

Landlords, Tenants, and Domestic Violence: Liability for Damage to Residential Premises

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This is the sixth and last in a series of blog posts on “Landlords, Tenants, and Domestic Violence”, examining some of the legal uncertainties facing landlords and property managers who seek to respond to domestic violence on their premises, as identified in the Centre for Public Legal Education Alberta (CPLEA) report on [Domestic Violence: Roles of Landlords and Property Managers](#). That report recommends that “further consideration should be given to ways that the law impedes or assists landlords in accommodating the needs of their tenants who are experiencing domestic violence” (at 9). Even landlords who are motivated to help improve the circumstances of victims of domestic violence are worried about recovering the costs of repairing damage to their property by the perpetrators of domestic violence when the security deposit is not enough (CPLEA report at 8, 45). But, in an example of the further victimization of too many of the victims of domestic violence, the CPLEA June 2014 report entitled “[The Hidden Homeless: Residential Tenancies Issues of Victims of Domestic Violence](#)” noted that “it is often the victim that the landlord pursues for overdue rent and damages” (at 5, 34, 38) — damages caused by the perpetrator of the violence. This post will discuss the interaction between the provisions in the *Residential Tenancies Act*, [SA 2004, c R-17.1](#) (*RTA*) governing security deposits and compensation for property damage and the *Protection Against Family Violence Act*, [RSA 2000, c P-27](#) (*PAFVA*), the *Family Law Act*, [SA 2003, c F-4.5](#) and the *Matrimonial Property Act*, [RSA 2000, c M-8](#). The more general implications of those and other sources of protection orders in this context are discussed by Professor Jennifer Koshan in “[Clarifying the Implications of Different Protection Orders](#)”. Some of the points in this post rely upon or repeat issues raised in my “[Landlords, Tenants, and Domestic Violence: Who is a Tenant?](#)” and “[Landlords, Tenants, and Domestic Violence: Changing Locks and Barring Access](#)” posts. This post will first set out the general rule about responsibility for damages to the residential premises, noting the likely areas of uncertainty. Next, I will discuss security deposits before turning to responsibility for damage that exceeds the amount of a security deposit. I will end with a few suggestions for reform.

The General Rule about Responsibility for Damages to the Residential Premises

Generally speaking, a tenant is required to repair damage to the residential premises or the building’s common areas if that damage is the tenant’s fault. In the *RTA*, this obligation is found in section 21:

21 The following covenants of the tenant form part of every residential tenancy agreement:

...

(e) that the tenant will not do or permit significant damage to the premises, the common areas or the property of which they form a part; (emphasis added)

Breach of the section 21(e) obligation will allow the landlord to sue for compensation under section 26 *RTA*:

26(1) If a tenant commits a breach of a residential tenancy agreement, the landlord may apply to a court for one or more of the following remedies:

...

(d) recovery of damages resulting from the breach.

Like the other rights and responsibilities discussed in this series, the responsibility for not damaging the residential premises — and for compensating the landlord for any damage done in breach of this covenant under section 26 *RTA* — is part of being a “tenant”.

Note that a tenant is responsible for more than their own actions. Section 21(e) *RTA* makes a tenant responsible for permitting damage without specifying whose conduct the tenant is responsible for. The tenant’s obligation therefore seems broader than the equivalent clauses in some other provinces because they do specify and limit whose conduct is included. But section 21(e) *RTA* is also narrower than the equivalent provisions in some other provinces because the tenant is only responsible for “significant” damage, rather than simply “damage”. For the equivalent provisions in some other provinces, see:

- British Columbia’s *Residential Tenancy Act*, [SBC 2002, c 78](#), section 32(3) and Saskatchewan’s *Residential Tenancies Act, 2006*, [SS 2006, c R-22.0001](#), section 49(6), both of which make a tenant responsible for damage “caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant” (emphasis added)
- The Northwest Territories’ *Residential Tenancies Act*, [RSNWT 1988, c R-5](#), section 42(1) is very similar, making the tenant liable for damage “caused by the wilful or negligent conduct of the tenant or persons who are permitted on the premises by the tenant” (emphasis added)
- Nova Scotia’s *Residential Tenancies Act*, [RSNS 1989, c 401, section 9\(1\), statutory condition 6](#), is also similar, making the tenant responsible for “the repair of damage caused by wilful or negligent act of the tenant or of any person whom the tenant permits on the premises” (emphasis added)
- Ontario’s *Residential Tenancies Act, 2006*, [SO 2006, c 17](#), section 34, is more specific, making a tenant responsible for the repair “of undue damage to the rental unit or residential complex caused by the wilful or negligent conduct of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant” (emphasis added).

