

16. Claims in Damages

Jan-04

This Policy Guideline is intended to provide a statement of the policy intent of legislation, and has been developed in the context of the common law and the rules of statutory interpretation, where appropriate. This Guideline is also intended to help the parties to an application understand issues that are likely to be relevant. It may also help parties know what information or evidence is likely to assist them in supporting their position. This Guideline may be revised and new Guidelines issued from time to time.

The *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* (the Legislation) recognize two types of remedies:

- (1) the statutory remedy allowed with respect to a "service or facility".
- (2) a monetary claim in Tort and/or Breach of Contract .

1. TERMINATION OR RESTRICTION OF SERVICE OR FACILITY¹ REMEDIES

The Legislation allows a tenant to file a claim by way of a "hidden rent increase" where there has been a charge for, a failure to provide, or a reduction of a "service or facility" provided under the tenancy agreement.

2. MONETARY REMEDIES²

The Legislation allows a landlord or tenant to make a claim in debt or in damages against the other party where there has been a breach of the tenancy agreement or the Act. Damages is money awarded to a party who has suffered a loss which the law recognizes. Claims may be brought in Tort and/or Breach of Contract.

Limitation Periods for Filing Claims

There are three statutes which provide limits within which a claim must be filed: the *Limitation Act*, and the *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act*. The interaction of these statutes means that, even if a claim is filed within the two years permitted under the Legislation, the *Limitation Act* may prevent it from being heard if it relates to something that occurred more than two years before the claim was filed.

The Limitation Act

The *Limitation Act* provides that certain specified claims must be filed within specified time limits or the right to make those claims will be ended. It is very important to note that there are many variables which could change the specified time limits both for damages and for debt.

The law with regard to when the limitation period begins, how it continues, whether it is extended, and whether it governs in any particular case is complicated. Since failure to make a claim within the specified period(s) will end the claim, a person who is not certain about the applicable time limits in the *Limitation Act* should obtain a legal opinion.

The two most frequently applied sections of the *Limitation Act* are with regard to physical and economic damages, and debt.

The *Limitation Act* provides that the right to bring an action for damages in respect of injury to person or property, including economic loss arising from the injury, ends at two

¹ *Residential Tenancy Act* s. 27; *Manufactured Home Park Tenancy Act* s. 21
² RTA s. 67; MHPTA s. 60

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years from the date on which the right arose, whether based on contract, tort or statutory duty.

The *Limitation Act* provides that the right to bring an action for most other claims, including claims in debt, ends at six years from the date on which the right arose. A person who owes a debt may, under certain circumstances, be found to have confirmed that debt such that the limitation period for filing a claim in respect of that debt is extended.

The Ultimate Limitation Period under the Legislation

The *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* provide that if these Acts do not state a time by which an application for arbitration must be filed, it must be filed within 2 years of the date that the tenancy to which the matter relates ends or is assigned³

The same sections of the Legislation provide that **despite the *Limitation Act***, if an application for arbitration is not filed within the 2 year period, a claim arising under these Acts or the tenancy agreement in relation to the tenancy ceases to exist for all purposes.

However, in the event that one party files for arbitration within the limitation period and the other party has a claim which was not yet filed and which is barred by the limitation period that party may file an application for arbitration so long as it is filed before the first application is heard⁴. This exception does not apply to a limitation established under the *Limitation Act*, however that Act has its own provisions for counterclaims.

Claims in Tort

A tort is a personal wrong caused either intentionally or unintentionally. An arbitrator may hear a claim in tort as long as it arises from a failure or obligation under the Legislation or the tenancy agreement. Failure to comply with the Legislation does not automatically give rise to a claim in tort. The Supreme Court of Canada decided that where there is a breach of a statutory duty, claims must be made under the law of negligence. In all cases the applicant must show that the respondent breached the care owed to him or her and that the loss claimed was a foreseeable result of the wrong.

An arbitrator may also hear a claim where there has been a breach of the common law of landlord and tenant. These are evolving legal principles set out by court decisions and may, or may not, be recorded in a tenancy agreement or set out in the Legislation.

