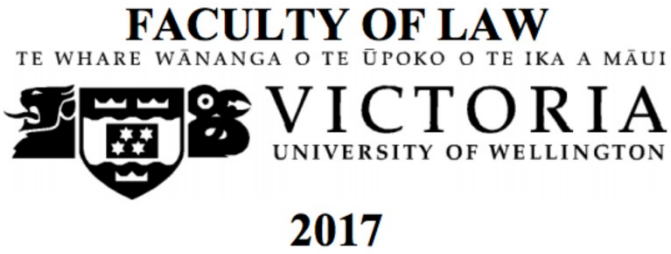
PO TSAI[*]

HOLLER v OSAKI: THE CARELESS TENANT EXONERATED

Submitted for the LLB (Honours) Degree



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I Abstract

The author examines the New Zealand Court of Appeal's reasoning in Holler v Osaki *[2016] NZCA 130. The Court held exoneration provisions in the Property Law Act 2007 were general principles of law so could be read into the Residential Tenancies Act 1986 and found no inconsistency between the two statutes. This decision means residential tenants can be exonerated from accidental, careless or negligent damage liability under certain circumstances. The author discusses provisions in the Property Law Act 2007 which are more likely to be general principles of law – instead of exoneration provisions – which the Court failed to consider. Inconsistencies between the Property Law Act 2007 and Residential Tenancies Act 1986 are identified and an in-depth analysis of the legislative background of both statutes is carried out using a purposive approach to interpretation. The author states the Court's decision could fairly be described as instrumentalist. While policy considerations may support the outcome, the two key legal issues were answered incorrectly by the Court.*

Keywords:
Holler v Osaki – tenant – exoneration – residential tenancies

II Introduction and Factual Background

Suppose you are a landlord, having leased your property to ideal tenants. You ensured the tenancy agreement contained a clause which states tenants are jointly and severally liable for damage caused by them. All goes well for three months, until a dreaded phone-call in the middle of the night. Your rental property is ablaze and unsalvageable but everyone is safe. Upon further inspection, the fire was caused by a pot of oil carelessly left unattended on the stove. Thankfully, the tenants will surely be liable for the damage. Or will they?

In short, these were the facts of *Holler*.[1] Holler was the landlord of the property tenanted by Mr Osaki and his family. In March 2009, Mrs Osaki left a pot of oil unattended on the stove. The repair costs for the resulting fire exceeded $200,000. AMI as insurer covered this cost, but exercised their right of subrogation to sue the Osakis.[2]

Yet by reading in provisions of the Property Law Act 2007, the unanimous Court of Appeal held residential tenants are not liable for careless or negligent damage in two situations.[3] Firstly, for any fire, flood or explosion.[4] This includes non-catastrophic damage and non-natural causes such as flooding from a blocked sink, a kitchen fire or explosions from fireworks.[5] Secondly, for *any* non-intentional damage if the landlord was insured for that type of damage.[6]

Landlords therefore bear all losses resulting from fire, flood or explosion if they are not insured. If landlords are insured, they must at minimum bear the insurance excess and increased premiums provided damage was non-intentional.[7]

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[1] *Holler and Rouse v Osaki* [2016] NZCA 130 (*Holler* (CA)).

[2] At [2].

[3] At [3].

[4] Property Law Act 2007, s 268(1)(a); This provision also includes lightning, storm, earthquake and volcanic activity however fire, flood or explosion are the most likely to be carelessly or negligently caused by a tenant.

[5] Melissa Poole "Practice Note 2016/1: Tenant Liability for Damages" (Tenancy Tribunal, 26 July 2016) at 7.

[6] Property Law Act 2007, ss 268(1)(b) and 269(3)(a); see also *Holler* (CA), above n 1, at [58].

[7] Property Law Act 2007, s 270(1)(b) not applicable as Residential Tenancies Act 1986 s 39(2)(b) states a landlord is solely liable for insurance premiums.

III Issues

A Two Key Legal Issues

The key legal issue for exonerating residential tenants was whether the exoneration provisions of the Property Law Act 2007 (PLA) could be applied within the Residential Tenancies Act 1986 (RTA). If so, residential tenants would have the same benefit as commercial lessees of exoneration from liability.

This key issue can be broken down into two sub-issues which are the focus of this paper. Firstly, whether exoneration provisions are general principles of law so can be read into the Residential Tenancies Act 1986. Secondly, whether the Property Law Act 2007 exoneration provisions are nevertheless barred due to inconsistencies with the Residential Tenancies Act 1986.

B Explanation of Relevant Legislation

Firstly, the *exoneration provisions* of the PLA (ss 268 and 269) provide:[8]

> **PLA s 268: Application of sections 269 and 270**
> (1) Sections 269 and 270 apply if… premises are situated, are destroyed or damaged by 1 or more of the following events:
> (a) fire, flood, explosion, lightning, storm, earthquake, or volcanic activity:
> (b) the occurrence of any other peril against the risk of which the lessor is insured…
> (2) Section 269 applies even though an event that gives rise to the destruction or damage is caused or contributed to by the negligence of the lessee or the lessee's agent.
>
> **PLA s 269: Exoneration of lessee if lessor is insured**
> (1) If this section applies, the lessor must not require the lessee-
> (a) to meet the cost of making good the destruction or damage; or
> (b) to indemnify the lessor against the cost of making good the destruction or damage; or
> (c) to pay damages in respect of the destruction or damage.

Counsel for Osaki argued these exoneration provisions extended to residential tenancies as they were general principles of law. The *general principles exception* refers to ss 142(2) and

[8] Property Law Act 2007, ss 268 and 269; "Exoneration provisions" and "ss 268 and 269 of the PLA" are used interchangeably throughout this paper.

85(2) of the RTA, which allows the Tribunal to turn to the PLA for general principles of law:[9]

> **RTA s 142: Effect of Property Law Act 2007**
> (2) … the Tribunal, in exercising its jurisdiction in accordance with section 85 of this Act, *may look to Part 4 of the Property Law Act 2007 as a source of the general principles of law*…
>
> **RTA s 85: Manner in which jurisdiction is to be exercised**
> (2) The Tribunal shall determine each dispute *according to the general principles of the law relating to the matter*…

While initially it may seem ss 142(2) and 85(2) of the RTA means exoneration provisions can simply be read in as general principles of law, the second issue arises when other relevant provisions of the RTA and PLA are examined. These other provisions are as follows and form the basis of discussion in the second half of the paper.

Reading in exoneration provisions raises issues of inconsistency with *damage provisions* of the RTA (ss 40 and 41), which states tenants are obligated not to cause careless damage and are responsible for any damage caused by them and third parties:[10]

> **RTA s 40: Tenant's responsibilities**
> (2) The tenant shall not—
> (a) Intentionally or carelessly damage, or permit any other person to damage, the premises;
>
> **RTA s 41: Tenant's responsibility for actions of others**
> (1) The tenant shall be responsible for anything done or omitted to be done by any person…

As damage provisions prima facie appear inconsistent with exoneration provisions, there was also a question of whether s 8(4) of the PLA – which states the PLA is subordinate – should be invoked, so damage provisions prevail over exoneration provisions. If so, tenants would nonetheless be liable to compensate the landlord through s 77(2)(n) of the RTA.[11]

> **PLA s 8: Application**
> (4) If a provision of this Act is inconsistent with a provision in another enactment, the provision in the other enactment prevails.

