THE FITNESS AND CONTROL OF LEASED PREMISES IN VICTORIA*

The branch of the law of landlord and tenant which concerns itself with implied obligations to repair and the fitness of leased premises for human habitation is fraught with iniquities. The legislation governing 'controlled and prescribed' premises, whilst extremely detailed and pervasive, is also in need of reform. It is therefore surprising that this particular area of the law has stimulated so little academic concern. This paper aims to draw attention to some of the existing injustices and to suggest possible reforms. Neither the analysis of the common law nor that of the relevant legislation pretends to be exhaustive. It is hoped, however, that this study may invite the more detailed examination of this important area.

The Fitness of Premises for Human Habitation

1. THE POSITION AT COMMON LAW

A. *Obligations of the Landlord*

In the absence of express covenant to the contrary, a landlord is not generally burdened with any implied warranty that premises let by him will be in a reasonably fit condition for human habitation.[1] As Erle C.J. stated, 'there is no law against letting a tumbledown house'.[2] Nor is there generally any implied undertaking by the landlord, that he will carry out repairs.[3] However, where the demise is of a *furnished* dwelling-house, there is both an implied undertaking and an implied condition that it is fit for human habitation when let.[4] With regard to *unfurnished* dwelling-houses, there is no warranty of fitness on the part of the landlord.[5]

These anachronistic rules, which stem from nineteenth century decisions,

* The authors wish to thank Mr Ronald Sackville for his helpful comments whilst we were writing this article. Needless to say, any errors which may appear herein are entirely our own.

[1] *Hart v. Windsor* (1843) 12 M. & W. 68. The presumption seems to be that the tenant has made his own enquiries as to the condition of the premises and he must therefore take them as they stand: *Chappell v. Gregory* (1863) 34 Beav. 250. The general rule is thus 'caveat lessee': *Cheater v. Cater* [1918] 1 K.B. 247, 255-6.

[2] *Robbins v. Jones* (1863) 15 C.B. (N.S.) 221, 240. *Cf. Taylor v. Liverpool Corporation* [1939] 3 All E.R. 329 where the landlord was held liable for injury to the tenant's daughter caused by a brick falling from a defective chimney-stack.

It should also be noted that if the lease is already executed and the tenant finds the premises unfit for human habitation he has, it seems, no remedy: *Angel v. Jay* [1911] 1 K.B. 666; *Elder v. Auerbach* [1950] 1 K.B. 359, but *contra Solle v. Butcher* [1950] 1 K.B. 671, 695 *per* Denning L.J.

[3] *Gott v. Gandy* (1853) 2 E. & B. 845; *Sleafer v. Lambeth B.C.* [1960] 1 Q.B. 43.

[4] *Smith v. Marrable* (1843) 11 M. & W. 5; *Wilson v. Finch Hatton* (1877) 2 Ex.D. 336. The significance of the fact that the implied undertaking is also a condition is that, if the premises are not fit for habitation when let, the tenant may repudiate the lease and recover damages for losses incurred: *Charsley v. Jones* (1889) 53 J.P. 280. If the furnished premises are fit for human habitation when let, there is no duty on the landlord to maintain them in this state: *Sarson v. Roberts* [1895] 2 Q.B. 395.

[5] *Hart v. Windsor* (1843) M. & W. 68. *Cruse v. Mount* [1933] Ch. 278 extends the rule to unfurnished flats.

attach undue recognition to the importance of landholding. An examination of the key decisions reveals their foundation on social policies not relevant to the present day.

* * * *

The obligation of fitness of furnished premises for human habitation seems to have arisen by analogy with the doctrine relating to the hiring of chattels. Contracts for hiring and letting chattels carried with them an implied undertaking that the chattels would be fit for the purpose for which they were intended to be used. The leading authority, *Smith v. Marrable*,[6] involved the lease of a furnished dwelling-house. The furniture was infested with bugs. Therefore, the implied undertaking concerning the chattels[7] had been broken and the contract was at an end.[8] From this the proposition was established that in the lease of a furnished dwelling-house the tenant could avoid the lease upon discovery of a defect *in the furniture* rendering it unfit for human habitation. This was subsequently substantially extended so that the tenant of a furnished dwelling-house could avoid the lease upon discovery of a defect, *whether that defect was in the furniture or was not connected with the furniture in any way*.[9] Presumably if the premises had been unfurnished, the tenant could not have avoided the lease.[10] If this is so, what is the possible rationale for allowing the tenant to avoid the lease for a defect rendering the premises unfit for habitation if there is furniture on the premises, and not allowing him to do so if there happens to be no furniture?

DANGEROUS PREMISES AND LIABILITY IN TORT

Similar anomalies exist in the branch of the law of torts relating to dangerous premises where again the prevailing rule is weighted in favour of the landlord.

There is no general duty of care imposed upon the landlord to protect his tenant from such dangers as may exist on the demised premises.[11] Indeed, a lessor has been held to be not guilty of fraud, even though he had failed to disclose a defect in the premises rendering them dangerous.[12] As there was no misrepresentation alleged the lessor could presume, it was said, that the lessee would 'make proper investigation, and satisfy himself

[6] (1843) 11 M. & W. 5.

[7] *I.e.* the furniture.

[8] *Sutton v. Temple* (1843) 12 M. & W. 52 would appear to support this interpretation.

[9] *Wilson v. Finch Hatton* (1877) 2 Ex.D. 336. *Smith v. Marrable* was expressly approved and applied despite the fact that the tenant's objection was not to defective chattels but to defective drains. See further, Williams, 'The Duties of Non-Occupiers in Respect of Dangerous Premises' (1942) 5 *Modern Law Review* 194.

[10] *Hart v. Windsor* (1843) 12 M. & W. 68. This case is commonly cited as the first clear enunciation of the rule relating to unfurnished premises, although the remarks of the court relating to whether there was an implied warranty of fitness were, strictly speaking, *obiter*. The question before the court was whether the tenant was bound to pay rent for the full period of the 3 year lease.

[11] *Lane v. Cox* [1897] 1 Q.B. 415 and cases discussed below.

[12] *Keates v. Cadogan* (1851) 10 C.B. 591.

as to the condition of the house before he entered upon the occupation of it'.[3]

In *Cavalier v. Pope*[14] the landlord let an unfurnished house under a verbal agreement. The house was defective in that the kitchen flooring was in disrepair. It was proved that the house was in 'a dangerous or dilapidated condition'[15] when let. Nevertheless, the landlord was not held liable for subsequent physical injury to the plaintiff's wife on the ground that she was not a party to the contract. The wife was possibly in an even worse position than a customer or guest because, as Lord MacNaghten said, 'She had the disadvantage of knowing more about the state of the house than any guest or customer could have known'.[16] Thus, the ratio of the case really amounts to the principle that a tenant must bring his wife on to the leased premises at his peril, if she is not a party to the tenancy agreement.[17]

