead cannot be absorbed and retained in this manner, and consequently the excess metal circulates in the bloodstream and produces serious disability. Even when the lead is stored in bone, certain conditions such as acidosis, dehydration, alcohol intoxication, or starvation tend to release the lead from the bone into the bloodstream, resulting in damage months or years after the original episode. Thus, detecting an injury can be a difficult medical problem.

Aside from a blood or urine test, a technique for the detection of lead poisoning through a scalp hair analysis has been developed at the Children’s Medical Center in Boston. This technique has been successful in screening children in slum areas for lead poisoning. Due to the fact that human hair has the unique ability to concentrate more lead per unit of weight than any other tissue or body fluid, it makes an almost ideal diagnostic tool. See Amares Chattopadhyay et al., *Scalp Hair as a Monitor of Community Exposure to Lead*, 32 Archives of Environmental Health, No. 5, 226 (Sept./Oct. 1977).

The initial symptoms of lead poisoning are usually nausea, vomiting, fatigue, and in the more serious cases, convulsions. However, an early diagnosis of acute or chronic lead poisoning is often made because of the discovery of high lead concentrations in blood or urine or both without any additional symptoms of lead poisoning present. It is usually premature to classify the person as a victim of acute or chronic lead poisoning until other symptoms develop that are attributable solely to lead. Therefore, it is essential that one find a physician or clinic that is specially qualified to evaluate such symptoms. A useful medical reference in lead-based substance poisoning cases is included in 7 AM.JUR. Proof of Facts, *Lead Poisoning*, pp. 11 – 14 (Supp. 1997).

b. [9.30] Sample Pleadings for a Lead Poisoning Case

Following is a sample complaint for a lead poisoning case. In drafting a complaint the attorney should determine if a federal, state, county, or municipal statute has been violated. If so, the violation should be referred to in the complaint.

Following the complaint is a set of plaintiff's interrogatories and a set of defendant's interrogatories. Please note the direction of the defendant's interrogatories in regard to possible defenses, such as the place where the child ingested the paint and an attack on the causal relationship of the injury.

c. [9.31] Complaint at Law

COMPLAINT AT LAW

The Plaintiff, JANE DOE, a minor, by ALICE DOE, her mother, and by their attorneys, complains against the defendant, RICHARD ROE, as follows:

1. On and prior to January 15, ____, the Defendant, RICHARD ROE, owned, possessed, and controlled a certain building and premises located at and commonly described as ____ West Fillmore, City of Chicago, County of Cook, and State of Illinois.

2. At all times mentioned herein the Defendant was under a duty to use reasonable care in the operation, management, maintenance, and control of the aforesaid building and premises.

3. On or prior to January 15, ____, the Plaintiff, JANE DOE, a minor, was lawfully on the aforesaid premises as a tenant and therefore occupied the premises as an invitee.

4. Prior to January 15, ____, the Defendant, in the management, maintenance, operation, and control of the aforesaid premises, had caused the walls, window frames ceilings, and/or halls thereof to be painted, or to remain painted, with a paint containing a high concentration of lead.

5. On or prior to January 15, ____, the Plaintiff, JANE DOE, a minor, ingested loose, chipped, and fallen paint chips that contained a high concentration of lead.

6. Contrary to his duty, the Defendant was guilty of one or more of the following careless and negligent acts or omissions:

- A. Owned, possessed, controlled, and maintained said building and premises in a dangerous condition.**
- B. Allowed said building and premises to be in an unsafe and dangerous condition as a result of the walls, window frames, ceilings, and/or halls, although the Defendant knew, or in the exercise of ordinary care and caution should have known, of such dangerous conditions.**
- C. Allowed an unsafe and dangerous condition to exist on said premises, although the Defendant knew, or in the exercise of ordinary care and caution should have known, of the said condition.**