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[9] Residential Tenancies Act, ss 142(2) and 85(2); "General principles exception" and "ss 142(2) and 85(2) of the RTA" are used interchangeably throughout this paper.

[10] Residential Tenancies Act 1986, ss 40 and 41; *Holler* (CA), above n 1, at [27]; "Damage provisions" and "ss 40 and 41 of the RTA" are used interchangeably throughout this paper.

[11] Property Law Act 2007, s 8(4); Residential Tenancies Act 1986, ss 77(1) and 77(2)(n).

> **RTA s 77: Jurisdiction of Tribunal**
> (2)…the Tribunal shall have jurisdiction to do the following things…
> (n) to order the landlord or the tenant… to pay to the other party such sum by way of damages or compensation as the Tribunal shall assess in respect of the breach…

The application of these provisions together form the basis of the issues in *Holler*. How the Court came to its conclusion, their reasoning and my opinion will be discussed in the following paper.

IV Procedural History

After the fire, AMI initiated a subrogated claim against the Osakis in the High Court for the cost of repairing the damage.[12] However, the claim was referred to the Tenancy Tribunal to determine whether the Holler's claim was barred by the exoneration provisions.[13] The Tribunal followed prior Tribunal practice[14] and found Holler's claim was not barred, as the language of ss 142(2) and 85(2) could not support reading in the exoneration provisions as general principles.[15] Accordingly, the RTA damage provisions prevailed over the PLA exoneration provisions and Holler – thus AMI – succeeded in their claim for compensation under s 77(2)(n).[16]

The Osakis' appeal to the District Court was successful.[17] The Court held exoneration provisions applied to residential tenancies through the general principles exception.[18] No mention was made of s 8(4) and Holler's subsequent appeal to the High Court came to the same conclusion, again with no mention of s 8(4).[19] Appealing to the Court of Appeal, Holler

[12] *Holler v Osaki* [2012] NZHC 939.

[13] *Osaki v Holler and Rouse*, Tenancy Tribunal Manukau, TT 12/02284/AK, October 2012 (*Osaki* (TT))

[14] Some recent examples: *Innes v Hudson*, Tenancy Tribunal Christchurch, TT 15/00365/CH, December 2015; *Crockers Property Management v Armstrong*, Tenancy Tribunal Waitakere, TT 15/01822/HE, November 2015; *Owen v Billingsley*, Tenancy Tribunal Christchurch, TT 15/02661/CH, November 2015.

[15] *Osaki* (TT), above n 13, at [81]; see also David Grinlinton *Residential Tenancies: The Law and Practice* (4th ed, Lexis Nexis NZ, Wellington, 2012) at 144 and 145.

[16] *Osaki* (TT), above n 13, at [80] and [81].

[17] *Osaki v Holler and Rouse* DC Auckland CIV-2012-004-2306, 23 September 2013 (*Holler* (DC)).

[18] At [56].

[19] *Holler and Rouse v Osaki* [2014] NZHC 1977, [2014] 3 NZLR 791 (*Holler* (HC)).

was again unsuccessful.[20] The Court of Appeal were unanimous in holding the exoneration provisions extended to residential tenancies through the general principles exception.[21] The Court found no Parliamentary intent to justify withholding exoneration provisions from residential tenants. While acknowledging s 8(4), the Court found no inconsistency with damage and exoneration provisions.[22]

Therefore Osaki – the careless tenant – was exonerated. Holler bore the insurance excess and AMI covered the cost of repair. This may have been desirable from a practical standpoint as tenants would often become bankrupt so insurers and landlords were left with the burden anyway.[23] However, the reasoning of the lower courts and the Court of Appeal is questionable. This paper identifies stronger arguments in favour of the landlord.

V Analysis of the Court of Appeal

Although this analysis is largely focused on the Court of Appeal, my reasoning applies similarly to the District Court and High Court. The issues in *Holler* are essentially issues of statutory interpretation and this paper will often refer back to statutory interpretation principles.

Two issues will be analysed in context. Firstly, whether the exoneration provisions are general principles of the law as ss 142(2) and 85(2) require. Secondly, whether the exoneration provisions can be reconciled with damage provisions. This paper contends "no" for both issues. Policy considerations are covered at the end.

[20] *Holler* (CA), above n 1.

[21] At [57] and [58].

[22] At [27].

[23] Kristine King "*Holler v Osaki* and how it affects landlords" (9 May 2016) Auckland Property Investors Association <https://www.apia.org.nz/apia-blog/holler-v-osaki-and-how-it-will-affect-landlords>.

A Are Exoneration Provisions General Principles?

In order to apply the exoneration provisions, the Court held they were general principles of law so could be read in to the RTA through the general principles exception. However, it is arguable on a proper interpretation that exoneration provisions are not general principles.

Firstly, *general principles* must be defined. A definition was not provided in the PLA nor in Law Commission Reports leading to the PLA 2007 reform, and the term is still ambiguous.[24] The High Court called s 142 "awkwardly expressed" and one commentator said there is "no easy way to identify general principles".[25]

The Court of Appeal noted this difficulty. Winkelmann J stated "there is no neat subpart labelled "general principles" in pt 4, and none of the provisions in that part can easily be categorised as such".[26] Yet, the Court allowed exoneration provisions to fall under the general principles exception because Holler's counsel could not point to a better provision in Part 4 for general principles.[27] Winkelmann J stated that the exoneration provisions were "very good, if not the best candidates in pt 4 for general principles".[28]

The drafting of s 142(2) is poor and creates an ambiguity. However, "bad drafting is not allowed to frustrate an Act's purpose" and this paper suggests exoneration provisions are perhaps one of the worst candidates to be general principles.[29] Instead, other provisions are analysed and all are likely more suitable candidates for general principles of law relating to leases. One common feature of the recommended provisions listed – and my preferred interpretation of general principles – are that they codify well-settled common law rules which have been widely applied in the law of leases prior to the PLA reform in 2007.

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[24] Law Commission *The Property Law Act 1952: A discussion paper* (NZLC PP16, 1991); Law Commission *A New Property Law Act* (NZLC R29, 1994).

[25] *Holler* (HC), above n 19 at [29]; Thomas Gibbons "Residential Tenancy – *Holler v Osaki* [2016] NZCA 130" (2016) 17 BCB 307 at 307.

[26] *Holler* (CA), above n 1, at [24].

[27] At [24].

[28] At [30].

[29] John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR 981 at 984.

