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Landlords and Torts

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In April of this year, the Virginia Supreme Court held that a tenant who slipped and fell down stairs could not recover from his landlord for his personal injuries under a claim founded on alleged violation of the Virginia Residential Landlord and Tenant Act. Although that act requires a landlord to "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition," it was held to have created no cause of action in tort for breach; its remedies were strictly contractual. *Isbell v Commercial Investment Associates, Inc.,* 644 S.E.2d 72 (Va. 2007). That conclusion puts the Virginia court at odds with several other appellate decisions that have been rendered in this decade, based on a quick survey I made of recent high court decisions on this question.

In 2006, the Ohio Supreme Court held that a violation of its statute, which requires a landlord "to do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition" constituted negligence *per se*, leaving it only for a jury to decide whether the landlord "exercised reasonable diligence and care in repairing the wall or instead breached her statutory duty to repair". *Robinson v Bates*, 857 NE 2d 1195 (Ohio 2006).

In 2005, the Montana Supreme Court held that a violation of its statute – which has the same wording as Virginia's - also constituted negligence per se on the ground that it was a simple matter of a safety statute violation. *Edie v Gray*, 328 Mont. 354 (2005). "The RLTA was intended to protect renters, and Edie was a renter; slip and falls are the sort of injury the statute was designed to prevent, and this was a slip and fall; and the RLTA was intended to regulate rental property landowners, such as Gray. Thus Gray was negligent *per se*." Id. at 359. (It doesn't look like anything goes to a jury in Montana.)

And in 2004, the Wyoming Supreme Court concluded that a guest of the tenant could recover from the landlord under that state's newly enacted Residential Property Act ("Act") – which required landlords to maintain property "in a safe and sanitary condition fit for human habitation". That Act, said the court, was intended to abrogate the old common law rule of landlord nonliability in tort by imposing a new duty on landlords, which therefore "gives rise to a new standard of care", to "further the legislature's intent." *Merrill v Jansma*, 86 P.3d 270 (2004). As for the many nontort remedies that were explicitly enumerated in the Act (unlike the tort remedy, on which the statute was silent), the court said "The remedies provided for in the act are limited to cases where corrective action is sought by a tenant in the form of an order requiring the landlord to make repairs, refund or excuse rental payments or allow the tenant to be excused from the lease." By so holding, the court was able to confine many other statutory provisions - such as written notice and items of recovery - to contract cases, claiming that "the remedies provision of the act is exclusive to cases in which corrective action is sought and does not apply in personal injury actions." Id. at 289.[1]

The Virginia court is obviously in the minority on this issue, but its reasoning was perfectly respectable: statutes in derogation of the common law are always narrowly construed, and the common law clearly held that a

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landlord was not liable in tort for defects in the premises – neither for those that existed at the start (because the tenant could inspect) nor those that arose during the term (because the tenant was the possessor). Nothing in the Act declares any intent to change these underlying tort rules, and nothing in it suggests that such an intent should be implied, because the duty to keep the premises in good condition was designed to be part of "an integrated statutory scheme governing *contractual relationships* between landlords and tenants," describing contract remedies and contract measures of damages rather than tort ones. I find the Virginia logic no less (and no more) persuasive than the counter argument that tort liability is really what the legislatures wanted the courts to do.[2]

These different conclusions are clearly not due to differences in statutory wordings. All of the acts impose the same general duty upon residential landlords of taking good care of the properties that they rent to their tenants. Yet, despite their common language of duty, they also all share a complete absence of language as to what is to happen when the duty is breached and personal injuries follow. This total lack of statutory guidance as to tort consequences forces the courts to guess at the secret legislative intent, and in that sense, one guess is as good as another.

When I first caught on to this statutory omission, my reaction was how cowardly our lawmakers were: they wanted to spout brave language in support of a politically appealing cause but shrank back from actually putting any financial teeth into laws that could antagonize their real estate industry supporters. Then I realized that all of these acts were derived from the Uniform Residential Landlord & Tenant Act (thus the uniform language), so that blame for silence on the remedies question should perhaps be laid at the doorstep of the National Conference of Commissioners on Uniform State Laws, which proposed URLTA in 1973. But were the Commissioners equally craven?