- D. Failed to warn the Plaintiff of the nature of the premises in question and that the premises were in a dangerous and unsafe condition, although the Defendant knew or should have known of said condition.**
- E. Failed to take reasonable care and measures to protect those legally present on said building and premises, including Plaintiff, from the aforesaid dangerous, unsafe, and defective condition.**
- F. Failed to use lead-free paint for painting the portions of the aforesaid premises, although the Defendant knew, or in the exercise of ordinary care should have known, of the danger inherent in the products that he used.**
- G. Allowed dangerous and hazardous material to be and remain in use on the walls and other portions of said premises, although the Defendant knew or should have known of its presence.**
- H. Allowed the paint on portions of said premises to become chipped, cracked, and otherwise dangerous so that portions of the paint were likely to fall off and be ingested by the Plaintiff or other persons on the premises.**

7. As a proximate result of one or more of the foregoing acts or omissions on the part of the Defendant, the Plaintiff, on and/or before January 15, ____, ingested paint or other material that had fallen from the walls, window frames, ceilings, halls, or other portions of the aforesaid building and premises.

8. As a result thereof, ALICE DOE, mother of said minor, has been forced to expend and to incur, and in the future will incur, obligations and liabilities for hospital, surgical, and medical treatment for the minor endeavoring to cure JANE DOE'S injuries, and ALICE DOE has assigned, transferred, and relinquished to JANE DOE all rights against the Defendant arising as elements of additional damage.

WHEREFORE, the Plaintiff, JANE DOE, asks the entry of a verdict by a jury against the Defendant, RICHARD ROE, in an amount in excess of FIFTY THOUSAND AND NO/100 (\$50,000) DOLLARS as a jury may see fit, which will fairly and adequately compensate her for injuries and damages sustained.

Respectfully submitted,

Attorneys for Plaintiff

d. [9.32] Plaintiff's Interrogatories

NOTE: These interrogatories may need to be tailored in accordance with Illinois Supreme Court Rule 213, which limits interrogatories to 30, including subparts, absent agreement of the parties or leave of court.

PLAINTIFF'S INTERROGATORIES

To: [Attorneys for Defendants]

The Plaintiff, JANE DOE, a minor, by ALICE DOE, her mother, and by their attorneys, comes before the court and submits the following Interrogatories to be answered in writing

under oath by the Defendants on or before [date] pursuant to the Rules of the Supreme Court and the Illinois Compiled Statutes.

1. What are the names and last known residence addresses in the possession of the Defendants of any and all persons who witnessed or claim to have witnessed the occurrence complained of in the Plaintiff's Complaint?

2. What are the names and addresses of the last known employers of each of said persons inquired about in the preceding Interrogatory?

3. What are the names and last known residence addresses in the possession of the Defendants of all persons having knowledge of facts concerning the occurrence complained of in the Plaintiff's Complaint?

4. What are the names and addresses of the last known employers of each of said persons inquired about in Interrogatory No. 3 above?

5. Was there in force on [date of occurrence] and for one year prior to that date a policy of public liability insurance covering the premises commonly known as [address], in Chicago, Illinois?

6. If the answer to Interrogatory No. 5 is in the affirmative:

A. What is the name of the insurance company that issued the policy of public liability insurance, and what were the dates that the policy was issued and would expire?

B. What is the maximum amount of insurance coverage for bodily injuries to any one person provided by the policy of insurance?

C. What is the name of the person or other entity who appears as the assured or assureds in the policy of public liability insurance?

7. What are the names, last known residence addresses, and last known employers of any persons who have knowledge of the condition of the ceilings, walls [or other areas or surfaces painted] of the DOES' apartment at [address], Chicago, Illinois, on [date of occurrence] and for one year prior to that date?

8. Were the painted surfaces of the [walls, etc.] of the DOES' apartment at [address], Chicago, Illinois, cracked and peeling on [date of occurrence]?

9. If the answer to Interrogatory No. 8 above is "Yes," how long had said condition been in existence?

10. On what date or dates last, prior to [date of occurrence], were the [walls, etc.] of the DOES' apartment at [address], Chicago, Illinois, painted?

11. What is the name and address of the person, corporation, or other entity who last painted the [walls, etc.] of the DOES' apartment at [address], Chicago, Illinois, prior to the date of the occurrence complained of?

12. What are the names, last known residence addresses, and last known employer of the painter or painters who painted the [walls, etc.]?