A basic definition to ascertain the ordinary meaning of general principles of law may be helpful and can be used to objectively assess any potentially relevant provisions. "General" is defined in the Collins Dictionary as "common, widespread".[30] "Principles" is defined as "a set of standards or rules…".[31] Black's Law Dictionary defines "general principles of law" as a "principle widely recognised by peoples…".[32] From this, it seems general principles are provisions which are common, widely recognised and create standards. A wider purposive approach for the meaning of general principles is difficult due to the lack of internal context and extrinsic evidence, however an excerpt from the 1991 Law Commission Report on the PLA Bill sheds some light on the meaning of general principles:[33]

> …general principles of landlord and tenant to be found in the new Property Law Act would apply to long term residential tenancies… Thus [long term residential tenancies] would remain subject to provisions for termination in the event of a breach by the tenant *and for relief against termination as found in the New Property Law Act. And that Act's provisions concerning restrictions on assignment or the running of covenants would apply*.

While this was in reference to long term residential tenancies, it does state general principles which could similarly apply to short term residential tenancies. Further, general principles of law have also been mentioned in other areas of law such as tort law, property law and international law. In *Matheson*, the Court stated the need to consider general principles of law relating to tort law.[34] For this, the Court cited a line of common law decisions settled at least 30 years prior to *Matheson* as evidence of *clear* law in relation to trespassing.[35] McGregor J rejected an argument to add another limb to the test in question, as he "cannot find any foundation for this suggestion either in English or Scotch law".[36] This supports a finding that general principles are something that needs a foundation in common law, something which exoneration provisions lack. This is supported by *Neylon*, which held in a

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[30] Collins Dictionary "General" (23 August 2017) Collins Dictionary Online <https://www.collinsdictionary.com/dictionary/english/general>.

[31] Collins Dictionary "Principles" (23 August 2017) Collins Dictionary Online <https://www.collinsdictionary.com/dictionary/english/principles>.

[32] Bryan Garner *Black's Law Dictionary* (9th ed, Thomson Reuters, United States of America, 2009) at 753.

[33] Law Commission *The Property Law Act 1952: A discussion paper*, above n 24, at [617] and [618] (emphasis added).

[34] *Matheson v Attorney-General* [1956] NZLR 849 (CA) at 880.

[35] At 880 (emphasis added).

[36] At 881.

property law context that general principles of law consisted (in this case) of law "formulated 30 years ago" and "settled law".[37]

In international law, international courts and tribunals often rely on the concept of general principles of law when dealing with substantive legal questions.[38] Definitions have been discussed and the general consensus is that general principles are:[39]

> …principles which are common to all or most domestic legal systems; general tenets that can be found underlying international legal rules; principles that are inherent principles of natural law; and principles that are deduced from legal logic.

Thus, this paper now turns to PLA provisions which in my belief are better candidates for general principles of law instead of exoneration provisions.

1 Consent in Subletting and Assignment

One obvious candidate for general principles of law relating to leases would be provisions in the PLA regarding consent in subleasing and assignment. Notwithstanding the Law Commission's statement above signalling that restrictions on subleasing are in fact general principles, support is also found in the schemes of both the RTA and PLA.

While subleasing and assignment is permitted in residential tenancies under ss 44 and 77(2)(p) of the RTA, there are no provisions explaining what constitutes unreasonable withholding of consent by the landlord.[40] Prior to the PLA, one would turn to common law cases such as *Corunna Bay*.[41] Post PLA reform in 2007, it is likely one would turn to the statute which codifies the principles of law in ss 224–229 of the PLA.[42] However, for residential tenancies, tenants and landlords are prima facie barred from looking to the PLA under s 142(1) even though the provision is equally applicable to residential tenancies.

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[37] *Neylon v Dickens* [1979] 2 NZLR 714 (SC) at 719.

[38] Neha Jain "Exploring Comparative International Law" (2015) 109 AJIL 486 at 486.

[39] At 487.

[40] Residential Tenancies Act 1986, ss 44 and 77(2)(p).

[41] *Corunna Bay Holdings Ltd v Robert Gracie Dean Ltd* [2002] 2 NZLR 186 (CA).

[42] Property Law Act 2007, ss 224–229.

By applying the general principles exception, ss 224–229 could helpfully apply to residential tenancies, allowing tenants and landlords to determine whether consent is reasonable or not in the context of subleasing and assignment.

2 Relief against Cancellation

The other provisions mentioned by the Law Commission for which the RTA is silent are those concerning a tenant seeking relief against cancellation. While ss 55 and 56 of the RTA cover situations where the landlord or tenant can apply to the Tribunal to terminate the tenancy, there is no provision in the RTA which states how a tenant can seek relief against termination. However, the PLA defines this clearly in ss 253, 255 and 256.[43]

In addition to having been mentioned by the Law Commission (see above), there is a strong argument to say these provisions are general principles, because they contain well settled rules regarding leases. Sections 253, 255 and 256 simply expanded on the law in the PLA 1952,[44] and the 1952 Act itself was derived from well-settled common law where a court could exercise its equitable jurisdiction to grant relief against forfeiture.[45]

It therefore seems quite plausible that ss 253, 255 and 256 are general principles relating to leases which can be applied to residential tenancies using ss 142(2) and 85(2). There appears to be no reason why relief should be limited to commercial lessees.

3 Non-Derogation from Grant

Furthermore, the common law doctrine of non-derogation from grant is not stated in the RTA but is implied in all leases under the PLA.[46] This codifies historic cases such as *Tram Lease* and allows a lessee to hold their lessor to account when the lessor derogates from their

[43] Property Law Act 2007, at ss 253, 255 and 256.

[44] Property Law Act 1952, s 118.

[45] *Shiloh Spinners v Harding* [1973] 2 WLR 28 (HL), [1973] AC 691 at 772; cited *in Greenshell v Kennedy Bay Mussel Co* [2015] NZCA 374 at [41].

[46] Property Law Act 2007, ss 218 and sch 3, pt 2, cl 8.

grant.[47] Blanchard J held non-derogation from grant was "a *principal of law*" which "does not depend…on a construction of the document conferring the grant, but is implied".[48]

Non-derogation is equally relevant to residential tenancies as it is to commercial leases due to the nature of the landlord-tenant relationship. With its well-recognised application in leases, it is a good candidate for a general principle of law.

4 Assignee Becomes New Lessee

Another suitable provision in the PLA is s 240 of the PLA which states assignees become the new lessee without the need for express acknowledgment.[49] The interpretation provision of the RTA defines a tenant as a "lawful successor in title of a tenant to the premises", defines assignment as a "transfer of all of the *rights* that a tenant has under a tenancy agreement" and s 44(6) removes a departing tenant's liability.[50] However, there is still an ambiguity regarding assignees' responsibilities under the RTA upon assignment.[51]
If s 240 of the PLA was read in as a general principle of law, it would clarify that assignees in a residential tenancy become the new tenant and therefore the lawful successor in title. Therefore, they will incur not only tenants' rights, but also responsibilities under s 40 of the RTA. This simply codifies common law rules relating to the dual nature of leases as held in *Fell*.[52]

5 Relief against Refusal to Renew

Another excellent candidate for a general principle relating to leases is ss 261–264 of the PLA,[53] concerning relief against a lessor's refusal to renew a lease. Currently, the RTA

[47] *Tram Lease Ltd v Croad* [2003] 2 NZLR 461 (CA).