One might have expected the courts to take the first opportunity they could find to remedy this situation by, for example, extending the duty of care in tort to cover the landlord-tenant relationship. However, in *Bottomley v. Bannister*[18] the lessors were held to be under no duty of care towards their tenants even though they had themselves created, prior to the commencement of the tenancy, a danger on their premises in the form of a gas boiler with no flue for ventilation.[19] This judicial approach culminated in *Davis v. Foots*,[20] where the defendant lessor's son, prior to the commencement of the tenancy, had removed a gas fire from the premises leaving no stop-gap on the disconnecting pipe. When the gas was turned on the plaintiff's husband was asphyxiated and the plaintiff herself suffered severe illness. The court held that *the lessor of an unfurnished house is not liable to the lessee for defects in the house making it dangerous, even if he has himself brought about the defects or has knowledge of their existence.*

One of the grounds on which the decision rests seems to have been that there was a reasonable opportunity for intermediate examination of the premises by the lessee.[21] Should the existence of an opportunity for inter-

[13] *Ibid.* 601 *per* Jervis C.J.
[14] [1906] A.C. 428.
[15] *Ibid.* 431 *per* Lord Atkinson.
[16] *Ibid.* 430. *Robbins v. Jones* (1863) 15 C.B. (N.S.) 221 had laid down that the landlord was not to be held liable for injuries to the tenant's *customers and guests.*
[17] See now, in relation to covenants to repair, Occupiers' Liability Act 1957 (Eng.).
[18] [1932] 1 K.B. 458.
[19] The same view was expressed in *Otto v. Bolton* [1936] 2 K.B. 46 despite the fact that the well-known enunciation of negligence principles in *Donoghue v. Stevenson* [1932] A.C. 562 had come shortly after the decision in *Bottomley v. Bannister* [1932] 1 K.B. 458. The mother of the plaintiff was injured when a defective ceiling fell on her. It was held, although 'with great regret', that the vendor was under no duty of care. (It should be noted that this was a vendor-purchaser and not a lessor-lessee situation, but the principle remains the same.)
[20] [1940] 1 K.B. 116. 'A striking illustration of the privileged position of landlords with respect to liability in tort for letting dangerous premises.' (1939) 17 *Canadian Bar Review* 753. See also *Travis v. Gloucester Corporation* [1947] K.B. 71.
[21] Du Parcq L.J. thought the defect to be a patent one, apparent on any inspection. See also *Travis v. Gloucester Corporation* [1947] K.B. 71; *Otto v. Bolton* [1936] 2 K.B. 46.

mediate examination be the basis for exculpating a landlord in circumstances where he himself has created the peril prior to the commencement of the lease?[22] While a landlord should perhaps be absolved from liability where he has done nothing to bring about the danger, it is difficult to understand why he should also escape liability in a situation where he has created the danger by his own act of misfeasance (or that of his servant).

B. *Duties of the Tenant*

Where there is no express covenant, the duties of the tenant are dependent upon the law relating to waste and upon an implied contract that he will use the premises 'in a tenantlike manner'. The liability for waste is determined according to the duration of the tenancy. A weekly tenant is generally not liable for permissive waste.[23] It is now implied in weekly tenancies that 'the house will be kept in reasonable and habitable condition . . . by the landlord and not the tenant'.[24] Although this absolves a weekly tenant from liability to repair, it does not place an obligation to repair upon the landlord.[25]

With regard to yearly tenancies the tenant is liable for voluntary waste.[26] If he commits voluntary waste he must make 'fair and tenantable repairs',[27] *i.e.*, such repairs as will enable the premises to exclude 'wind and water'. The expression, 'to keep the premises wind and water tight', had been used[28] but was rejected by Denning L.J. in *Warren v. Keen*.[29] He favoured a duty on the tenant to use the premises 'in a tenantlike manner', and, as Romer L.J. commented in that case, this excludes liability for deterioration due to 'fair wear and tear'.[30]

'To use in a tenantlike manner', in fact means to do the 'little jobs' which a reasonable tenant would do. The tenant must

> take proper care of the place. He must, if he is going away for the winter, turn off the water and empty the boiler. He must clean the chimneys, when necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by his waste . . . . But apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time, or for any reason not caused by him, then the tenant is not liable to repair it.[31]

[22] It is now established that a landlord is liable for any danger created by him *after* the commencement of the lease—*Billings v. Riden* [1958] A.C. 240, where the court disapproved of earlier authorities exempting landlords from liability for repairs negligently carried out during the tenancy.

[23] *I.e.* for a failure or omission to do what ought to be done in order to maintain the premises in a reasonable condition. This is to be contrasted with voluntary waste which is waste resulting from a voluntary act of the tenant.

[24] *Mint v. Good* [1951] 1 K.B. 517, 522.

[25] *Sleafer v. Lambeth B.C.* [1960] 1 Q.B. 43.

[26] *Warren v. Keen* [1954] 1 Q.B. 15.

[27] *Marsden v. Edward Heyes, Ltd* [1927] 2 K.B. 1, 6, *per* Bankes L.J.

[28] *Wedd v. Porter* [1916] 2 K.B. 91, 100 *per* Swinfen Eady L.J.

[29] [1954] 1 Q.B. 15, 20.

[30] *Ibid.* 22 *per* Romer L.J.

[31] *Ibid.* 20 *per* Denning L.J.

The tenant must take care not to damage the premises either wilfully or negligently. If he causes such damage then he must repair it. He must 'take care that the premises do not suffer more than the operation of time and nature would effect'.[32]

C. *Some Practical Effects*

The brief summary above shows that in the absence of express provisions in the lease, the courts are loathe to impose any implied obligations or terms upon the landlord. The privileged status thus enjoyed by the landlord often places the tenant in an extremely difficult position. If he is a person of limited means, such as an old age pensioner,[33] his prime requirement will be cheap accommodation. Faced with such a tenant it is not difficult for a landlord to impose his will within the lease itself. The pensioner will have little, if any, bargaining power. When housing is in short supply statistics indicate that an unscrupulous landlord is able to rent premises in such poor condition that they ought to be a disgrace to our civilized community.[34] Should it be possible for him to do so?

2. THE HOUSING ACTS

In England, the common law rules have been greatly reformed by the Housing Acts of 1957 and 1961. The 1957 Act imposes obligations upon the landlord in certain low-rent leases.[35] Houses let for more than 80 pounds per year in London[36] carry with them an implied condition that the premises will be fit for human habitation at the commencement of the lease, and an implied undertaking that they will be kept so fit for the duration of the tenancy. This condition applies even in the face of express

[32] *Gutteridge and Others v. Munyard and Another* (1834) 1 M. & Rob. 334, *per* Tindal C.J. It also needs to be noted that a tenant for years is liable for both voluntary and permissive waste, Statute of Marlborough 1267 (Eng.), *Yellowly v. Gower* (1855) 11 Exch. 274, *Davies v. Davies* (1888) 38 Ch.D. 499. The most recent authority is *Regis Property Co. Ltd v. Dudley* [1958] 3 All E.R. 491, where it was held that a 'tenant (for life or years) is bound to keep the house in good repair [fair wear and tear excepted] . . . . He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear, from producing others which wear and tear would not directly produce'. *Ibid.* 498 *per* Viscount Simonds.

[33] Other vulnerable groups are newly arrived migrants (McCaughey *Migrant Study* (1968); Institute of Applied Economic Research), and deserted wives with children (Henderson, *Dimensions of Poverty* (1968); Institute of Applied Economic Research).