Claims for Breach of Contract

Prior to making a claim for breach of the tenancy agreement, the Legislation permits either the landlord or the tenant to apply for arbitration for an order that the other party comply with the tenancy agreement or the Act⁵ that governs the agreement.

The purpose of damages is to put the person who suffered the loss in the same position as if the contract had been carried out. It is up to the person claiming to prove that the

3 RTA s. 60; MHPTA s. 53 (3)

4 RTA s. 60; MHPTA s. 53 (3)

5 RTA s. 55 and s. 58; MHPTA s.55 and s. 58

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other party breached the contract and that the loss resulted from the breach. The loss must be a consequence that the parties, at the time the contract was entered into, could reasonably have expected would occur if the contract was breached. Losses that are very unexpected are normally not recoverable. The party making the claim must also show that he/she took reasonable steps to ensure that the loss could not have been prevented, and is as low as reasonably possible.

Where a landlord and tenant enter into a tenancy agreement, each is expected to perform his/her part of the bargain with the other party regardless of the circumstances. A tenant is expected to pay rent. A landlord is expected to provide the premises as agreed to. If the tenant does not pay all or part of the rent, the landlord is entitled to damages. If, on the other hand, the tenant is deprived of the use of all or part of the premises through no fault of his or her own, the tenant may be entitled to damages, even where there has been no negligence on the part of the landlord. Compensation would be in the form of an abatement of rent or a monetary award for the portion of the premises or property affected.

Types of Damages

An arbitrator may only award damages as permitted by the Legislation or the Common Law. An arbitrator can award a sum for out of pocket expenditures if proved at the hearing and for the value of a general loss where it is not possible to place an actual value on the loss or injury. An arbitrator may also award "nominal damages", which are a minimal award. These damages may be awarded where there has been no significant loss or no significant loss has been proven, but they are an affirmation that there has been an infraction of a legal right.

In addition to other damages an arbitrator may award aggravated damages. These damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. (Losses of property, money and services are considered "pecuniary" losses. Intangible losses for physical inconvenience and discomfort, pain and suffering, grief, humiliation, loss of self-confidence, loss of amenities, mental distress, etc. are considered "non-pecuniary" losses.) Aggravated damages are designed to compensate the person wronged, for aggravation to the injury caused by the wrongdoer's willful or reckless indifferent behaviour. They are measured by the wronged person's suffering.

- The damage must be caused by the deliberate or negligent act or omission of the wrongdoer.
- The damage must also be of the type that the wrongdoer should reasonably have foreseen in tort cases, or in contract cases, that the parties had in contemplation at the time they entered into the contract that the breach complained of would cause the distress claimed.
- They must also be sufficiently significant in depth, or duration, or both, that they represent a significant influence on the wronged person's life. They are awarded where the person wronged cannot be fully compensated by an award for pecuniary losses. Aggravated damages are rarely awarded and must

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specifically be sought.

An arbitrator does not have the authority to award punitive damages, to punish the respondent.

Criteria Considered When Awarding Damages

If a claim is made by the tenant for loss of quiet enjoyment, the arbitrator may consider the following criteria in determining the amount of damages:

- the amount of disruption suffered by the tenant.
- the reason for the disruption.
- if there was any benefit to the tenant for the disruption.
- whether or not the landlord made his or her best efforts to minimize any disruptions to the tenant.

If a claim is made by a tenant for damages for breach of the abandonment regulations by the landlord the normal measure of damages is the market value of the lost articles, i.e. the price of a similar item in the market. The price of a similar item in the market must include reference to its condition at the time of its loss. For items, such as photographs, which may have limited market value but great sentimental value to the tenant, an arbitrator may consider the size and scope of the collection and the intrinsic value to the tenant.

If a claim is made by the landlord for damage to property the normal measure of damage is the cost of repairs, with some allowance for loss of rent or occupation during repair, or replacement (less depreciation), whichever is less. The onus is on the tenant to show that the expenditure is unreasonable.