[48] At [24] and [25] (emphasis added).

[49] Property Law Act 2007, s 240.

[50] Residential Tenancies Act 1986, ss 2 and 44(6) (emphasis added).

[51] Contractual liability depends on whether the landlord has covenanted with the assignee (GW Hinde, DW McMorland and PBA Sim *Land Law* (Butterworths, Wellington, 1978) at 550; see also Emma Tait "Liability of Lessees of Commercial Leases in New Zealand" (2008) 39 VUWLR 193 at 199–200.

[52] *City of London Corp v Fell* [1993] QB 589.

[53] Property Law Act 2007, ss 261 and 264.

permits reading in s 264 PLA under s 77(4). However, PLA s 261, which is fundamental and referred to in s 264 is not covered under the s 77(4) exception.

The principles found in s 261–264 were originally contained in the PLA 1952 s 120 and has been part of the law of leases for at least half a century.[54] Prior to the PLA 1952, a court could simply exercise its equitable jurisdiction to grant specific performance.[55] Because of their widespread (and historical) effect on leases and equal applicability to residential tenancies, ss 261–264 are suitable candidates to be general principles of law relating to leases.

6 Conclusion

Although Parliament simply left open what is meant by general principles of law, the provisions outlined above contain rules which have been law for many decades and all have common law roots. For example, consent for assignment, relief against cancellation, relief against refusal to renew, non-derogation from grant and assignees becoming new lessees are all provisions with common law foundations prior to PLA reform in 2007. They are well settled law, have widely applied to leases and tenancies from at least the early 1900s and have set binding precedents.[56] They are all relevant and applicable to residential tenancies. This seems to satisfy the strict meaning of *general principles* and accords with the definition given in international law.

Exoneration provisions on the other hand, introduce a relatively new concept with genesis through statute law as opposed to common law foundations. Perhaps the earliest mention of exoneration was in the Law Commission Reports for PLA reform in 1991. There is no dicta suggesting it applies to leases generally – it has only been applied to commercial leases thus

[54] Property Law Act 1952, s 120.

[55] *Vince Bevan Ltd v Findgard Nominees Ltd* [1973] 2 NZLR 290 (CA) per McCarthy J at 300; cited in *Besseling and Bracegirdle Restaurants Ltd v Bali Restaurant Ltd* (1981) 1 NZCPR 294 at 4.

[56] *Tram Lease* non-derogation, above n 47, at [24] goes as far back as 1888 in *Birmingham, Dudley and District Banking Co v Ross* (1888) 38 Ch D 295 at 313; *Corunna Bay* withholding consent, above n 41, at [14] goes as far back as *Evans v Levy* (1910) 1 Ch 452; *City of London v Fell* dual nature of leases, above n 52, at 605 goes as far back as *Junction Estates Ltd v Cope* (1974) 27 P&CR 482.

far – having never applied to residential tenancies prior to *Holler*.[57] Tenant exoneration is not the position in any overseas jurisdiction.[58] It seems unlikely something which was conceived only five years prior to first litigation in *Holler* could be described as a general principle of law relating to leases.

If the Court was correct to hold exoneration provisions *were* general principles under s 142(2), it is difficult to see when s 142(1) of the RTA would ever apply, which states "nothing in Part 4 of the PLA applies to a tenancy to which this Act applies." Of course, it is true provisions irrelevant to residential tenancies would be barred by s 142(1) of the RTA, as noted by the High Court.[59] But aside from that, if exoneration provisions – a new concept created by statutory PLA reforms in 2007 with no common law history – could be considered general principles of law relating to leases, it would seem s 142(1) becomes redundant which would be an unusual interpretation.

Finally, these views are also supported by Professor Grinlinton, an academic authority on residential tenancies.[60] He believes the Court overlooked many provisions which could have been general provisions including most of the aforementioned.[61] Grinlinton strongly suggests many of the above provisions are much better candidates for general principles and he notably concluded "ss 268 and 269 are the *least likely* candidates for principles".[62]

[57] For example: *Sheehan v Watson* [2010] NZCA 454, [2011] 1 NZLR 314; *Galbraith v Alderson Logistics Ltd* [2013] NZHC 3102, (2013) 15 NZCPR 112.

[58] For ACT and NSW in Australia see Residential Tenancies Act 1997 and 2010 ss 31 and 166 (respectively); for United Kingdom see Susan Bright and Geoff Gilbert *Landlord and Tenant Law: The Nature of Tenancies* (Clarendon Press, Oxford, 1995) at 396.

[59] *Holler* (HC), above n 19, at [46].

[60] David Grinlinton "The boundaries between residential tenancies and commercial leases" [2017] NZLJ 4.

[61] At 6.

[62] At 6.

B Are Exoneration Provisions Reconcilable with Damage Provisions?

Even if the Court were correct to hold the exoneration provisions were general principles of law, tenants may still not be exonerated if the exoneration provisions are inconsistent with provisions already in the RTA. This is because s 8(4) of the PLA provides if a provision of the PLA is inconsistent with a provision in another enactment, the provision in the other enactment prevails.[63]

Parliament has set out obligations of tenants under ss 40 of the RTA to not intentionally or carelessly damage the premises. Section 41 further states tenants are responsible for damage caused by third parties.[64] Combined, these two are referred to as the damage provisions. The default position before *Holler* was that a breach of tenants' obligations allows the Tribunal to exercise its discretionary power to order "compensation and damages" against the tenant under s 77(2)(n), in effect making tenants financially liable for damage.[65]

This section aims to prove the exoneration provisions of the PLA are in fact inconsistent with damage provisions of the RTA, so should not have been read into the RTA due to the bar in s 8(4) PLA. As a result, residential tenants should not be exonerated.

Firstly, it would be useful to define "inconsistent". Black's Legal Dictionary defines it as "lacking agreement among parts; not compatible with another".[66] Stroud's Judicial Dictionary is more helpful – inconsistency among statutes is defined as "so at variance with the machinery and procedure indicated by the previous Act that, it that obligation were added, the machinery of the previous Act would not work".[67] Reading in exoneration provisions (ss 268 and 269 of the PLA) as the Court has done, would mean a tenant is actually not financially liable for careless damage as exoneration provisions give tenants immunity for all careless damage. On its face, this appears incompatible with the damage

[63] Property Law Act 2007, s 8(4).

[64] Residential Tenancies Act 1986, ss 40 and 41.

[65] Section 77(2)(n).

[66] Bryan Garner *Black's Law Dictionary*, above n 32, at 834.

[67] D Greenberg *Stroud's Judicial Dictionary of Words and Phrases* (7th ed, Sweet & Maxwell, London, 2006) at 1313.

provisions in the RTA which import obligations and responsibilities, allowing the Tribunal to impose liability through financial means if these are breached.