[34] 'For instance, a widow aged about 63, was living in a room in an old bluestone house in an inner suburb described by the interviewer as "a cold, cob-webby little bungalow, the door the main source of ventilation, damp and smelly; the floor was lumpy as if lino. were laid on bare earth! The kitchen, bathroom, lavatory and laundry were all shared with other pensioners renting bungalows".

Another case was a man aged 75 living in what the interviewer described as "a bungalow 6 ft. by 8 ft. held up by two smelly toilets on either side in the backyard of a rooming house. The door does not close properly and cannot be locked. He shares the kitchen, bathroom, laundry and toilet with 8 or 9 other people who live in the rooming house".' From Henderson, *op. cit.* The files of the Institute contain many similar cases.

[35] Housing Act 1957 (Eng.), s.6(1), (2).

[36] In most other places this is reduced to 52 pounds *per annum* but is sometimes as low as 16 pounds *per annum*, s.6(1) (a) (iii).

stipulation to the contrary. However, in order to be liable, the landlord must have had prior notice of the defect.[37] Matters which are considered relevant in determining the fitness of premises are such things as lighting, drainage, dampness and the condition of the walls and ceilings.[38] The crucial question is whether the defect is likely to cause physical injury to the person or injury to health.[39] If it is likely to do so, then it must be repaired.[40]

The Housing Act of 1961 applies to houses let for less than seven years.[41] Under the Act there is an *implied covenant* by the landlord (a) to keep in repair the *structure*[42] and exterior of the dwelling-house (including drains, gutters and external pipes) and (b) to keep in repair and proper working order the *installations*[43] in the dwelling-house.

The English legislation has no parallel in Victoria. However, the Housing Commission does have very broad powers granted to it by the Housing Act 1958. The Commission has express power to declare premises unfit for human habitation, to condemn them and order their demolition, or to serve a notice on the owner requiring repairs to be done.[44] Alternatively, the Commission may do the repairs itself and demand payment from the owner.[45]

It may be questioned whether these provisions are of practical assis-

[37] *McCarrick v. Liverpool Corporation* [1947] A.C. 219; *Morgan v. Liverpool Corporation* [1927] 2 K.B. 131. Notice from a source other than the tenant is probably not enough see *McCarrick's* case, 232.

[38] Housing Act 1957 (Eng.), ss4, 5, 189(1).

[39] *Summers v. Salford Corporation* [1943] A.C. 283, 289.

[40] The difficulty of repairing is not the test.

[41] Housing Act (Eng.), s.41.

[42] *Granada Theatres v. Freehold Investments (Leytonston) Ltd* [1959] 2 All E.R. 171 where it was said that 'structure' is concerned with walls, roof, foundation and floors. Structural repairs therefore differ from decorative repairs (which are left to the tenant) since they involve an alteration to the framework of the building.

[43] 'Installations', it would seem, refers to facilities for the supply of gas, water, electricity, space heating, sanitary conveniences and drainage.

[44] Housing Act 1958.

S.56(1) empowers the Commission to declare a house to be:

(a) unfit for human habitation; or

(b) in a state of disrepair.

Sub-s. (2)(c) states that in any case in which a house has been declared unfit for human habitation the Commission may serve a notice requiring

(i) such house to be and remain unoccupied; or

(ii) the occupier of such house to vacate such house.

Sub-s. (7) reads:

'For the purpose of prescribing standards on non-compliance with which any house may be declared to be unfit for human habitation or in a state of disrepair the Governor-in-Council may make regulations for or with respect to—

(a) the drainage, sanitation, ventilation, lighting, cleanliness and repair of houses and of land on which houses are situate;

(b) the construction, condition and situation of houses;

(c) the dimensions cubical content and height of rooms of houses (including cellars basements and other rooms);

(d) the protection of houses from damp;

(e) the provision in houses of adequate water supply, bathing, laundry, cooking and food storage facilities and sanitary conveniences;

(f) the freedom of houses from infestation by vermin and rats; and

(g) generally prescribing standards of sanitation and hygiene for houses.

[45] *Ibid.* s.56 (5).

tance to the tenant. In most cases, if a house is unfit for human habitation the first person to discover this will be the municipal health officer. He may have been led to inspect the premises by the complaint of the tenant himself, or one of his neighbours. After inspection the officer reports to the local council which then conveys the information to the Housing Commission. The Commission subsequently sends out an inspector. At this point the system tends to break down. If the Commission decides that repairs will have to be carried out it must serve notices, all of which have to expire before the next step can be taken. The landlord can often hold matters up by appeals for more time to repair or renew.[46] This lengthy delay pays scant respect to the needs of the tenant, who is, after all, the person suffering most from the substandard condition of the premises.

Although the Commission has undertaken and is undertaking extensive building and slum reclamation schemes,[47] it does not as yet have a scheme whereby it lends money for repairs to those landlords who could not otherwise afford to make them, but who have been ordered to do so by the Commission.[48] The following table illustrates the backlog of demolitions and repairs to premises under Housing Commission orders.[49]

	Orders existing at 30.6.67	Orders issued 1967/1968	Orders completed 1967/1968	Orders remaining at 30.6.68
Demolition	2,495	861	846	2,510
Repair	2,401	500	456	2,445
	4,896	1,361	1,302	4,955

Thus, even if all the orders completed in 1967/1968 were orders existing at 30 June 1967, there were still 3,594 orders in existence at the end of the period under review which were there at the commencement. It therefore appears that the majority of demolition and repair orders of the Housing Commission take more than one year to be complied with, hardly an encouraging picture for any tenant living in sub-standard premises.

[46] Such requests are usually granted, for the Commission tries to be as lenient as possible. The Minister for Housing, the Hon. E. R. Meagher, M.L.A., quoted one instance in which attempts to repair a dwelling-house have been dragged out over a period of 9 years. As against this it must be pointed out that the Housing Standards Branch has an independent power to repair premises. Moreover premises may be declared unfit for human habitation after which no tenant will be permitted to move in. It is difficult however, to gauge how effectively these powers are employed in practice.

[47] *Thirtieth Annual Report of the Housing Commission Victoria* 1967-8.

[48] However the Minister for Housing, the Hon. E. R. Meagher, M.L.A., stated in an interview that such a scheme was under consideration. Such a scheme would appear to be desirable especially in view of the estimate that in order to simply retain the *status quo* in Victorian housing, it will be necessary to build as many houses again over the next 31 years, as have been built in the entire history of this State.

[49] *Thirtieth Annual Report of the Housing Commission Victoria* 1967-8 14.

Control of Rents and Evictions in Victoria

1. HISTORY OF LEGISLATION

The history of rent control in Victoria dates back to World War I, although this control was lifted in the 1920s. Victoria enacted the Fair Rents Act in 1938, which was superseded after the outbreak of World War II, by the Commonwealth National Security (Landlord and Tenant) Regulations, promulgated under Commonwealth legislation based on the defence powers. In 1948, the control passed back from the Commonwealth to the States.[50] The relevant legislation in Victoria was the Landlord and Tenant Act 1948 which basically re-enacted the Commonwealth Regulations.