13. What is the name of the person or company who supplied the paint to be used on the [walls, etc.] on the occasion when it was painted prior to [date of occurrence] and:

A. When was the paint purchased?

B. What is the name of the store or company from which the paint was purchased?

C. What type of paint was used? (Give the name of the manufacturer, the color of the paint, and the type of the paint.)

D. Do you have in your possession or under your control any paint of the same manufacturer, type, and kind as that used to paint said [walls, etc.]?

E. Were there any warnings or indications on the paint container that the paint was dangerous in any manner?

F. If the answer to Interrogatory No. 13(E) above is in the affirmative, what was the exact wording of any and all such warnings?

G. Did the paint that was last applied to the [walls, etc.] prior to [date of occurrence] contain lead?

H. Was there any indication on the label of the paint container in which said paint was purchased that the paint contained lead?

14. Were the [walls, etc.] painted at any time between [date of occurrence] and [date of photographs, chemist's samples, etc.]?

15. If the answer to Interrogatory No. 14 above is in the affirmative, on what date or dates was said painting done, and what is the name, last known residence address, and last known employer of the person or persons who did the painting?

16. Was there any person, corporation, or other entity employed to manage the building on and/or prior to [date of occurrence]?

17. If the answer to Interrogatory No. 16 above is in the affirmative, what is the name, last known residence address, and last known employer of the person or persons employed to manage the building?

18. Was there any agreement, either written or oral, concerning the leasing of an apartment in the building at [address], Chicago, Illinois, to ALICE DOE and her family?

19. If the answer to Interrogatory No. 18 above is in the affirmative, what were the oral terms of the agreement? (If in writing, attach a copy of the agreement.)

20. Was there any agreement in effect on and/or prior to [date of occurrence] between [owner] and [manager] concerning the management of the building at [address], Chicago, Illinois?

21. If the answer to Interrogatory No. 20 above is in the affirmative, what were the oral terms of the agreement? (If the agreement was in writing, attach a copy of that agreement.)

22. Was there any agreement prior to [date of occurrence] between the person or company that last painted the [walls, etc.] of the DOES' apartment at [address], Chicago, Illinois, and either [owner] or [manager] concerning the painting of the [walls, etc.]?

23. If the answer to Interrogatory No. 22 above is in the affirmative, what were the oral terms of that agreement? (If the agreement was in writing, attach a copy of that agreement.)

24. Were the premises complained of in Plaintiff's Complaint inspected at any time during a period of three years prior to [date of occurrence] by any City, County, State, or governmental agency or their employees, or any social agencies?

25. State the name, current address, and position of the person answering these Interrogatories.

e. [9.33] Defendant's Interrogatories

DEFENDANT'S INTERROGATORIES

To: [Attorneys for Plaintiffs]

The Defendant, RICHARD ROE, by his attorneys, comes before the court and submits the following Interrogatories to be answered in writing under oath by the Plaintiffs on or before [date] pursuant to the Rules of the Supreme Court and the Illinois Compiled Statutes.

1. State the name and current address of the person answering these Interrogatories.
2. State the name (including any aliases or former names) of Jane Doe's natural mother and father. List all addresses of both parents from the time of Jane's birth through the current date.
3. State the date and place of Jane's parents' marriage to include city and state.
4. State the date and place where Jane Doe was born, indicating city, county, and state.
5. List all prior illnesses of Jane Doe since birth. State the name and address of each doctor, hospital, and other medical person who examined or treated her aforesaid illnesses.
6. List all prior injuries of Jane Doe since birth. State the name and address of each doctor, hospital, and other medical person who examined or treated her aforesaid injuries.
7. List the names and addresses of all other doctors, hospitals, and all other medical persons who have examined or treated Jane Doe at Jane Doe's birth, including the attending physician.
8. State the names and current addresses of all individuals who possess any photograph taken of Jane Doe since birth.
9. Identify each and every residence of Jane Doe since her birth, including her residence at the time of the occurrence. For each, state:

- A. Address;
- B. Floor and apartment number;
- C. Name and address of rental agent;
- D. Owner;
- E. Name and address of janitor;
- F. Dates during which Jane Doe lived at each address;
- G. Names and current addresses of other individuals who lived with Jane Doe at each address.