The main point is that a “tenant” is responsible for the conduct of others under the *RTA*. So, once again, the status of the “tenant” is the key issue under the *RTA* — and as my post on “Who is a

Tenant” argued, the status of “tenant” extends to a lot more people than most landlords and tenants realize because a written lease is not required to make a person a tenant. If victims of domestic violence are not tenants, then the victims are responsible only for their own conduct (subject to any general rules about vicarious liability).

The issue of whether a tenant has “permitted” damage under section 21(e) could be a contentious one. My post, “[Landlords, Tenants, and Domestic Violence: Landlords’ Power to Terminate Residential Tenancies for Acts of Domestic Violence \(and an Argument for Publicly-Accessible RTDRS Reasons for Decisions\)](#)”, noted a few situations in which the question of “permission” was raised in the context of actions to terminate tenancies, such as:

- [This decision](#), where termination of the tenancy of a victim of domestic violence was justified after the police were called to the rented premises four times in two months, even though the tenant had a restraining order and her male partner was barred from the rented premises, because she had permitted her male partner to return.
- [This decision](#), where a tenant, who had been assaulted by her visitor who was stalking her and against whom she subsequently got a peace bond, nevertheless had her tenancy terminated because of complaints of fighting, yelling, bashing of walls, swearing, loud noise, and people coming and going at varying hours that resulted in the police being called five times and other tenants and their children living in fear of her visitor, who had also assaulted the landlord — even though the conduct of the visitor was found not to be the tenant’s fault.

In addition to uncertainty around whether a tenant has permitted damage to residential premises, there is also uncertainty around whether any damage is “significant damage” as it must be for there to be a breach of section 21(e). This is a question of degree, and will depend on the facts in each case.

Security Deposits

A security deposit, also known more informally as a damage deposit, is a guarantee of a tenant’s performance of their obligations, including the obligation under section 21(e) *RTA* not to do significant damage. A security deposit is a one-time, refundable payment that cannot be more than one month’s rent: section 43(1) *RTA*. A landlord must place a security deposit in a trust account and the money stays in the trust account (usually) until the tenancy expires or is terminated: sections 44, 45 *RTA*.

A landlord can use the security deposit to reimburse itself if the landlord has a valid reason to do so: section 46 *RTA*. For example, a landlord can keep all or part of a security deposit if the tenant has damaged the property, but only if the landlord has completed the move-in and move-out inspection reports: section 46(6) *RTA*. It is an offence under the *RTA* for a landlord to keep money from the security deposit for property damage and cleaning costs if the inspection reports were not completed: section 60(1)(a) *RTA*. However, while a landlord cannot deduct for damages or cleaning costs from the security deposit without the inspection reports, it can still use the security deposit to cover other things, such as unpaid rent, and it can sue the tenant(s) to recover the costs of repairing significant damage: section 26 *RTA*. If the costs of repair exceed the amount of the security deposit, a landlord can sue the tenant(s) to recover the excess.

I have already dealt with the impact of several of the statutes under which orders of exclusive possession are available on security deposits: see “Changing Locks and Barring Access”. To briefly summarize:

- The *PAFVA*, which allows for protection orders granting exclusive possession to residential premises under section 2 and 4, says nothing about security deposits.
- Section 9(3) *PAFVA*, which allows a victim who was not a tenant to choose to “assume the responsibilities of the [perpetrator] under the lease”, says nothing about what happens to the perpetrator’s security deposit if the victim assumes the lease.
- It is likely that, if the victim assumes the responsibilities under the lease pursuant to section 9(3) *PAFVA*, the landlord would have to return the existing security deposit to the perpetrator or account to the perpetrator for deductions made from the security deposit for the costs of cleaning or damage or rent unpaid: section 46 *RTA*.
- It is likely that, if the victim assumes the responsibilities under the lease pursuant to section 9(3) *PAFVA*, the victim will need to pay the landlord a security deposit.
- If the victim was a co-tenant or decides not to assume the responsibilities of the perpetrator pursuant to section 9(3) *PAFVA*, then it is likely the landlord does not have to return the perpetrator’s security deposit because the perpetrator continues as a tenant.
- If the victim is granted an order of exclusive possession under section 68 of the *Family Law Act* or section 19 of the *Matrimonial Property Act*, the victim likely becomes responsible for the security deposit after the date of the order because those statutes say the victim is “deemed to be the tenant for the purposes of the lease” (FLA section 72 and MPA section 24).
- After an order of exclusive possession under section 69 of the *Family Law Act* or section 19 of the *Matrimonial Property Act*, the victim and the perpetrator will likely be co-tenants who are jointly responsible for the security deposit if the perpetrator was a tenant before the victim was deemed to be a tenant.

A lot of uncertainty about the impact of these statutes remains because there is no case law on these issues. Perhaps relevant decisions have been made by the Residential Tenancies Dispute Resolution Service (RTDRS), but their decisions are not accessible.