The Victorian Act pegged rents at the 31 December 1940 level, or, where the premises were not in existence or were not leased on that date, at the rent payable when first leased after 31 December 1940. It allowed rents to be determined by Fair Rents Boards, consisting of a Stipendiary Magistrate sitting alone, basing their determination on the capital value of the premises as at 31 December 1940.

Possession could only be recovered from tenants on a limited number of grounds set out in the Act and then only after a Court order.

The Landlord and Tenant Act 1953 saw the first relaxation of this strict control over all premises. Operating from 1 February 1954, it excluded from the control of the legislation any premises which had not been let between 31 December 1940 and 1 February 1954, or which had not been erected or completed by the latter date. Business premises for which a lease in writing for a term of at least three years was entered into after the commencement of the Act, were also released from control.

Further relaxations of control followed in 1954[51] and in 1955.[52] The culmination of this policy as far as business premises were concerned came in

[50] The continuation of the power to control rents by the Commonwealth was deemed unconstitutional. The Constitution Alteration (Rents and Prices) Referendum 1948, held on 29 May 1948, to amend the Constitution to give the Commonwealth this power was defeated by a majority in all States.

[51] The Landlord and Tenant Act 1954 provided that dwelling-houses leased at 31 December 1940 at a rent (not including the rent on any chattels leased) of not less than £2.10.0 *per* week were to have their rents determined by the Fair Rents Board in relation to their capital value at the date of the application for a determination. An agreement between the lessor and lessee in a prescribed form could now have the effect of fixing the fair rent in relation to the same class of premises. The grounds for recovery of possession by the lessor were also varied.

[52] The Landlord and Tenant (Amendment) Act 1955 allowed the lessor of a dwelling-house to give notice of an increase of 25% in the rent over that payable on 31 December 1940 or that payable when the premises were first leased after that date if not leased on that date. An increase of 30% was allowed where business premises were concerned. The lessor could also dmand an increase of eight % per annum of any amount expended on repairs to the premises ordered by any statutory authority. The parties could agree upon a new rent if there was any substantial alteration or addition to the premises. Indeed, premises now ceased to be under control if a new lease, whether in writing or ont, or a lease in writing for not less than three years, was entered into after the commencement of the Act.

1957 when all premises other than dwelling-houses were freed from control.[53]

2. IS CONTROL DESIRABLE?

The present legislation governing rent control is contained in Part V of the Landlord and Tenant Act 1958. Before any detailed study of its provisions can be undertaken, it should be asked whether some form of control over the landlord-tenant relationship is desirable. If this is answered affirmatively, then the present legislation must be examined to see how it performs this task and whether it could be improved.

A survey conducted by the Institute of Applied Economic Research at the University of Melbourne points out that there is a shortage of satisfactory low-cost housing in Victoria. The Director of the Institute, Professor Ronald F. Henderson, has estimated that about 130,000 people ($7\frac{1}{2}$% or one in sixteen of the total population in private dwellings in Melbourne), are living in poverty.[54] He concludes

> the cost of housing is often critical . . . . It may well be that the provision of enough low-cost housing for those who need it will prove to be one of the most effective ways of abolishing poverty.[55]

The importance of this low-cost housing is further borne out by the three year waiting list for Housing Commission flats in the metropolitan area. On 30 June 1968 there were 15,301 applications to the Housing Commission on hand.[56] The highest rental for a Housing Commission flat is $10.80 *per* week. A similar flat 'outside' would cost $25.[57] From an economic point of view, the demand for housing is relatively inelastic, that is, it will be the same whatever the price. It is a basic necessity. Thus it would seem that if the supply of housing could be sufficiently increased, only those premises in reasonable condition and offered for a reasonable rent, would be accepted by tenants. From this point of view then, a housing shortage exists in Victoria.

Problems of oppression by landlords are magnified

> . . . in conditions of shortage because the prospect of eviction is not simply a matter of having to move but a very real threat of being rendered literally homeless.[58]

[53] The Landlord and Tenant (Control) Act 1957. This Act also further extended the grounds for recovery of possession.

[54] Henderson, *Measuring Poverty* 14. Institute of Applied Economic Research (Reprint Series No. 26).

[55] *Ibid.* 13.

[56] *Thirtieth Annual Report of the Housing Commission Victoria* 1967-8 11.

[57] Information supplied by the Minister for Housing, the Hon. E. R. Meagher, M.L.A.

[58] Crane, 'Report of the Committee on Housing in Greater London: Rent Act 1965' (1966) 29 *Modern Law Review* 170, 172. The statement is a partial quotation from the 'Insecurity of Tenure' chapter in the Committee's Report Cmnd 2605 179-187.

But whilst this may be true in some cases the *Committee on Housing in Greater London* in 1964 found that

> the great majority of landlords . . . treat their tenants with complete fairness and propriety and that many of them have exercised the freedom to raise rents on de-control with restraint and humanity.[59]

If this is accepted as being generally true in Australia, one must ask whether all landlords should be bound by strict and rigid control of rents and evictions when the majority may already be acting in a commendable manner. The landlord is, after all, providing a service. Another problem is that if controls are too rigid, private landlords may cease to exist, thus aggravating any shortage in housing.

The 1956 Victorian Board of Inquiry into the Landlord and Tenant Acts, consisting of Mr R. M. Eggleston, studied the effect of the legislation in force at that time. As he saw it, the effect of complete control of rents is to make owners less willing to let their premises because of the general apprehension that they will be unable to recover the premises when they want them again, or be unable to obtain an increase in rents in accordance with changes in general price levels. There is also a great disparity between the sale price which can be obtained for homes giving vacant possession and those with a controlled tenancy. Both of these factors limit the freeing of accommodation for tenancy and accentuate a shortage.[60]

After the Second World War rents remained controlled whilst other prices were released from control. The landlords had for some years been the only sector of the community pegged to 1940 values and this was a source of a feeling of discrimination. In effect, landlords were subsidizing tenants. This could perhaps be better done by the community as a whole. There is a strong case for arguing that the way to improve the position of pensioners, for example, is not to control rents but to increase the pension. In this way more allowance would be made for the ability of the tenant to pay than is possible under a system of controlled rents.

Against this, however, it must be remembered that rents are generally higher now than in 1940. Before the Second World War it was possible to rent standard accommodation at 20 *per cent* of the basic income which was then approximately five pounds. Rents for similar accommodation now tend to be at or near 17 dollars *per* week as compared with an average wage of 34 dollars *per* week.[61] The tenant, as a general rule, has less bargaining power than the landlord and even if other houses are available he may well be prepared to pay more rather than move. There is no substitute for shelter and security.

> As a general proposition it might be assumed that the hardship suffered by tenants through an increase of their rents would counterbalance the relief

[59] *Ibid.* 176.
[60] *Report of the Board of Inquiry into the Landlord and Tenant Acts* (Vic.) 1956 9.
[61] Information supplied by the Secretary, Metropolitan Fair Rents Board.