10. State the names and addresses of all day care facilities, nursery schools, or Head Start programs that have cared for Jane Doe.

11. Has Jane Doe ever been left with a baby-sitter? If so, state the name of each baby-sitter. State the address of the baby-sitter at the time of care, as well as the current residence address.

12. State the names and present or last known addresses of all persons known to you or your attorneys or agents who witnessed or claim to have witnessed the occurrence alleged in your Complaint.

13. State the name, address, phone number, and professional background of each and every person (expert or otherwise) who has examined the apartment in which Jane Doe resided or has tested or examined any material from the apartment with reference to any possible health or safety standards.

14. List and describe all expenses that you have incurred as a result of the occurrence.

15. Has Jane Doe ever been party to any other lawsuit? If so, give the court location and case number. Has Alice Doe ever been a party to any other lawsuit? If so, give the court location and case number.

16. Has Alice Doe ever been convicted of an infamous crime or felony?

17. Were any written or oral statements taken from any persons concerning the occurrence complained of in Plaintiff's Complaint?

18. State with particularity and detail what areas of the [walls, etc.] or the premises alleged in the Complaint were chipped, cracked, or unsafe for persons living in said building.

19. Did anyone in behalf of Plaintiff or otherwise notify any agent of the Defendants of any alleged unsafe condition of the apartment? If so, state the name of the agent contacted, the date, the nature of the matter communicated, and whether the communication was oral or written.

20. With respect to Jane Doe on the date of her first symptoms of poisoning, state in general her complaints and appearance of ill-being, if any.

III. LANDLORD LIABILITY FOR THIRD-PARTY CRIMINAL ACTIVITY

A. [9.34] Scope of Subchapter

This subchapter examines Illinois law involving tenants or visitors who seek to recover from the landlord for injuries sustained on the premises due to criminal acts of third parties.

B. [9.35] Negligence Theory

In order to establish actionable negligence against the owner of property for injuries suffered as a result of criminal acts of third parties by persons lawfully on the premises, a plaintiff must prove three elements: (1) a duty imposed on the landlord to exercise care in favor of the plaintiff, (2) the failure to perform that duty adequately, and (3) an injury so connected with the failure to perform the duty that its failure is the proximate cause of the injury. *Neering v. Illinois Central R.R.*, 383 Ill. 366, 50 N.E.2d 497 (1943); *Jacobsma v. Goldberg's Fashion Forum*, 14 Ill.App.3d 710, 303 N.E.2d 226 (1st Dist. 1973). Whether there exists a legal duty is a question of law. *Fancil v. Q.S.E. Foods, Inc.*, 60 Ill.2d 552, 328 N.E.2d 538 (1975). The questions of whether the duty was breached, proximate cause, and due care are questions of fact. *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 117 N.E.2d 74 (1954).

Ordinarily, a landlord has no duty to protect tenants or guests from the criminal acts of third parties. No special relationship between a landlord and tenant is recognized in Illinois making the landlord liable to the tenant for such criminal acts. *See generally Pippin v. Chicago Housing Authority*, 78 Ill.2d 204, 399 N.E.2d 596, 35 Ill.Dec. 530 (1979). *See also Davis v. Chicago Housing Authority*, 176 Ill.App.3d 976, 531 N.E.2d 1018, 126 Ill.Dec. 391 (1st Dist. 1988).

Exceptions to the general rule of non-liability are beginning to emerge. In determining whether a landlord has a duty to protect a tenant from the criminal acts of another person, the courts will consider three factors: the foreseeability of the injury, the magnitude of the burden of guarding against the injury, and the consequences of placing the duty on the landlord. *Morgan v. Dalton Management Co.*, 117 Ill.App.3d 815, 454 N.E.2d 57, 73 Ill.Dec. 313 (1st Dist. 1983). The leading case outside of Illinois imposing a duty on landlords to protect tenants from foreseeable criminal assaults is *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477 (D.C.Cir. 1970). *See also* Miriam J. Haines, *Landlords or Tenants: Who Bears the Costs of Crime?*, 2 *Cardozo L.Rev.* 299 (1981), and Hiram H. Lesar, *Tort Liability of Illinois Landlords for Crimes of Third Persons*, 1983 *S.Ill.U.L.J.* 415.