To learn why the URLTA drafters did not cover this economically important matter, I looked at the various reports and commentary that appeared when the Act was promulgated. What I found on the tort liability issue was – nothing. It appears as if nobody ever thought about it. Julian Levi, who drafted URLTA's predecessor, the Model Landlord-Tenant Code, said not a word about tort remedies in his description of what he had done. See Levi, *New Landlord-Tenant Legal Relations - The Model Landlord-Tenant Code*, 3 Urb. Law. 592? (1971). The ABA Committee that examined and described the Act did the same. See Report of the Subcommittee on Model Landlord Tenant Act of Committee on Leases, Proposed Uniform Residential Landlord And Tenant Act, 8 Real Prop. Prob. & Trust J. 104(973). And those who wrote in the law reviews and were quick to praise or attack

[1] Also decided in this decade are two interesting court of appeal cases from Washington, where having first held, in 2001, that the Washington RLTA did not create a "generally actionable duty on the part of the landlord", for which a tenant could sue in tort; it was then held, two years later, that tort liability could nevertheless be imposed under Restatement of Property § 17.6, for failure to exercise reasonable care in repairing a condition that was in violation of "1) an implied warranty of habitability; or 2) a duty created by statute . . ", both of which duties apparently having sprung out of that same Washington RLTA. *Lian v Stalick*, 25 P3d 467(2001), and 62 p3d 933(2003).

[2] There was also a decision by the Maryland Court of Appeals that a violation of the Baltimore City Housing Code – which requires owners to keep their property "in good repair and safe condition" — would be evidence of negligence against a landlord who was being sued by a tenant for lead paint poisoning. *Polakoff v Turner*, 869 Atl 2d 837(2005). But that decision was different because the liability in tort was based upon a municipal housing code that applied to all property owners rather than upon a state statute that was applicable only to residential landlords.

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other provisions of the Act said nothing about any omission of the personal injury issue. *See, e.g.* Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 Hastings LJ 369(1970); Moskovitz, The Model Landlord-Tenant Code – An Unacceptable Compromise, 3 Urb. Law. 597(971); Note, *The Uniform Residential Landlord And Tenant Act: Reconciling Landlord-Tenant Law with Modern Realities*, 6 Ind LR 741(972).

Apparently those involved in the enterprise of reforming residential landlord-tenant law were so preoccupied with getting tenants the right to repair and deduct, or to stay and pay less rent (under an implied warranty theory), or to quit (under a constructive eviction theory), that they were not also worrying about what tenants could do when untenantable conditions caused them personal injuries rather than economic discomfort. And I suspect that very little was said about that in the legislative debates that then followed as URLTA was being considered by the states. As a well known Property professor said 25 years ago, "Something happened to the bandwagon on its way into the brave new world of landlord-tenant law. Property law was rejected, contract law was embraced, and tort law was simply overlooked." Browder, *The Taming of a Duty; the Tort Liability of Landlords*, 81 Mich L.Rev 99(982).

(It is possible for state legislatures to actually decide this question by themselves, without forcing their courts to do it for them, and a few have done so. An Arkansas statute says that landlords are liable in tort for disrepairs only when they breach an agreement to repair. (§ 18-16-110). Conversely, a Massachusetts statute makes landlords liable in tort whenever they fail to correct unsafe conditions within a reasonable time (Ch 186 § 19). Just last year, the Alabama legislature declared, as Nebraska had done earlier, that its RLTA neither creates nor eliminates tort causes of action. § 35-9A-102 (effective January 1, 2007; a wobbly sounding posture but one that at least forthrightly tells the judges that they have to decide the question on their own, without pretending to base their conclusion on any kind of implicit legislative intent.)

We should also remember that URLTA was promulgated and debated by real estate interests. Sanitary and affordable housing was their goal and they kept their eyes on that prize. As real estate lawyers, they probably thought very little about personal injury cases. That may still be as true today. The only amici who appeared before the Virginia Supreme Court were the Virginia Trial Lawyers Assn for the tenant, and the Virginia Assn of Defense Attorneys for the landlord. Where were the attorneys for any Virginia Association of Apartment Owners or Virginia Tenant's Action League, or even a Virginia Association of Realtors? Didn't they care?

Maybe we real estate lawyers should not bemoan the fact we are not consulted on these tort matters. Most of us have never actually had to try a slip and fall case – even when brought by a tenant rather than by a store patron. Indeed, even if the original activists had thought about the tort issue, did they have any sort of expertise to help them decide it? As long as real estate lawyers assure that their landlord clients carry good insurance, that may be all they need to know or do about this issue. Then their clients can just call their carriers when something goes wrong. ■