> given to landlords in respect of the injustices suffered by them from their inability to increase the prices charged to tenants while all prices charged to the landlord have gone up.[62]

Rents are not in many respects related to the costs of borrowing for improvements or to rates for building a home and indeed only subsidies enable many public authorities to let at reasonable rates. On the other hand rents are not related to wages—indeed had they remained at a fixed percentage of wages since 1940 they would be considerably lower than they are.[63] As a general rule the landlord will be wealthier than the tenant, so he will be better able to shoulder any burden. This, however, is not true in all cases, as many tenants are well-off financially and many landlords may be very dependent on rents for their income.

The 1956 Board of Inquiry concluded:

> But I feel that the possibilities of hardship for a substantial number of people are real and it is in the light of this that I have come to the conclusion that although some adjustments of dwelling rents must be made in order to relieve the tensions and distortions which have resulted from the present state of the legislation, the initial step at all events should be moderate in amount and controlled so that its effects can be considered before a further step is taken.[64]

Despite this finding the present legislation does not embody the complete control recommended but adopts decontrol with exceptions. It is submitted that the existing legislation provides the better system. It allows scope for landlords to get a reasonable return whilst enabling individual cases of oppression to be dealt with as they arise. Although complete control would remove much of the arbitrariness of the present system it would needlessly bind all for the sake of a few. It would also require a large administrative corps as an overseer. To deal with the individual cases of oppression and hardship however, some form of control of a limited extent is required. Whether the present legislation deals with these individual cases satisfactorily will be considered shortly.

The problem takes on a different aspect when *business premises* are considered. The finding of the Board of Inquiry[65] was that many tenants felt that rentals should be increased, as not only did their low rentals make them peculiarly susceptible to actions for eviction, but also, the tenants could cover them in their operating costs, which are in turn covered by the prices they charge. The recommendation that they be decontrolled is embodied in section 49[66] of the Act.[67] This provision still allows for pre-

[62] *Report of the Board of Inquiry into the Landlord and Tenant Acts* (Vic.) 1956 16.
[63] *Supra.*
[64] *Report of the Board of Inquiry into the Landlord and Tenant Acts* (Vic.) 1956 20.
[65] *Ibid.* 2-8.
[66] Section 49 states: 'The provisions of Division two, three and four of this Part shall not apply to any premises (not being a dwelling-house) unless an Order in respect of those particular premises is made pursuant to sub-section (1) of section forty-four of this Act.'
[67] Whenever the 'Act' is referred to, the Landlord and Tenant Act 1958 as amended is intended.

mises to be brought under the Act and so prevent a business from being forced to close down or move due to excessive rentals closing the gap between costs and prices.

The next question is whether special consideration should be given to old age pensioners and the infirm. 'Old age', 'no male head of the family' and a 'large family' have emerged as the three most important disabilities keeping people below the poverty line.[68] Increased pensions for old age, widows, and deserted wives, and an increase in child endowment may be one method of solving these problems. The view of the Board of Inquiry commends itself here:

> If the rents of any section of the community are to be subsidised it must be done by the community generally. If applied to landlords it would itself be unequal and haphazard and bear no relation to their financial ability to bear it.[69]

What is more, it would only make landlords less willing to accept them as tenants as the rental would be lower. This would aggravate the position of these tenants by making less accommodation available to them. Without doubt the problem of 'key money'[70] would arise again as these groups competed for accommodation.

Control over rent is of little value without guaranteeing security of tenure to the tenant. Some protection must be afforded to the tenant who applies to have his rent examined. A tenant will not complain about an excessive rent if he fears that he will lose his accommodation as soon as the complaint is made.

Thus it is submitted, there is a basic need for some form of rent and eviction control. That control is best exercised only in particular instances and not as complete control. It is best exercised against the landlord who charges an excessive rent rather than in favour of a needy tenant. It is of limited use without some form of provision ensuring security of tenure for those tenants who wish to take advantage of the controls provided.

3. THE EXISTING LEGISLATION

A. *Which premises are controlled?*

Division I of Part V of the Act sets out the scope of the control. There are two classes of premises now controlled or prescribed.[71]

The first class is that included within the scope of the definition of 'prescribed premises' in section 43—those dwelling-houses which were leased to a tenant at some time between 31 December 1940 and 1 February 1954

[68] Henderson, *Measuring Poverty* (1968) 10.

[69] *Report of the Board of Inquiry into the Landlord and Tenant Acts* (Vic.) 1956 54.

[70] This refers to a widespread practice amongst landlords in the 1940s of demanding a lump sum payment at the commencement of the tenancy in a symbolic exchange for the key. It really amounted to a means by which landlords could supplement their loss in income caused by the fixing of maximum rents.

[71] Premises which are prescribed are subject to all the controls of the Act.

and which have neither been re-let, nor become vacant, nor been let again to the same tenant by a lease in writing for not less than three years, nor previously been excluded from the operation of the Act by an Order of the Governor-in-Council published in the *Government Gazette.*

The second group consists of premises which have come under the Act by operation of the powers granted to the Governor in Council. He is given the power[71a] to bring premises under the Act by an Order published in the *Government Gazette,*[72]

The first class of premises is dwindling in numbers as those premises become vacant or re-let, but the second class is gradually increasing, and it appears that the two are compensating for each other.[73] The premises, having been prescribed under s.44(1) and s.45(1), will cease to be subject to the Act where they are let by a lease in writing for a term of at least three years.[74] The Governor in Council may also at any time revoke his Order prescribing the premises.[75]

A criticism of this Division of the Act is that it gives a few civil servants very broad powers without allowing for any appeal against their decisions. It appears arbitrary in that whilst some landlords are subject to rigid controls, others charging the same rent for similar premises are not. However, there will always be some who escape the operation of the law. Even the lifting of the prescription order is arbitrary.

The Rental Investigation Bureau—which consists of the same personnel as the Metropolitan Fair Rents Board, although it has a different function —will, following a tenant's complaint of excessive rent, investigate the situation. If it finds, after a valuation of the premises, that the rent is excessive—and this usually means a charge of 16 *per cent* or more of the capital value of the premises as rent[76]—the landlord will be interviewed to ascertain whether the tenant has misrepresented the position. If the Bureau concludes that the rent is excessive it will attempt to negotiate a fairer rent, which it considers to be approximately 13% of the capital value of the premises.[77] In most cases this is agreed to. The fear that his premises will be prescribed, which results in a rent assessed at eight *per cent* to nine *per cent* of the capital value of the premises *per* week,[78] is usually enough to persuade most landlords to agree. Approximately 1,000 complaints are dealt with each year by the Bureau yet only 10 *per cent*–12½ *per cent* result in premises being prescribed by the Governor in Council; 60 *per cent* are reduced by agreement, and the remainder are either not excessive, or not high enough to justify interference by the Bureau.[79] If an agreement is

[71a] Ss44 (1), 45 (1).

[72] This may be done notwithstanding that the premises had been excluded from the operation of the Act by some previous Order or enactment—ss44 (3) and 45 (3). Business premises—*i.e.* premises not being a dwelling-house (s.43)—are not subject to any control but they may become so if prescribed under s.44 (1), s.45 (1), s.49.

[73] Information supplied by the Secretary, Metropolitan Fair Rents Board.

[74] S.48. [75] Ss44 (2), 45 (2).

[76] Information supplied by the Secretary, Metropolitan Fair Rents Board.