The exoneration and damage provisions are therefore difficult to reconcile and it is argued they are incompatible and would make the application of ss 40 and 41 – which imposes liability – not possible. One commentator went as far as calling it a "clear contravention" of s 8(4) of the PLA.[68]

An argument that has been advanced for reconciling both provisions is that while damage provisions mean a tenant has an obligation to not cause damage and is responsible for breaching this, this does not necessarily mean financial liability. Tenants can still be held responsible through the Tribunal's exercise of discretion, ordering termination if substantial damage is caused (s 55(1)(b) RTA), regardless of financial immunity.[69] This mirrors the Court of Appeal reasoning where Winkelmann J held she "…does not consider there is such conflict" further stating "the RTA… does not expressly address what liability a tenant has to make good damage."[70]

However, this is unconvincing for multiple reasons. The following section will discuss why it is unlikely exoneration provisions were meant to be reconciled with the RTA damage provisions.

1 Purposive Approach: Introduction and Context

Firstly, it is well-recognised that modern interpretation rules allow a purposive approach.[71] As noted by Professor Burrows, courts have had an "inevitable shift to a purposive approach" and s 5 of the Interpretation Act 1999 states "the meaning of an enactment must be ascertained from its text and in the light of its purpose".[72] This means extrinsic evidence

[68] David Grinlinton "The boundaries between residential tenancies and commercial leases", above n 60, at 6.

[69] See *Holler* (CA), above n 1, at [37].

[70] At [25] and [28].

[71] RI Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 248.

[72] John Burrows "The Changing Approach to the Interpretation of Statutes", above n 29, at 983.

is admissible to an extent, including the factual matrix which often surrounds statutes.[73] This is because it is "often difficult to read an Act in a vacuum" and the general view is that "it is a mistake to consider statutory words in isolation".[74] Using this approach, we can examine evidence extrinsic to the RTA and PLA, including wording, Hansard, case law, legislative scheme and legislative history.[75]

The status quo since the RTA damage provisions were enacted in 1986 was absolute tenant liability for careless damage. This was noted in a Housing Corporation New Zealand Government Publication shortly after the RTA was enacted and applied in numerous Tenancy Tribunal judgments and court decisions up until *Holler*.[76] Notably in *Harrison v Shields*, a fact situation similar to *Holler* occurred where a tenant left bacon frying on the stove causing extensive fire damage.[77] There the Court held all tenants jointly and severally liable for the damage and the landlord's insurers successfully exercised their right of subrogation. There was widespread publicity on this decision with many calling for legislative reform as the outcome was unjust.[78]

The Court of Appeal in *Holler* emphasised a recommendation from the 1991 Law Commission Report to include residential tenants in any PLA reform on liability.[79] However, the Court of Appeal in *Holler* failed to emphasise the Commission's Final Report which did not mention exoneration for residential tenancies at all.[80] There is no evidence to suggest residential tenant exoneration was incorporated into the PLA. Notably, upon the PLA's introduction into Parliament, the Minister of Housing at the Bill's first reading stated the Bill would "…remove a *commercial* lessee's liability for unintentional damage to lease

[73] RI Carter *Burrows and Carter Statute Law in New Zealand*, above n 71, at 272.

[74] RI Carter *Burrows and Carter Statute Law in New Zealand*, above n 71, at 251.

[75] Justice Susan Glazebrook, DNZM "Statutory Interpretation in the Supreme Court" (Parliamentary Counsel Office, Wellington, 4 September 2015) at 11.

[76] Housing Corporation New Zealand *Renting and You: Landlords, Tenants and the Residential Tenancies Act 1986* (Government Printing Office, Wellington New Zealand, 1987) at 12; see also *Innes v Hudson, Crockers Property Management v Armstrong, Owen v Billingsley*, above n 14.

[77] *Harrison v Shields* (DC Dunedin 435/00), 25 September 2002.

[78] (29 March 2006) 630 NZPD 2336.

[79] Law Commission *The Property Law Act 1952: A discussion paper*, above n 24, at [466].

[80] Law Commission *A New Property Law Act*, above n 24.

premises when the lessor is insured".[81] There was no indication of this extending to residential tenancies.

Furthermore, ever since the PLA was introduced, the Tenancy Tribunal has continued to hold tenants financially liable for careless damage and successive Parliaments have failed to include clarification in subsequent RTA amendments (such as in 2010) indicating absolute liability is incorrect.[82]

In *Boyd v Mayor of Wellington*, there was a similar legalistic argument to try and reconcile two opposing positions in the Land Transfer Act. The status quo was upheld even though a technical legalistic argument was made for an opposing position. The majority stated:[83]

> …it is the law… which has been accepted as such for eighteen years. Perhaps hundreds of titles have been dealt with on the assumption that the law was settled by that decision. It has never been, attacked. We have had two consolidating Land Transfer Acts, one passed in 1908 and another in 1915. The decision… was well known. …No change has been made in our Land Transfer statutes. If it had been imagined that the decision was wrong or mistaken the Legislature would surely have interfered.

Similarly, one would expect Parliament to have made clear if they intended to move away from the status quo and exonerate residential tenants in light of *Harrison v Shields* and subsequent tribunal decisions which have followed in its path. Absolute liability of tenants has been the position for the past 30 years and it is unconvincing to say now that tenants are in fact exonerated from liability for careless damage.

2 Purposive Approach: Purpose and Hansard

Using intrinsic and extrinsic evidence as permitted under a purposive approach,[84] an examination of the intention of Parliament when enacting the RTA and PLA along with subsequent proposed amendments makes it evident Parliament did not intend exoneration provisions to extend to residential tenancies. There are two Parliamentary intentions to assess here which the Court failed to properly address.

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[81] (14 November 2006) 635 NZPD 6460.

[82] Residential Tenancies Amendment Act 2010.

[83] *Boyd v Mayor of Wellington* [1924] NZLR 1174 (CA) at 1189.

[84] RI Carter *Burrows and Carter Statute Law in New Zealand*, above n 71, at 252.

Firstly, an assessment of the intention of Parliament at the time of enacting the damage provisions in the RTA is required. The purpose of the RTA was to:[85]

> …reform and restate the law relating to residential tenancies, to define the rights and obligations of landlords and tenants of residential properties, to establish a tribunal to determine expeditiously disputes arising between such landlords and tenants…

There is little doubt Parliament in 1986 intended tenants to be absolutely liable for all damage they cause. This was a time before the PLA exoneration provisions and due to damage provisions, there was simply no way one could argue tenants were exonerated. *Harrison v Shields* is an example of this in practice.[86]

Section 40 was derived from PLA 1952 s 116D(b) which put an onus on residential tenants to make good damage caused, as acknowledged by the Property Law and Equity Reform Committee for the Residential Tenancies Bill.[87] In fact, this provision has roots stemming back as far as the Statute of Marlborough 1267 voluntary waste provisions, which meant tenants were prohibited from causing damage to tenanted land "damage to, or deterioration of, tenanted land".[88]

Additionally, a 1987 Government Publication by Housing Corporation New Zealand published shortly after the RTA was enacted shows the Government's intention for the damage provisions.[89] Under tenant's obligations, it states a tenant must "repair or pay for the repair of any damage caused deliberately or carelessly by the tenant or the tenant's guests".[90]

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[85] Residential Tenancies Act, Long Title.