1. [9.36] Illinois Cases Supporting Tort Theory of Recovery

Two principal theories have been accepted by Illinois courts allowing tenants to recover from their landlords for injuries caused by the criminal acts of third parties. One theory relates to the landlord's actions in maintaining the property, and the other relates to the landlord's voluntary efforts to provide security to tenants.

a. [9.37] Cases Relating to Landlord's Actions/Inactions and Condition of Property

In *Mims v. New York Life Insurance Co.*, 133 Ill.App.2d 283, 273 N.E.2d 186 (1st Dist. 1971), the court found the landlord liable in a negligence action filed by tenants to recover damages for the loss of a fur coat and money taken from their apartment by an unknown third party. The loss occurred when the landlord's agent allowed the door of the tenants' apartment to remain open while conducting an inspection of the premises. In upholding the imposition of the legal duty, the court relied on basic principles of tort liability and stated:

The law imposes a duty to exercise ordinary care to guard against injury which may naturally flow as a reasonably probable and foreseeable consequence of one's act, and the law is presumed to furnish a . . . redress of every wrong. 273 N.E.2d at 187.

Thus the court in *Mims* held that the theft of the tenants' property by a third party was a reasonably probable and foreseeable consequence of the landlord's agent's act of allowing the door to remain open while conducting the inspection of the apartment. The magnitude of the burden of guarding against such conduct was slight since the landlord had to take only reasonable precautions against theft when inspecting the premises. The consequence of placing this burden on the landlord was minimal. The key elements in *Mims* are that the conduct of the landlord's agent increased the risk of loss to the tenant and the loss directly resulted from these actions. *But see Petrauskas v. Wexenthaller Realty Management, Inc.*, 186 Ill.App.3d 820, 542 N.E.2d 902, 134 Ill.Dec. 556 (1st Dist. 1989), in which the court refused to assess liability on the landlord when a tenant was raped by an intruder who secured access to the building through an open fire escape door and laundry room window because the injury was not reasonably foreseeable from the landlord's conduct.

In *Stribling v. Chicago Housing Authority*, 34 Ill.App.3d 551, 340 N.E.2d 47 (1st Dist. 1975), the tenant's apartment was burglarized on three separate occasions within a 47-day period. On each occasion, the theft was accomplished by burglars who entered the tenant's apartment by demolishing a portion of the wall separating the plaintiff's apartment and one of the vacant adjacent apartments. The tenant, prior to the burglaries, had observed unauthorized persons entering and leaving the area. The tenant repeatedly informed the landlord about these persons and demanded that the vacant apartments be made secure, but the landlord failed to respond to any of these complaints. The court concluded that once the landlord had been put on notice of the first burglary and had refused to secure the adjacent apartments, another burglary became foreseeable. The loss was a direct result of the landlord's failure to secure the vacant apartments, and this inaction led to the commission of the burglaries.

A case following and expanding *Stribling* is *Duncavage v. Allen*, 147 Ill.App.3d 88, 497 N.E.2d 433, 100 Ill.Dec. 455 (1st Dist. 1986). In *Duncavage*, a woman was killed by an intruder in her apartment. The administrator of her estate sued the landlord, and the appellate court found several tort theories actionable. First, the plaintiff stated a claim in negligence because the landlord knew of prior crimes in the building and failed to maintain the common areas in a manner designed to prevent future crimes. The court found that the failure of the landlord to comply with local building codes designed to protect the safety of tenants also supported a negligence claim. Third, the plaintiff stated a claim under Illinois' wrongful death statute due to the landlord's alleged negligence. Finally, the court found that the plaintiff stated a claim for damages under the state's Consumer Fraud Act and the Uniform Deceptive Trade Practices Act by alleging that the landlord misrepresented the safety of the demised premises to the decedent. However, to collect under the Consumer Fraud and Deceptive Business Practices Act, the tenant's injury must be the direct and proximate result of an alleged violation of the Act. *Petrauskas v. Wexenthaller Realty Management, Inc.*, *supra*. If the criminal act is reasonably foreseeable at the time of defendant's act, the causal chain is not necessarily broken. *Id.*

b. [9.38] Cases Relating to Landlord's Negligence in Performance of a Voluntary Duty

When a landlord voluntarily undertakes to protect tenants from criminal acts on the premises, the landlord must use reasonable care in the efforts. *Pippin v. Chicago Housing Authority*, 78 Ill.2d 204, 399 N.E.2d 596, 35 Ill.Dec. 530 (1979). The Illinois Supreme Court also found in *Pippin* that if a landlord contracts with a person or organization to provide security services to protect tenants from criminal acts, the service provider may be liable for failure to exercise reasonable care in the performance of the services.