[77] *Ibid.* [78] *Ibid.* [79] *Ibid.*

reached the matter ends there. If the landlord gives the tenant a notice to quit before the premises can be prescribed, there is nothing the tenant can do about it. However, since the machinery of the Bureau operates quickly this rarely occurs.

One of the anomalies in this legislation is that although there are extremely detailed provisions governing the eviction of a tenant from prescribed premises,[80] there is no guide in the legislation as to the grounds on which premises should be prescribed by the Governor in Council. There is no requirement that a case be proved justifying prescription to the satisfaction of a court. The fair operation of this process depends solely on the vigilance of the Minister in charge of the Bureau. Indeed, the government could prescribe premises on any grounds it thought fit without contravening the legislation.

Another factor contributing to the arbitrary situation is the result of government policy not to publicize the Board and its functions. It is impossible to estimate how many people know of the Board, but it would be safe to assume that the percentage is higher amongst tenants than amongst the general public. It would also seem probable that the existence of the Board is better known in some areas than in others, as information concerning it is spread only by word of mouth. Many of the injustices of the system as between various landlords all charging excessive rents for similar premises, some of whom have their premises prescribed and others not, would disappear if a programme were launched informing the public of the existence and function of the Fair Rents Board. The Victorian Government's view appears to be that it does not have the responsibility of informing everyone of their rights. Any person aggrieved has only to go to his local council or local member of Parliament to be informed of his rights. However, if a tenant has no idea that a form of rent control exists, there is nothing to suggest to him that his local council or local member would be of any assistance. The result of this, however, is that some landlords are subject to stringent controls whilst others in similar positions carry on unhindered.[81] Indeed if a campaign publicizing the Board were launched it would probably have the effect of lowering rents generally as landlords would realize that there was a greater chance of their being called before the Board.

B. *How are rents controlled?*

Division 2 of the Act sets up the Fair Rents Boards,[82] defines a 'fair rent' and states how it may be determined. The fair rent fixed is that paid immediately prior to prescription of the premises except where altered in

[80] Division 3 of the Act.

[81] The investigators at the Rental Investigation Bureau have had tenants seeking assistance who have just discovered that the Bureau exists even though they have been renting premises for 20 years or more. This problem is greater for those migrants with a language barrier.

[82] S.51 authorizes the Governor in Council to constitute a Board consisting of a Stipendiary Magistrate sitting alone.

accordance with the remainder of the Act.[83] It can only be altered by a determination of the Board, by an agreement in writing signed by the lessor and lessee on the appropriate form,[84] or by service of a notice on the lessee by the lessor in accordance with s.67—that is, where the lessor has been ordered to carry out repairs by a statutory authority, he can increase the rent by eight *per cent per annum* of the amount spent on those repairs, including an allowance for any work he, or anyone else carried out free of charge.[85] The Board has power to determine the fair rent on application of the lessor or lessee,[86] or of its own motion.[87] It may order any inspection or valuation of the premises,[88] and it is not bound by any legal forms, solemnities or rules of evidence in its inquiries.[89]

The Board is to have regard to certain matters in determining the rent.[90] The rent is to be assessed on the capital value at the date of the application with allowances for costs to either the landlord or tenant of the tenancy.[91] This generally results in a rent of 8.3 *per cent* of the value.[92] The practice of the Fair Rents Board is to value on a tenanted basis making a deduction from the vacant possession value on this account. The effect of this is to reduce the rent which would otherwise be fixed by taking into account the fact that the premises are occupied by a tenant whose rent is controlled. Thus the pegged rent becomes an element in determining a rent fixed in relation to current capital value. This becomes even more important when it is realized that by investing his capital in debentures the landlord could gain at least seven *per cent* on capital with less effort and probably a risk not much greater than that of leasing his premises to a tenant who re-

[83] S.56. The lease from which this rent is taken is defined by s.43 to include every contract, express or implied, made orally, in writing or by deed, but excludes a tenancy at will implied at law in any mortgage or agreement for sale and purchase of land. The 'agreement for sale and purchase of land' clause was inserted following the 1956 Board of Inquiry. This was to ensure that a vendor would not become subject to the harsh provisions of the Act because of the decision in *Sandhurst Building v. Gissing* (1889) 15 V.L.R. 329 stating that a tenancy at will would arise in favour of the purchaser before he had completed paying the balance of the purchase money.

[84] Ss68 and 69 provide that where the lessor and lessee agree upon an amount and lodge an executed copy of the agreement with the Fair Rents Board within one month of making it, this shall become the fair rent of the premises.

[85] There are stringent provisions relating to proof of completion of the repairs and of the amount expended. These are contained in sub-sections 2, 3, 4 and 9 of s.67. Sub-section 7 of s.67 allows the Board to use its discretion in assessing the rent when dealing with a landlord who deliberately allows the premises to fall into disrepair, whilst claiming an amount for repairs in the rent, and who then tries to claim an increase in the rent to cover the repairs which should have been carried out from the proceeds of the existing rent.

[86] S.57. [87] S.61. [88] S.62.

[89] S.59 (1), (2). [90] S.64.

[91] The present system is to allow 6%-7% of the capital value as the net return to the landlord and then allow for the cost of municipal, water, sewerage and sanitary rates; land tax; insurance; agent's commission (5%); cost of repairs; depreciation; furniture (20% of value); any services or obligations performed by either party in connection with the lease; rents of comparable premises; the Commonwealth Trading Bank's overdraft interest rate (this is taken into account in assessing the minimum net rental which should be allowed—Cook, *The Law of Landlord and Tenant of Queensland* (1956) 38); the justice and merits of the case and any hardship which would be caused to the lessor or lessee.

[92] Information supplied by the Secretary, Metropolitan Fair Rents Board.

fuses to pay rent and is destructive. Therefore, the premises should be valued at what they would be worth if there were no tenant. In this case the allowance for the reduced capital value involved in having the tenancy would be borne by the tenant. This could be provided for in the Act.

Once the rent has been fixed by a determination, no further proceedings can be commenced for six months unless there have been substantial alterations, or a material change (either increase or decrease) in the accommodation or goods provided, or unless by some error or omission an injustice has been perpetrated.[93]

> Misgivings are often expressed about the substantial immunity of rent tribunals from external control. No appeal lies to any superior body from a decision as to what is a reasonable rent.[94]

However, whilst in the United Kingdom there is no appeal at all, with the result that the Divisional Court has reviewed some decisions whilst discussing the jurisdiction of tribunals,[95] in Victoria an appeal lies to the Supreme Court on questions of law only.[96] The finding of the Board of Inquiry in 1956 was that

> the need to keep cost to a minimum and to keep proceedings short was vital. If a right of appeal was given by way of re-hearing this will raise the cost —and so put an advantage in the hands of the wealthier party .... And as the Magistrate sitting as a Fair Rents Board acquired specialised knowledge there is no reason to suppose that the decision of an appellate tribunal would be likely to be an improvement on that of the Magistrate.[97]

In South Australia and Western Australia, however, an appeal lies to a local court. [98] In Tasmania,[99] and New South Wales,[1] a Rent Controller fixes the rent and from his decision an appeal lies to a Fair Rents Board. This latter scheme appears to have much to commend it as not only will the initial determination be made in a similar way but at reduced cost (as no legal representatives will be used at all) and with at least the same speed.[2] Furthermore, the appeal will be as swift and inexpensive as the present initial determination of the Fair Rents Board. Therefore, we submit, this scheme should be adopted in Victoria.