[86] *Harrison v Shields*, above n 77.

[87] Property Law Act 1952, s 116D(b); Property Law and Equity Reform Committee *Interim Report on Legislation Relating to Landlord and Tenant* (November 1983) at [12] and [13].

[88] Property Law and Equity Reform Committee *Final Report on Legislation Relating to Landlord and Tenant* (November 1986) at [38].

[89] Housing Corporation New Zealand *Renting and You: Landlords, Tenants and the Residential Tenancies Act 1986*, above n 76.

[90] At 12.

Furthermore, upon introducing the RTA to Parliament, there were many debates and criticisms alleging the Bill was too harsh on landlords. It was discussed that "tenants can lose their bond only by irresponsible or careless treatment of their flat or house".[91] This clearly suggests liability for careless damage. The Court's decision means bond can only be used for outstanding rent payments and compensation for intentional damage.

Contrary to the Court's statement, the RTA is *not* consumer protection legislation.[92] It is also intended to protect landlords and this is evident in Hansard – a "balance was needed between landlords and tenants", further "protection to reasonable landlords and tenants against irresponsible or unreasonable behaviour by the other party", and even still there were debates that the reforms strikes balance too far towards tenants.[93] In light of this context, it is unlikely Parliament after taking into account the criticism, would have intended to shift the balance so far in favour of tenants that landlords bear the loss caused by their careless tenant.

However, an assessment of the intention of Parliament when enacting the PLA is also necessary. The PLA was enacted to "restate, reform, and codify (in part) certain aspects of the law relating to real and personal property".[94]

Winkelmann J in *Holler* claims the Minister "does not state that [PLA] reforms do not apply to residential premises", nor gives any indication "that he intended the reforms to be narrower in scope than those proposed by the Commission"[95] (the Commission in 1991 had recommended any exoneration provisions to extend to residential tenancies).[96]

However – with respect – her Honour's statement appears to be grasping at straws. While it is technically true on a wide interpretation of the Minister's statement, it seems to be somewhat instrumentalist considering the Minister statement was: "the bill proposed to

[91] (19 September 1985) 466 NZPD 6898.

[92] *Holler* (CA), above n 1, at [20].

[93] (19 September 1985) 466 NZPD 6896; (9 December 1986) 476 NZPD 6000.

[94] Property Law Act 2007, s 3.

[95] *Holler* (CA), above n 1, at [52].

[96] Law Commission *The Property Law Act 1952: A discussion paper*, above n 24, at [466].

remove a *commercial lessee's* liability for unintentional damage to lease premises when the lessor is insured".[97] Nevertheless, this was cited by the Court of Appeal in support of the *Osakis*, the tenant's argument.[98]

Further, while the Court may have an argument the Minister did not specifically exclude residential tenancies, it is also conversely true there is no evidence to show Parliament intended exoneration provisions to *include* residential tenancies. Rather, the Law Commission stating the RTA was to have "supremacy" over residential tenancies suggest otherwise.[99] While it was suggested by the first Law Commission Report in 1991 (and mentioned previously) that PLA reform should extend to residential tenancies,[100] it was never mentioned since and the subsequent Law Commission Final Report and Hansard make no mention of residential tenancies being included in the PLA reform. The Law Commission Final Report even stated measures in the draft PLA Bill relating to leases should not interfere with the RTA, saying that the "PLA does, however, contain some general rules relating to leases, *excluding residential tenancies*".[101] Therefore, from extrinsic evidence including Hansard and Law Commission Reports, there is no evidence of any intention of Parliament to include residential tenancies in the application of exoneration provisions.

3 Purposive approach: Legislative History

This section aims to show the Court came to the wrong conclusion and the legislative history of the RTA and PLA make clear exoneration provisions were never intended to extend to residential tenancies.

The same Parliament that enacted the PLA in 2007 earlier introduced two amendment bills aimed to limit tenant liability. Firstly, the Residential Tenancies (Damage Insurance) Amendment Bill 2006 (Bill One) and the Residential Tenancies Amendment Bill (No 2)

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[97] (14 November 2006) 635 NZPD 6460 (emphasis added).

[98] *Holler* (CA), above n 1, at [51] and [52].

[99] Law Commission *A New Property Law Act*, above n 24, at [787].

[100] Law Commission *The Property Law Act 1952: A discussion paper*, above n 24, at [466].

[101] Law Commission *A New Property Law Act*, above n 24, at [4] (emphasis added).

2008 (Bill Two).[102] Both Bills were similar, however Bill One intended to exonerate residential tenants for all damage whereas Bill Two intended to limit liability to four weeks rent. One would have thought if liability needed to be *limited,* there must have been absolute liability beforehand.

In support of the exoneration provisions not extending to residential tenancies, when Bill One was being debated in the House, the opposition at the time (National) was adamantly opposed to the amendments:[103]

> But the Labour Party member does not stop there. It is not just the landlord's fault. She wants us to pass legislation, because she said it is 20,000 landlords' fault. She wants 20,000 landlords in this country to pay insurance so that their tenants will be covered when they cause damage or vandalism, or have fry-ups and burn the house down. That is absolutely absurd.

At the Committee of the Whole, Bill One failed to pass. Sceptics may argue that because the Bill did not pass, the Government simply incorporated it into the PLA reform through exoneration provisions and the general principles exception already mentioned. However, this does not seem to be the case for a few reasons.

Firstly, upon the introduction of the PLA, exoneration provisions were mentioned as specifically applying to commercial leases. The PLA passed with cross party support and judging by the fierce debate in Bill One (a Bill which the entire opposition voted against),[104] it is unlikely the opposition would have supported the passing of the PLA if exoneration provisions were intended to apply to residential tenancies.[105]

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[102] Residential Tenancies (Damage Insurance) Amendment Bill 2006 (29–1); Residential Tenancies Amendment Bill (No 2) 2008 (217–1), cl 26.

[103] (29 March 2006) 630 NZPD 2336.

[104] (03 May 2006) 630 NZPD 2742.

[105] (11 September 2007) 642 NZPD 11763.

Secondly, the Social Services Committee Report sheds some light on the intentions of the Government at the time Bill One failed:[106]

> We have been assured by the Minister for Building Issues that the issues covered by the Bill will be considered in the Department of Building and Housing review of the Residential Tenancies Act 1986. This review is expected to be complete by November 2006, with legislation to be introduced in 2007 to give effect to amendments arising from the review.