Illinois appellate courts have applied *Pippin* narrowly outside the context of public housing authority landlords. One court held that when a landlord voluntarily provided a burglar alarm system but did not keep it in good repair, a tenant's rape by an intruder was not proximately caused by the broken burglar alarm system, and there was no liability. *Carrigan v. New World Enterprises Ltd.*, 112 Ill.App.3d 970, 446 N.E.2d 265, 68 Ill.Dec. 531 (3d Dist. 1983). However, the First District court was willing to assess liability to the landlords by distinguishing *Carrigan*. In *Shea v. Preservation Chicago, Inc.*, 206 Ill.App.3d 657, 565 N.E.2d 20, 151 Ill.Dec. 749 (1st Dist. 1990), the landlord at the time the lease was signed promised tenants that an interior security door and safety lock would be repaired. The landlord made attempts to repair the security door and safety lock but failed to restore the door and lock to operable condition. The court found that the landlord could be liable for reasonably foreseeable third-party criminal attacks since the landlord voluntarily undertook actions designed to prevent rather than alert tenants of unauthorized entries onto the premises.

Another court held that voluntary undertakings to prevent criminal actions will not arise from vague contractual language in leases and that landlords are not responsible for the criminal acts of one tenant against another tenant if the risk is not reasonably foreseeable. *Morgan v. Dalton Management Co.*, 117 Ill.App.3d 815, 454 N.E.2d 57, 73 Ill.Dec. 313 (1st Dist. 1983). Further, landlords who provide security systems and security personnel in their buildings do not guarantee the safety of their tenants; they are responsible only for providing these services with reasonable care. *Rabel v. Illinois Wesleyan University*, 161 Ill.App.3d 348, 514 N.E.2d 552, 112 Ill.Dec. 889 (4th Dist. 1987).

In *Cross v. Wells Fargo Alarm Services*, 82 Ill.2d 313, 412 N.E.2d 472, 45 Ill.Dec. 121 (1980), a tenant was beaten as he was waiting for an elevator in the lobby of a Chicago Housing Authority (CHA) building. The CHA had voluntarily undertaken to provide a private guard service in this building. However, the guards were required to be on duty only between 9:00 a.m. and 1:00 a.m. The tenant alleged that by having part-time guard service, the danger to tenants from criminal acts occurring after 1:00 a.m. was actually increased. The tenant further alleged that CHA was aware of this danger but took no steps to prevent it or to inform residents of the increased risks, and these failures were the proximate cause of the injuries suffered by the tenant. The Illinois Supreme Court held that the CHA was obligated to use reasonable care to ensure that risks to tenants from criminal acts were not increased by the deployment of the security service. The court noted in *Cross* that *Pippin* should not be narrowly read so as to hold the CHA liable only for the negligent hiring of a guard service. Rather, if the CHA's deployment of the guard service actually increased the risk of harm to tenants, a negligence claim would exist. The court did order that the private guard service company be dismissed as a defendant because its only obligation was to comply with its contract with the CHA to provide guard service during the designated hours. The court in *Petrauskas v. Wexenthaller Realty Management, Inc.*, 186 Ill.App.3d 820, 542 N.E.2d 902, 134 Ill.Dec. 556 (1st Dist. 1989), however, found that the landlord did not create a situation of increased danger when the landlord left the fire escape doors and laundry room windows open.