C. *Recovery of Possession*

Sections 82, 92 and 93 are the crucial provisions of Division 3 of the Act

[93] S.73.
[94] De Smith, 'Review of Findings by Rent Tribunals' (1950) 13 *Modern Law Review* 503.
[95] An example is *R. v. Paddington and St. Marylebone Rent Tribunal* [1949] 1 All E.R.720.
[96] S.59 (4) (b).
[97] *Report of the Board of Inquiry into the Landlord and Tenant Acts* (Vic.) 1956 56.
[98] Cook, *op. cit.* 4. [99] *Ibid.* 5.
[1] Hope and Freeman, *Landlord and Tenant Practice and Procedure in New South Wales* (4th ed. 1955) 56.
[2] At present an application takes only approximately 15 minutes to hear.

which relates to recovery of possession of prescribed premises by the landlord.

Section 82(b) itself contains 25 subsections enumerating the grounds on which a court order granting possession of the premises to the landlord will be made. The crucial difference between controlled and uncontrolled premises is that the grounds for serving a notice to quit on a 'controlled' tenant must be proved by the landlord to the court's satisfaction.[3]

Section 92 provides that the court, when considering an application for recovery of possession on any of the grounds specified in s.82(6), will take into account any hardship which would result to the lessor, lessee or any other person. If the notice to quit is based on certain specified grounds,[4] the court will also consider whether suitable alternative accommodation is available. The security of tenure of such alternative accommodation is a

[3] There are some interesting points to note in dealing with s.82 (6). Under s.82 (6) (a) the landlord can give notice to quit if the tenant has been in arrears of rent for 56 days. But the tenant by paying the rent just before the Court proceedings and by pleading hardship, may be able to retain possession. The Court of Appeal, however, in *Dellenty v. Pellow* [1951] 2 K.B. 858 stated that where there has been a long history of default in the payment of the rent an order for possession might be made even though the arrears have been paid before judgment. This would appear to be a sound judgment but even if it were not applied in Victoria the Court may, under s.107 (1), order the tenant to pay the landlord's costs provided it is satisfied that, at the time of serving the notice to quit, the rent was in arrears.

It is a ground for a notice to quit if the premises are required for an educational establishment. S.82 (6) (k) was specifically designed to help non-government schools, as the government is not bound by the Act (s.50) and hence there is no need to make a similar provision with respect to government schools.

Sub-section (v) makes it a ground for a notice to quit if the lessor is a pensioner wishing to sell the only property he owns, apart from that in which he resides, with vacant possession (so as to get the best price). This allows people who would have received an old age pension, but for their possession of the property and receipt of income from it, to sell their property and so qualify for a pension.

A lessee of an apartment house is allowed to receive from sub-lessees more than twice the rent he pays without providing grounds for a notice to quit under s.82 (6) (t) because as proprietor he may have to furnish the premises and spend time and money to make the venture successful. He is entitled to whatever profits he can make.

S.82 (6) (g) gives the landlord grounds for a notice to quit if he requires the premises within 12 months. This will cover the situation which arises if he or one of his dependents has been served a notice to quit the premises he occupies himself as tenant, but has been granted a stay of execution of up to 12 months. Thus the decision in *Brown v. Luck* [1956] V.L.R. 285 is overcome. This decision, relating to s.35 (5) (g) (i) of the Landlord and Tenant Act 1948, required a reasonable need for the premises to be shown, either on the date the notice to quit is given, or on the date when it will expire.

If a landlord, who has expressly or impliedly given his consent to sub-letting for residential purposes, unreasonably withholds his consent to an assignment or sub-lease, the Court can bar his notice to quit by virtue of s.90.

However, in general, where there has been no such consent to sub-letting for residential purposes, the Court will require, under s.92 (4), special circumstances to be shown before it will refuse an application for possession by the landlord under s.82 (6) (p) and (q). The Board of Inquiry in 1956 (*op. cit.* 113) found that it had been difficult for tenants to show that such special circumstances exist to explain the assignment or sub-lease. However, this section does allow some discretion for exceptional cases.

[4] The grounds are those in s.82 (6) (g), (h), (i), (k), (l), (m), (n), (o) and (r). That is, because the premises are reasonably required for: the lessor; his family; an employee or share farmer; a minister of religion; a hospital or education establishment run by the lessor; a beneficiary under a trust for sale; a sale giving vacant possession and requiring 25% of the purchase price to be paid within 12 months; reconstruction, removal or demolition; or where the premises are shared accommodation.

major factor to be taken into account.[5] Special consideration is given to those receiving blinded or total permanent incapacity pensions, and to those who suffer a disability (whether physical, mental or financial) as a result of war service.[6] Special consideration will not be given, however, if the lessor also falls within one of similar classes of people.[7]

The competent court for proceedings under this division is a Court of Petty Sessions, consisting of a Stipendiary Magistrate sitting alone,[8] An appeal to the Supreme Court is allowed on matters of law only.[9] No costs are to be allowed in any proceedings before a Fair Rents Board,[10] nor in any action to recover possession[11] (except as provided for in s.107(1)). This places both parties in the same position, giving no advantage to the wealthy party who can afford to employ a legal representative. It also allows for the difficulty of assessing beforehand how a court will view the case, especially since many of the sections require the court to exercise a discretion, even though a closely guided discretion.

> There is much to be said for the existing position whereby the parties can ascertain beforehand with some certainty what their costs are likely to be and can therefore arrange for legal representation within their means without having to face the possible catastrophe of having to meet their own costs and the costs of the other party and, in the case of an unsuccessful tenant, suffering eviction as well.[12]

Proposals for Reform

To overcome the failings of the common law in granting satisfactory relief to those tenants who live in premises unfit for human habitation,[13] Queensland[14] and New South Wales[15] have enacted provisions stating that '. . . a person shall not let any dwelling-house which is not at the date of the letting in fair and tenantable repair'. In England there is an implied covenant placing the onus on the landlord to repair the structure and exterior of the dwelling-house and keep in proper working order the installa-

[5] S.92 (2) (c).

[6] This section may gain renewed significance as a result of the conflict in South Vietnam. It may be possible to argue, however, as there has been no formal declaration of war, that any disabilities would not be the result of 'war service'.

[7] Those designated in s.93 (1) (d) and further defined in s.93 (2). S.93 (1) (a) states that s.92 will also not be applied in favour of the tenant if the application for an eviction order is served on the basis that the premises have been used for an illegal purpose; or as a dwelling-house when it is leased as business premises; or where the lessee has said he will vacate and the lessor has agreed to sell on that basis; or where it is required for sale by a person who would qualify for an old-age pension if he sold the premises; or where vacant possession is required for a house for sale. If the premises are essential for the use of an employee or share farmer, then the Court will not exercise the discretion granted to it by s.92 in favour of the tenant (s.93 (1) (b)).

[8] S.89. [9] S.98. [10] S.63.