Evidently, reform was going to be effected *in the Residential Tenancies Act*, not the Property Law Act. This reform indicated by the Committee was actually Bill Two in 2008, introduced by the *same* Parliament that enacted the PLA in 2007. Bill Two attempted to limit a tenant's liability to four weeks rent, arguably indicative of absolute liability as the status quo beforehand.[107]

While this was brought to the attention of the Court, Winkelmann J stated: "nothing that happens after an Act has passed can affect the intention of the Parliament that enacted it".[108] However, this wrongly suggests the Court already established Parliament – at the time of enacting the PLA – intended the exoneration provisions to extend to residential tenancies, which is simply not the case. Instead, Bill Two is useful as context – as part of the purposive approach – to determine the intention of Parliament when enacting the PLA, after all, "provisions cannot be read in a vacuum".[109] It sheds some light on what the *same* Parliament (which enacted the PLA) thought when enacting the Act; tenants were absolutely liable. Otherwise there would have been no need to introduce a second amendment to the RTA to limit liability to four weeks rent. This is the significance of Bill Two.

While Bill Two ultimately also did not pass, the reason for this – as noted by the High Court – is merely because of the change of government. The failure to pass through Parliament does not support any contention that tenants were already covered by exoneration provisions as the Court of Appeal alludes to, otherwise there would be no logical reason for the Bill to

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[106] Residential Tenancies (Damage Insurance) Amendment Bill 2006 (29–1) (Social Services Committee Report).

[107] Residential Tenancies Amendment Bill (No 2) 2008, above n 102.

[108] *Holler* (CA), above n 1, at [55].

[109] RI Carter *Burrows and Carter Statute Law in New Zealand*, above n 71, at 251.

have introduced in the first place.[110] The Court of Appeal failed to take this into account. The High Court went further and explained:[111]

> There was a change of Government, before the bill was passed into law, and that key proposal [to limit liability] did not find a place in the RT Amendment Act 2010. The Social Services Committee, after the change of government, declined by a majority to support the proposal. The minority, the former Government, expressed regret.

If tenants were already exonerated with the PLA and that is why Bill Two failed, there would be no need to "express regret" when it failed to be passed by the incoming government.

Therefore, while Bill One confirms the Government had wished residential tenants to be exonerated *through the RTA*, Bill One never succeeded through Parliament. Then, exoneration for residential tenants was never intended to be effected through the PLA as it was to be addressed in later *RTA amendments* (see the Social Services Committee Report). While these amendments eventually made it to Parliament in Bill Two, it never finished passing through due to a change in Government. Therefore, exoneration provisions, while intended to be amended in *the RTA* to include residential tenants, was simply never effected due to bad timing and a change of government. It cannot be clearer.

Parliament did subsequently successfully amend the Residential Tenancies Act in 2010, but that did not include any exoneration provisions.[112] If Parliament intended residential tenants to be exonerated they could have easily clarified in the 2010 amendments, in light of the earlier attempted amendments and controversial common law decisions such as *Harrison v Shields*.[113] Instead, among other things, s 27 of the 2010 Amendment Act actually *increased* tenant liability:[114]

> If, on removing any fixture, the tenant causes any damage to the premises, the tenant must inform the landlord immediately and, at the landlord's option, either repair the damage or compensate the landlord…

[110] *Holler* (CA), above n 1, at [55].

[111] *Holler* (HC), above n 19, at [20].

[112] Residential Tenancies Amendment Act 2010.

[113] *Harrison v Shields*, above n 77.

[114] Residential Tenancies Amendment Act 2010, s 27.

Therefore, on a purposive approach to statutory interpretation, taking into account legislative history, Hansard and the factual matrix, it seems conclusive Parliament had not intended the PLA exoneration provisions to extend to residential tenancies. With the apparent inconsistency with damage and exoneration provisions – and no Parliamentary intention, relevant purpose of PLA or any provision to support a technical reconciliation of provisions – s 8(4) should be invoked to prevent extension to residential tenants.

4 Other Inconsistencies Caused by Exoneration Provisions

Reading in exoneration provisions causes numerous inconsistencies with other provisions in the RTA.

If exoneration provisions were to be read in notwithstanding s 8(4), it would be logical for the Court to also examine and apply if necessary s 270 of the PLA.[115] This is because s 270 is an exception to s 269.[116] This was noted by the Court of Appeal but not addressed.[117] Section 270(1)(b) limits the burden on a lessor caused by exoneration provisions in cases of negligent (as opposed to careless) damage as it allows the lessor to recover from the lessee any increased insurance premiums and future excesses due to negligent damage caused.[118]

However, this appears inconsistent with s 39(2)(b) of the RTA which states it is solely the landlord's responsibility for insurance premiums.[119] Because of this inconsistency, presumably s 8(4) of the PLA should be invoked in this case to restrict s 270 to commercial leases.

But if exoneration provisions were to apply to residential tenancies, it seems odd to exclude s 270 from applying too. Notwithstanding that s 269 is subject to s 270, landlords in residential tenancies will also undoubtedly incur increased premiums on their insurance policies like commercial lessors as a result of exoneration for negligent damage; this

[115] Property Law Act 2007, s 270.

[116] Section 270(2)

[117] *Holler* (CA), above n 1, at [56].

[118] Property Law Act 2007, s 270(1)(b).

[119] Residential Tenancies Act 1986, s 39(2)(b).

provision aims to lessen this burden. Without this provision, residential landlords would incur a greater burden than presumably more well-off commercial lessors.

Next, and perhaps most tellingly, the exoneration provisions are also inconsistent with s 42(6) of the RTA, which expressly states:[120]

> **RTA s 42: Tenant's fixtures**
>
> (6) If, on removing any fixture, the tenant causes any damage to the premises, the tenant must inform the landlord immediately and, at the landlord's option, either repair the damage or compensate the landlord for any reasonable expenses incurred by the landlord in repairing the damage.

One would have to question whether upon removal of the landlord's fixtures causing damage, whether they can be exonerated for that damage if it is covered under the landlord's insurance if exoneration provisions are read in as the Court held. But s 42 expressly specifies tenants must compensate the landlord for repairing the damage so reading in the exoneration provisions would be incompatible.

Once again, this would probably be a case where s 8(4) would apply, so using the Court's reasoning, exoneration provisions would apply for all damage in residential tenancies bar intentional and bar damage caused by removing fixtures. However it begs the question why Parliament would have created a distinction between careless damage caused when removing fixtures and any other careless damage. This seems overly complex for an Act designed to effect "fair and expeditious" resolution of disputes.[121]

5 Conclusion

In conclusion, it seems on a purposive approach, exoneration provisions were never intended to be read into the RTA as they appear irreconcilable with damage provisions. Reconciliation is contrary to well-settled law and requires an overly legalistic reading of the provisions which can hardly be described as fair and expeditious. Further, reconciliation is not supported by the legislative history in light of both RTA Amendment Bills. Reading in

[120] Residential Tenancies Act 1986, s 42(6).

[121] Residential Tenancies Act 1986, s 85(1).

exoneration provisions also causes inconsistencies with other provisions of the RTA, frustrating s 8(4) which affirms the PLA is subordinate to inconsistent legislation.