The rule that a landlord who voluntarily undertakes to provide security must do so without negligence was further clarified by the Illinois Supreme Court in *Phillips v. Chicago Housing Authority*, 89 Ill.2d 122, 431 N.E.2d 1038, 59 Ill.Dec. 281 (1982). In *Phillips*, the plaintiff alleged that numerous crimes had occurred on CHA's property — particularly rapes that had taken place in an area that the CHA sought to secure by closing off and locking certain unoccupied floors of a high-rise building. The CHA contended that since its actions in closing off floors had not increased the risk of harm to tenants, there could be no liability. The Illinois Supreme Court held that increased risk of harm by the landlord's actions was but one basis of negligence for a landlord's voluntary undertaking. Under *Phillips*, if the landlord's actions are negligently performed and are the proximate cause of injury to a tenant, the injury is actionable regardless of whether the landlord's action actually increased the risk of harm to the tenants.

2. [9.39] Cases Denying Tenant's Recovery for Injuries Suffered as a Result of a Criminal Act

Courts generally will find no duty on the part of the landlord to prevent crimes when two of the three factors set forth in §9.35 are balanced in favor of the landlord. For example, in *Trice v. Chicago Housing Authority*, 14 Ill.App.3d 97, 302 N.E.2d 207 (1st Dist. 1973), the court refused to hold the CHA liable for the death of a tenant that resulted from a television set's being thrown over a railing down to a common area of a housing project. Although the likelihood of injury was great, the magnitude of the burden of guarding against tenants' throwing objects over railings was also great. The consequence of placing this burden on the landlord was considered excessive by the *Trice* court.

In *Smith v. Chicago Housing Authority*, 36 Ill.App.3d 967, 344 N.E.2d 536 (1st Dist. 1976), the court refused to hold the CHA liable for the death of a tenant that occurred when the tenant entered a building in a housing project and was shot and killed by an unknown person. Here the loss was occasioned by neither the landlord's actions or inactions, nor was it a direct result of the condition of the premises itself. The court found that it would be unreasonable to require a landlord to take the extraordinary precautions necessary to protect tenants from injury when they simply entered their apartment buildings late one evening.

In *Martin v. Usher*, 55 Ill.App.3d 409, 371 N.E.2d 69, 13 Ill.Dec. 374 (1st Dist. 1977), the tenant was shot by an intruder when she entered her apartment. The plaintiff argued that negligence arose from the landlord's failure to maintain locks on the doors and windows of the common areas. The court found that the likelihood of injury was not reasonably foreseeable in this case but rather was a mere possibility of occurrence. Accordingly, no duty on the landlord was imposed.

In *Johnson v. Chicago Housing Authority*, 92 Ill.App.3d 301, 416 N.E.2d 38, 48 Ill.Dec. 143 (1st Dist. 1980), the court refused to hold the CHA liable when a tenant was injured when struck by bedding thrown from a window of a housing project. The tenant, in order to avoid the holding in *Trice*, argued that a duty arose when the CHA placed fencing around the exterior landings of the building. The plaintiff argued that once the landings were enclosed, the CHA should have known that tenants would throw articles out of the windows. In rejecting this argument, the court reasoned that although the injury may have been foreseeable, the magnitude of guarding against the likelihood of injury was great. The court held that placing a duty on the landlord to prevent injuries from debris being thrown from windows was too great and would require the CHA to convert its buildings into virtual sealed vaults.

IV. OTHER TORTS

A. [9.40] Infliction of Emotional Harm

Illinois recognizes a tort for the intentional or reckless infliction of emotional harm. The four elements of this tort are (1) extreme and outrageous conduct by the defendant; (2) intent by the defendant to cause, or a reckless disregard of the probability of causing, emotional distress; (3) severe or extreme emotional distress suffered by the plaintiff; and (4) an actual and proximate causal connection between the emotional distress and the defendant's outrageous conduct. *Debolt v. Mutual of Omaha*, 56 Ill.App.3d 111, 371 N.E.2d 373, 13 Ill.Dec. 656 (3d Dist. 1978). *Debolt* further held that a tort action for intentional infliction of severe emotional distress may be maintained even though it is unaccompanied by physical injury or the threat of physical injury.

