


Who Pays When Tenants Are Injured Due to the Landlord's Failure to Repair?

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Question

- Are you or have you ever been a landlord or tenant (or have family members or close friends who are or have been)?

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- Landlord and tenant law affects almost everyone at one time or another.
 - Many attorneys called upon to provide advice or representation to landlords or tenants with little notice or preparation.
 - Landlord and tenant law is a complex mixture of property, contracts, torts, constitutional, administrative, consumer, poverty, disability, regulatory, and legislative law.

Question

- Is the landlord or tenant responsible for repairs?

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- It depends on where you live.
 - Landlord and tenant law varies considerably from state to state.

Question

- Does the landlord have tort liability for not maintaining the property?

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- It depends on where you live.

Question

- What about Minnesota?

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- Let's see.

Tort Liability Under Common Law

- No landlord liability in tort
 - A common rule around the country
 - The landlord had no duty to the tenant, and thus no liability.
 - In Minnesota: *Johnson v. O'Brien*, 258 Minn. 502, 504-06, 105 N.W.2d 244, 246-47 (1960)

Exceptions

- Also a common rule around the country
- The property has a public use.
- The landlord controlled the property.
- The landlord committed fraud or concealed the property's condition.
- The landlord kept defects in the property secret.
- The landlord fails to disclose a danger which a tenant would not discover.
- The landlord agreed to repair the property.
- In Minnesota: *Johnson v. O'Brien*, 258 Minn. 502, 504-06, 105 N.W.2d 244, 246-47 (1960); *Harpel v. Fall*, 63 Minn. 520, 524, 65 N.W. 913, 914 (1896).

Warranties of Habitability

Created by Case Law

- Implied warranty of habitability
- The landlord must maintain the property and in compliance with housing codes.
- *Javis v. First National Realty Corp.*, 438 F2d 1071 (DC Cir. 1970), *cert. den.* 400 U.S. 925.
- By 2010, 22 states recognized the implied warranty of habitability.
- By 2010, only 11 states rejected the implied warranty of habitability.

Warranties of Habitability Created by Statute

- Statutory warranty of habitability
- By 2010, 42 states enacted a statutory warranty of habitability.
- Including Minnesota


Application of Warranty of Habitability to Tort Liability

- *Sargent v. Ross*, 308 A.2d 528 (N.H. 1973)
- By 1980, 10 states applied the implied or statutory warranty of habitability to created tort liability for violations.
- By 2010, 26 states applied the implied or statutory warranty of habitability to created tort liability for violations.

Minnesota:

Statutory Covenants of Habitability

- In 1971 the Minnesota State Legislature created the landlord's covenants of habitability, Minn. Stat. § 504.18, now § 504B.161.
- In every lease or license of residential premises, the landlord or licensor covenants:
 - premises and all common areas are fit for the use intended by the parties;
 - to keep the premises in reasonable repair
 - to maintain the premises in compliance state and local codes

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- Exception:
 - Willful, malicious, or irresponsible conduct of the tenant or licensee or a person under the direction or control of the tenant or licensee.



- Liberal Construction

- The parties to a lease or license of residential premises may not waive or modify the covenants imposed by this section.
- This section shall be liberally construed, and the opportunity to inspect the premises before concluding a lease or license shall not defeat the covenants.

The Only Reference to Tort Law in the Statute

- Subd. 5. Injury to third parties. Nothing in this section shall be construed to alter the liability of the landlord or licensor of residential premises *for injury to third parties*.

First Interpretation

- Enactment of the covenants, along with the directive to liberally construe them, led to the holding that the implied covenants of habitability and the covenant for payment of rent were mutually dependent rather than independent.
- *Fritz v. Warthen*, 298 Minn. 54, 57-58, 213 N.W.2d 339, 341 (1973).

Tort Liability

- *Meyer v. Parkin*, 350 N.W.2d 435 (Minn. Ct. App. 1984)
 - A child of the tenants developed myoclonusopsoclonus encephalopathy, resulting in permanent neurological damage.
 - There was evidence that toxic poisoning from formaldehyde exposure caused the child's condition.
 - An investigation found that the apartment contained formaldehyde.

- In reviewing both the statute and the *Fritz* decision, the court of appeals concluded that “[i]t seems clear that the legislature did not intend to alter a landlord's tort liability but only to require a landlord to covenant to keep leased residential premises in reasonable repair, fit for their intended use and maintained in compliance with applicable health and safety laws.”
- The *Meyer* court implied that since the *Fritz* court's discussion of remedies did not include actions in tort, the statute did not alter tort law, even though the only issue before the *Fritz* court was application of the statute in an eviction action.

- *Broughton v. Maes*, 378 N.W.2d 134 (Minn. Ct. App. 1985)
 - “The rule in Minnesota, as to defective conditions on the premises, is that a landlord who has not agreed to repair the leased premises has only a duty to warn a tenant of a defective condition if the landlord knows or should know of the danger and if the tenant, exercising due care, would not discover it.”
 - The court's opinion misses the obvious question: how could it apply a standard based on the lack of a landlord agreement to repair when the covenants provide that exact agreement by statutory implication?



- Judge Crippen concurrence

- “This case involves tragic injuries, related to a major defect on the premises that could have been readily repaired by the landlord before the disaster occurred. It is very important for this case and for others like it to determine whether it should be decided according to usual negligence standards and independent of historic standards that provide special protection for landlords.”
- *Id.* at 137-38, (citing Restatement (Second) of Torts, § 357 (1975)).

Tort Status in Minnesota

- The statute did not create tort liability.
- The resulting paradox:
 - The landlord who fails to repair the property, even though state law implies covenants to do so, may escape liability for injuries resulting from inaction.
 - The landlord who attempts repairs, but does so negligently, risks liability.

Legislation Should Be Proposed to Create Tort Liability

- Tort liability could lead the insurance industry to create different rates for compliant and noncompliant landlords.
- Differing insurance rates would create a financial incentive to maintain rental property.

The Need for Legislation Presents a Clinic Opportunity

- Bring together interested parties
 - Tenants
 - Personal injury bar
 - Cities
- Consult and coordinate with faculty with expertise in
 - Torts
 - Contracts
 - Legislation
- Draft legislation
- Lobby and testify for its passage

Proposal to Amend Minn. Stat. § 504B.161

- Subd. 5. Injury to third parties caused by violation.
- The landlord is subject to liability for physical harm caused to the tenant and others upon the land with the consent of the tenant by a violation of this section existing before or arising after the tenant has taken possession of the property if the violation creates an unreasonable risk to persons upon the land which the compliance with this section would have prevented, and the landlord fails to exercise reasonable care to comply with this section. Nothing in this section shall be construed to alter the liability of the landlord or licensor of residential premises for injury to third parties.

Credits

- L. McDonough, *Still Crazy after All of These Years: Landlords and Tenants and the Law of Torts*, 33 Wm. Mitchell L. Rev. 427 (2006)
- R Schoshinski, *American Law of Landlord and Tenant* (1980 and Supp. 2010)
- *Friedman on Leases* (5th ed. 2010)
- *Music, Overture to North by Northwest*, Composed and Conducted by Bernard Herrmann (1959) 🗣️
 - Why? Why not?