C Policy Considerations

Section 85(2) of the RTA allows the Tribunal to exercise its jurisdiction to decide a case on the substantial merits and justice of each case and policy considerations appear to have contributed to the Court's legalistic reasoning.[122]

On one hand, the consequences of *Holler* are far wider than large-scale devastating damage and allows courts to exonerate tenants who have caused minor damage. This includes – but is not limited to – walls, windows and chattels, provided their landlord is insured for the damage. Taking into account the excess for each claim, exoneration can be a significant burden on the landlord, especially if the cost to make good the damage falls below the excess amount, or if there are multiple incidents. Exonerating tenants simply disincentives tenants from taking care of their rental property.

It is interesting that these common consequences for landlords were not discussed in the judgments. Melissa Poole, Principal Tenancy Adjudicator said many landlords are selling their investment properties as margins are too low since the *Holler* decision.[123] This may have adverse effects on the supply of rental housing.

It is also interesting to note Housing New Zealand does not carry insurance cover except for large scale damage. So, tenants in state housing who are arguably the most vulnerable and lacking the means to compensate would not get the benefit of the exoneration provisions, but better-off tenants often will.[124]

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[122] Residential Tenancies Act 1986, s 85(2).

[123] Letter from Melissa Poole (Principal Tenancy Adjudicator) to Nick Smith (Minister of Building and Housing) regarding *Holler & Rouse v Osaki* [2016] NZCA 130 (23 September 2016).

[124] Letter from Melissa Poole, above n 123; see also *Housing New Zealand v Rotana*, Tenancy Tribunal Nelson, TT 4082147, May 2017; *Housing New Zealand v Siologa*, Tenancy Tribunal Manukau, TT 4073763, May 2017.

On the other hand, it may be meritorious to allow the tenant to escape financial liability, after all, the landlord has insurance and the tenant is often going to be bankrupted as a result so the burden falls on the landlord and insurer anyway.[125] Exoneration does not cover intentional damage, so those who are arguably the most at-fault will still be liable for damage caused.[126]

Further, this decision primarily affects insurers only and reduces them essentially double-dipping as tenants and landlords may often be insured for the same risk as a result of tenants having absolute liability.[127] Lastly, landlords currently pay a premium to insure a rental home as opposed to a regular home.[128] This premium takes into account the increased risk from the property being a rental, so surely the tenant should be protected.

While these may be a valid policy arguments, the scope of s 85(2) should be analysed first. This was discussed at the Tenancy Tribunal hearing of *Osaki v Holler*, but also in *Welsh v Housing New Zealand* in the High Court:[129]

> If a remedy is justified by the principles of law applicable to the matter, the Tenancy Tribunal will have to consider the merits and justice of the case and whether the strict application of the law gives rise to a fair result, but, if there is no remedy provided for by the law, it is not open to the Tenancy Tribunal to invent one… Such a completely merit-based approach is not authorised by the Act; the applicable principles of law must still be applied.

Evidently in *Holler*, even if the substantial merits and justice and policy arguments may be balanced in favour of the tenant, the crux of this paper suggests there has been no convincing

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[125] Kristine King "*Holler v Osaki* and how it affects landlords", above n 23.

[126] However, some questions were raised in *Tekoa Trust* regarding intentional damage. The Tribunal held allowing dogs urinating on carpet was merely careless damage so the tenant was exonerated as a result of *Holler* (*Tekoa Trust v Stewart*, Tenancy Tribunal Palmerston North, TT 4015340, August 2016). Thankfully on appeal, it was held oblique intent, therefore the tenant was still liable (*Tekoa Trust v Stewart*, [2016] NZDC 25578 at [14]).

[127] Letter from Melissa Poole, above n 123.

[128] Estimated extra $233.48 annually for a $500,000 home: State Insurance "Get a Home Comprehensive Quote" (29 August 2017) State Insurance <https://secure.state.co.nz/home/Comprehensive>.

[129] *Osaki* (TT), above n 13, at [60]; *Welsh v Housing New Zealand Ltd* HC Wellington AP35/2000, 9 March 2001.

remedy – no principle of law – put forward which makes it open to the Court to grant residential tenants exoneration.

VI Law Reform

In May 2017, the Residential Tenancies Amendment Bill (No 2) was introduced into Parliament.[130] This was created in response to *Holler v Osaki* and seeks to restore tenant liability in residential tenancies, caused by accidental, careless or negligent acts, limited to the lesser of either the insurance excess, or 4-weeks rent.[131] This Amendment Bill clarifies that insurance companies will have no right of subrogation against tenants.[132]

Some critics have argued the law reform proposed does not go far enough, and tenants should be fully liable for damage they cause.[133] For example, it is unclear how the law will act if there are multiple incidents, whether the four weeks rent liability is for each incident or for the entire length of tenancy.

Perhaps a solution could be to clarify the above ambiguities, or to impose joint and several tenant liability for up to $10,000 in total per tenancy. This would eliminate the moral hazard associated with complete exoneration and most landlords believe tenants should be exonerated for large scale damage.[134] After this threshold, they should have the benefit of the landlord's insurance, unless it was intentional damage. This takes into account tenants in effect pay a share of the insurance premiums indirectly through their rent.[135]

It is also interesting to note the proposed Bill also expressly repeals s 142(2).[136] While this was a source of ambiguity in *Holler* and the Court held it included exoneration provisions

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[130] Residential Tenancies Amendment Bill (No 2) 2017 (258–1).

[131] Clause 49B; Residential Tenancies Amendment Bill (No 2) 2017 (258–1) (Bill Digest).

[132] Clause 49C.

[133] Catherine Harris "Should tenants take more responsibility for cost of repairs to their homes?" (2 June 2009) Stuff.co.nz <http://www.stuff.co.nz/nelson-mail/nz-business/92913987/Landlords-say-a-bill-to-make-tenants-more-liable-for-damage-at-rentals-is-too-complicated>.

[134] Letter from Melissa Poole, above n 123.

[135] *Holler* (CA), above n 1, at [53].

[136] Residential Tenancies Amendment Bill (No 2) 2017 (258–1), cl 21(2).

(presumably why it is being repealed), repealing s 142(2) may have adverse consequences. As noted previously, there are helpful general principles of law in pt 4 of the PLA which courts and the Tribunal would not be able to turn to if s 142(1) stands on its own.

VII Conclusion

This paper argues that the Court of Appeal, when considering whether exoneration provisions apply to residential tenancies, came to the wrong conclusion on the two key legal issues. It seems unlikely general principles of law would have encompassed exoneration provisions. Even if possible, it would require a very generous reading of the exoneration provisions in the context of the RTA to circumvent s 8(4), something this paper suggests is simply untenable. While the outcome may be desirable in terms of policy, the reasoning used by the Court simply does not support the outcome. It has caused what the RTA was intending to rectify: "ambiguities, inconsistencies and self-contradictions, which have created uncertainty in tenancy law".[137]

Nevertheless, as *Holler v Osaki* stands, the careless tenant is exonerated and the landlord bears, at least partly, the burden of their careless tenant.

Consists of exactly 7984 words including substantive content in footnotes 4, 7, 8, 9, 10, 51, 58, 126, 128. Word count excludes cover page, table of contents, abstract, bibliography and all other footnotes.

[137] (19 September 1985) 466 NZPD 6896.

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