[11] S.107 (2).

[12] *Report of the Board of Inquiry into the Landlord and Tenant Acts* (Vic.) 1956 118.

[13] *Supra* section I.

[14] Landlord and Tenant Act 1948-57 (Qld), s.35.

[15] Landlord and Tenant (Amendment) Act 1948-65 (N.S.W.), s.39.

tions for supply of essential services.[16] However, such provisions have had limited practical effect; in most cases they will be of little assistance in ensuring that the house is repaired unless a tenant is prepared to come to court to enforce his rights, and if he does this he may find himself served with a notice to quit.

> No share of the credit for the progress [in housing conditions] can be attributed to the operation of the statutory warranty. The standard of fitness which has been established is probably not higher than that which would be observed in his own interest by any landlord of slum property. The statutory remedy has been confined within narrow limits of substance and procedure and its enforcement subjected to conditions which in many, if not most, cases it is impossible to fulfil.[17]

This is because it has been interpreted within the fabric of freedom of contract, not the reality of inequality brought about by economic dominance.

Despite this, in certain cases the statutory warranty could be of assistance to the tenant in having defects remedied, and, if it was made a condition of the lease, he could sue for its breach and repudiate the lease. Therefore to include it could be a step towards solving the problem. The courts might then, in accordance with the spirit of the legislation,

> determine the incidence of liability in the case of a latent defect by choosing from between two equally innocent persons the one better able to sustain the loss.[18]

There is nothing to lose and there may be something to be gained by inserting a statutory warranty into the Act, preferably one more detailed than in force in England, which would provide the courts with more guidance in its interpretation.

In considering this matter the 1956 Board of Inquiry concluded that

> so far as repairs necessary to preserve the health of the occupants are concerned, council health officers have power to deal with such repairs, and generally speaking, I think it can be taken that they will ensure that such repairs are done. Power to compel such repairs is given to them under the Health Acts and the Housing Acts . . . . The evidence before me was that on the whole, landlords kept their premises wind and water tight, and that they spent enough to prevent deterioration of the asset, but that they did not spend much money in making the premises more attractive for the tenant . . . It would be unjust however to compel a landlord to spend money on repairs of this kind in view of the restricted returns he has obtained since rent control was imposed . . . . I am therefore of the opinion that it is unnecessary to confer on Fair Rents Boards power to compel repairs.[19]

With respect, we disagree with this view. To say that no change should be made because the majority of premises are satisfactory disregards the pos-

[16] The Housing Act 1961 (Eng.), s.32.
[17] Unger, 'Statutory Warranty of Fitness in the Courts' (1942) 5 *Modern Law Review* 266, 267.
[18] *Ibid.* 270.
[19] *Report of the Board of Inquiry into the Landlord and Tenant Acts* (Vic.) 1956 130, 131.

sibility of remedying the defects in the minority of premises without imposing undue restrictions on the majority of landlords.

If legislation were enacted in this area there would be no need for those who were content with the state of repair to take advantage of it, just as there is no need for a tenant who is satisfied with his rent to complain under the existing legislation. Nor, similarly, would a landlord be ordered to repair premises already in a satisfactory state of repair. It would be designed to help those living in premises unfit for human habitation, or with defects of a more minor character, but which still should be remedied so as to bring the state of repair more into line with the rent paid. There is also a pressing need for reform in the law relating to dangerous premises.[20] It is our submission that the courts should extend the negligence principle that 'you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'[21] to include a tenant who is injured on dangerous premises. It seems anomalous that the law can on the one hand grant a remedy to the purchaser of a ginger-beer bottle who sustains injury due to the negligence of the manufacturer, yet deny relief to the tenant who is injured on premises which have become dangerous due to the negligence of the landlord.[22]

Some advantage may also be gained by removing the power to order necessary repairs from council officers and delegating it to officers of the Fair Rents Boards. This would centralize all functions in this sphere, apart from those of the Housing Commission, which because of its construction and planning functions should remain separate, and allow a Rent and Repairs Controller[23] to simultaneously order repairs and allow for these in determining the fair rent. Appeal should lie from these decisions to the Fair Rents Board. Thus one body would completely supervise the relationship between landlord and tenant. It can be argued that this would put considerable authority into the hands of one bureaucratic agency, but the right of appeal to the Board should eliminate most of the injustices which may arise.

Government policy should aim at publicizing the Board and its functions, thereby placing it at the centre of all complaints of either landlord or tenant. The Board should be empowered to order repairs to all premises, whether prescribed or not, with the right to prescribe the premises if the landlord fails to carry out the repairs within a certain time. When prescribed, the Board could fix the fair rent, allowing for the fact that the repairs have not been carried out. When they have been completed to its satisfaction, the Board should be directed to automatically readjust the rent and release the premises from control. In determining what is a fair

[20] *Supra.*

[21] *Donoghue v. Stevenson* [1932] A.C. 562, 580 *per* Lord Atkin.

[22] It should, however, be noted that the tenant would not gain complete relief if the landlord was made liable in negligence. He could claim damages for personal injuries, but, since the law of negligence is not concerned with the contract between the parties, he could not avoid the lease.

[23] *Supra.*

rent in these circumstances the Board should be directed to allow for the inconvenience to the landlord which he may be caused by having to carry out repairs, some of which may be minor in character, within a short time and at frequent intervals.

It may be argued that such legislation would place stringent controls on a landlord for what may well be a minor defect in the premises. However, such controls need only be applied where the landlord is unco-operative. The method of determining the necessary repairs would be no more arbitrary than the present system under which council officers administer the legislation. If this were incorporated into the Act, both aspects of landlord and tenant relations—the rent and the state of repair of the premises—could be administered together, thus allowing one to be adjusted with respect to changes in the other. To integrate the two would, therefore, lead to the simplification of some areas of the legislation.

A solution should also be found for the peculiar problems of married couples with children. In New South Wales it is an offence '. . . to refuse, or procure any person to refuse to let a dwelling-house to any person on the ground that it is intended that a child shall live in the dwelling-house'.[24] Housing is more difficult to find for married couples with children. There is only a limited amount of accommodation which is suitable for such a family.[25] Because of this, and the desire not to disrupt their children's education by numerous changes in residence, security of tenure means considerably more to them than to most other groups in the community. This makes them more likely to pay excessive rents because they may sometimes have no other practical alternative.

The New South Wales legislation raises difficult problems of proof. For example, how does one prove that lodging was refused because a child was to live on the premises? However, there will be some cases in which this could be shown and it is for those, however few, that a provision similar to that in New South Wales should be enacted in Victoria. Furthermore, a provision should be included in s.92(2) of the Act directing that the court have special regard, in assessing under s.92(1) (a) and (b), the hardships which may be caused to the lessee, lessor or indeed, any other person, to the special circumstances prevailing when a married couple, with a child (or children), attempt to find suitable alternative accommodation.

P. NEDOVIC

R. J. STEWART

[24] Landlord and Tenant (Amendment) Act 1948-65 (N.S.W.), s.38 (1).

[25] The need in this area is further borne out by the fact that both in the building programme of the Victorian Housing Commission and in its allocation of applications to its buildings, priority is given at all stages to a family.