In *Farnor v. Irmco Corp.*, 73 Ill.App.3d 851, 392 N.E.2d 591, 29 Ill.Dec. 894 (1st Dist. 1979), a tenant sued a landlord for intentional infliction of emotional harm arising out of the landlord's refusal to allow the tenant to move furniture out of her apartment in the middle of the lease term. The court

found that a landlord-tenant relationship could serve as a basis of this tort. See also RESTATEMENT (SECOND) OF TORTS §46, cmt. e (1965). However, the court held that the landlord's conversations, in which he threatened to confiscate the tenant's furniture if it was not removed from the hallway and said that she would not be permitted to use the freight elevator unless she paid rent for three months and forfeited her security deposit, could not be characterized as extreme and outrageous conduct.

Punitive damages cannot be recovered for intentional infliction of emotional harm because the outrageous quality of the defendant's conduct forms the basis of the action and the provision of compensatory damages will be sufficiently punitive. *Knierim v. Izzo*, 22 Ill.2d 73, 174 N.E.2d 157 (1961).

Illinois courts have not decided whether tenants can recover damages for the negligent infliction of emotional harm. However, this tort is recognized in Illinois in other contexts. *Rickey v. Chicago Transit Authority*, 101 Ill.App.3d 439, 428 N.E.2d 596, 57 Ill.Dec. 46 (1st Dist. 1981).

Courts in other jurisdictions have awarded tenants damages for emotional harm when their landlords have wrongfully evicted them. See *Annot.*, 17 A.L.R.2d 929 (1951). Also, when statutes provide tenants with protection from specific conduct by landlords (such as the Chicago Residential Landlord and Tenant Ordinance), damages for emotional distress may be awarded based on breaches of the statute. See *Annot.*, 6 A.L.R.4th 528 (1981).

B. [9.41] Retaliatory Eviction

765 ILCS 720/1 and various local ordinances provide that it is unlawful for a landlord to terminate a residential lease in retaliation for the tenant's complaints to a government agency of building code violations or other protected conduct. Retaliatory eviction can also serve as a basis for a claim for damages against a landlord. *Morford v. Lensey Corp.*, 110 Ill.App.3d 792, 442 N.E.2d 933, 66 Ill.Dec. 372 (3d Dist. 1982).

By analogy to cases allowing employees to sue employers for retaliatory discharge, a tenant may not be able to recover punitive damages for retaliatory eviction until Illinois courts unequivocally hold that such damages are available in these cases. See *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 23 Ill.Dec. 559 (1978); *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876, 52 Ill.Dec. 13 (1981).

C. [9.42] Trespass

A covenant of quiet enjoyment is implied in all lease agreements. *64 East Walton, Inc. v. Chicago Title & Trust Co.*, 69 Ill.App.3d 635, 387 N.E.2d 751, 25 Ill.Dec. 875 (1st Dist. 1979). If the landlord breaches the covenant by disturbing the tenant's occupancy, the tenant is entitled to contract damages (lost rental value) and such special damages as may have been caused to the tenant by the landlord's act. *Id.* Punitive damages can be awarded in appropriate cases. *West Chicago Street R.R. v. Morrison, Adams & Allen Co.*, 160 Ill. 288, 43 N.E. 393 (1896).

The landlord's breach of the covenant of quiet enjoyment constitutes a trespass. *Briggs v. Roth*, 28 Ill.App. 313 (2d Dist. 1888). When a landlord commits a trespass, the tenant can seek injunctive relief to remedy the breach. *Brooks v. LaSalle National Bank*, 11 Ill.App.3d 791, 298 N.E.2d 262 (1st Dist. 1973). Some local laws provide statutory damages when a landlord unlawfully obtains access to a tenant's apartment (e.g., Chicago Residential Landlord and Tenant Ordinance).

If a landlord's repairs to a building interfere with a tenant's use of the demised premises, the tenant can obtain damages and injunctive relief. *Blue Cross Associates. v. 666 North Lake Shore*

Drive Associates, 100 Ill.App.3d 647, 427 N.E.2d 270, 56 Ill.Dec. 190 (1st Dist. 1981). If the repairs are being made by a new purchaser of the building, the new landlord is liable because the new purchaser takes title subject to existing leases. *Bellows v. Ziv*, 38 Ill.App.2d 342, 187 N.E.2d 265 (1st Dist. 1962).