My opinions about the impact of protection orders on security deposits rely a lot on the distinction between being a tenant under the *RTA* and having exclusive possession of the residential premises. At common law that would have been a preposterous distinction because exclusive possession is essential to a tenancy at common law: see “[Street v Mountford Applied to Decide: A Residential Tenancy Agreement or a Licence?](#)”

It must be admitted that the *RTA* blurs that distinction and creates uncertainty about whether a landlord can keep a perpetrator’s security deposit if the perpetrator is excluded from the residential premises. Section 46 deals with the return of security deposits and subsection 46(2) states that the landlord must return the security deposit or the balance if deductions were made “within 10 days after the day on which the tenant gives up possession of the residential premises ...” (emphasis added). This seems to tie return of the security deposit to loss of possession, and not to the status of tenant.

However, the *RTA* in other sections contemplates that the return of a security deposit is triggered by the expiration or termination of the tenancy. For example, section 46(1)(c) defines “security deposit” to include “any amount owing to the tenant as interest under section 45 at the time of

the expiration or termination of the tenancy” (emphasis added). Section 46(1)(c) is referring to a provision in section 45 that allows a landlord and tenant to agree that interest need not be paid annually but may “be paid to the tenant on the expiration or termination of the tenancy”: section 45(2) (emphasis added). Section 44(6), which deals with the records that a landlord must keep, states that a landlord must keep security deposit records “for at least 3 years after the expiration or termination of the tenancy to which they relate” (emphasis added).

Therefore, in the context of the entire statute, and despite the infelicitous wording of section 46(2), it would seem the better interpretation is that a tenant who had paid a security deposit and who was subsequently excluded from possession by a protection order, is not entitled to have the security deposit returned as long as the perpetrator is still a tenant.

Responsibility for Damage that Exceeds the Amount of a Security Deposit

The question of who is responsible for and can be sued for damage to the residential premises that costs more to repair than the value of the security deposit is basically answered in the first section of this post on the general rule about responsibility for damages. Once again, the status of “tenant” is key.

A tenant can be sued under section 26(1)(d) if the tenant commits a breach of a residential tenancy agreement, such as a breach of section 21(e) that requires “that the tenant will not do or permit significant damage to the premises, the common areas or the property of which they form a part” (emphasis added). So, a landlord can sue a tenant for the difference. Whether that is a worthwhile course of action depends on whether the tenant can be located and whether the tenant has a job, bank account, assets, etc. from out of which a judgment could be paid.

A landlord can also sue the perpetrator of the damage to the residential premises. This will usually involve the intentional tort of trespass, a common law action that protects both real and personal property rights. Again, whether suing the perpetrator is a worthwhile course of action depends on whether the perpetrator can be located and whether the perpetrator has a job, bank account, assets, etc. from out of which a judgment could be paid.

It is not hard to imagine that landlords will often bear the cost of repairs of damage to residential premises. That is why recovery of the costs to repair damages was a landlord concern in the CPLEA report.

Suggestions for Reform

There are two main problems with the current law. First, the victim of domestic violence is held responsible for damage the victim did not cause. As noted in CPLEA’s earlier report [*The Hidden Homeless: Residential Tenancies Issues of Victims of Domestic Violence*](#) (at 9), this seems particularly unfair when the damage was caused by a perpetrator under a protection order or other form of restraining order that excludes them from the residential premises.

Some jurisdictions no longer hold victims responsible in such circumstances. Among other recent reforms in South Australia (and other jurisdictions in that country), the [*Residential Tenancies \(Domestic Violence Protections\) Amendment Act 2015*](#), the equivalent of our RTDRS and courts can decide that one or more but not all tenants are liable to compensate the landlord

for damages, so that the victim is not required to pay, either out of the security deposit or otherwise. They can also allow the equivalent of the RTDRS or the courts to split the security deposit. States such as [Oregon](#) relieve victims of domestic violence from liability for property damage caused by a perpetrator during a domestic violence incident and impose liability on the perpetrator.

The second problem is that landlords too often end up paying for the repairs to damages caused by the perpetrator. Landlords, who are private parties and owners of private property — and usually innocent bystanders — are forced to bear the costs in order to rent out their property again. Not all landlords are large and rich corporations with multiple properties. Some landlords are low-income individuals renting out a portion of their house to make ends meet.

If both victims of violence and landlords experience financial hardship as a result of bearing the burden of making good the damage done by perpetrators, it is appropriate to ask whether that burden should be relieved by the public. As Professor Koshan and I argued previously in “[The Residential Tenancies Act and Domestic Violence: Facilitating Flight?](#)” in connection with the financial burden of early termination:

Domestic violence is a public issue and responsibility, which for too long was relegated to the private realm and ignored by the law. We no longer dismiss domestic violence as a matter between private parties, and our collective responsibility should extend to the financial costs of dealing with domestic violence in tenancy situations.

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