The Law Commission

(LAW COM. No. 40)

CIVIL LIABILITY OF VENDORS AND LESSORS FOR DEFECTIVE PREMISES

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed*
15th December 1970

LONDON
HER MAJESTY'S STATIONERY OFFICE
8s. 0d. [40p] net

184

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*

Mr. Claud Bicknell, O.B.E.

Mr. L. C. B. Gower.

Mr. Neil Lawson, Q.C.

Mr. N. S. Marsh, Q.C.

The Secretary of the Commission is Mr. J. M. Cartwright Sharp, and its offices are at Conquest House, 37–38 John Street, Theobald's Road, London WC1N 2BQ.

LAW COMMISSION

Item VII of the First Programme

CIVIL LIABILITY OF VENDORS AND LESSORS FOR DEFECTIVE PREMISES

TABLE OF CONTENTS

	Paragraph	Page
A. INTRODUCTION	1–10	1
General	1–4	1
Consultation	5–8	2
Questions for Consideration	9–10	3
B. LIABILITY IN CONTRACT—DEFECTS OF QUALITY	11–37	3
The Present Law	11–13	3
Operation of the Law	14–25	4
(*a*) Sales and Lettings of Dwellings in General	17–19	5
(*b*) Newly Built Dwellings	20–21	6
(*c*) Liability of the Builder	22–25	6
Recommendations	26–37	8
C. DANGEROUS DEFECTS CREATED BY THE VENDOR OR LESSOR	38–47	13
The Present Law	38–44	13
Operation of the Law	45–46	15
Recommendations	47	16
D. DANGEROUS DEFECTS NOT CREATED BY THE VENDOR OR LESSOR	48–55	16
The Present Position	48–50	16
The Case for Liability for Non-disclosure of Known Defects	51–53	18
Recommendations	54–55	19

	Paragraph	Page
E. **LIABILITY OF A LANDLORD DURING THE LETTING**	56–69	19
Visitors to the Premises	56–59	19
Persons Not on the Premises Let	60–64	20
The Case for a General Duty of Care	65–68	22
Recommendations	69	24
F. **SUMMARY OF RECOMMENDATIONS**	70–73	24
APPENDIX A: Draft Bill with Explanatory Notes		28
APPENDIX B: Organisations consulted by the Law Commission		54

THE LAW COMMISSION

Item VII of the First Programme

CIVIL LIABILITY OF VENDORS AND LESSORS FOR DEFECTIVE PREMISES

To the Right Honourable the Lord Hailsham of Saint Marylebone, Lord High Chancellor of Great Britain.

A. INTRODUCTION

General

1. Under Item VII of our First Programme we explained the purpose and scope of the study which we recommended in the following terms:

> " The sale and letting of land and premises have widespread social implications and certain aspects of the law and practice in this field are dealt with under headings VIII and IX below. Another important aspect is the civil liability of vendors and lessors for defective premises.
>
> A vendor's liability in contract may depend *inter alia* on whether the premises were at the time of the sale to be constructed or in course of construction, or already completed ; and whether, if to be constructed or in the course of construction, any implied warranty as to defects has been expressly or impliedly excluded.
>
> A lessor's liability in contract may depend *inter alia* on whether the premises were furnished or unfurnished ; whether the lessor was under any express covenant to repair and, if so, whether notice of want of repair has been given ; and whether an obligation to repair is imposed by statute.
>
> Liability in tort of the vendor or lessor for negligence may depend *inter alia* on whether the negligence arose before or after a sale or lease ; and whether, where the negligence of a lessor is in question, he was under a contractual or statute-imposed obligation to repair.
>
> The above distinctions require examination in the light of current commercial and social considerations with a view to establishing a proper balance between the principle of freedom of contract and the desirability of protecting the public."

2. We have set out, therefore, to examine the liability of a vendor or lessor of defective premises both in contract and in tort ; and it follows that we use the term " defective " in two different senses. From the point of view of tort liability premises are defective only if they constitute a source of danger to the person or property of those who are likely to come on to them or to find themselves in their vicinity. In the contractual sense they are defective if their condition falls short of the standard of quality which the purchaser or lessee was entitled to expect in the circumstances. We refer to these different kinds of defects as dangerous defects and defects of quality respectively, where it is necessary to point the contrast.

3. We think it necessary to mention this distinction at the outset of our Report because it appears to have contributed to the existence of some of the deficiencies in the present law. The proper development of the tortious liability for the narrower range of dangerous defects may have been inhibited by the erroneous belief that this would necessarily entail an extension of the contractual liability for defects of quality. In fact, while the same premises may be defective in both senses, the basis of liability is different and independent.

4. In this item of our work we have not dealt with the position as between landlord and tenant in respect of defects which constitute a breach of a repairing obligation in a lease. Obligations of landlords and tenants, including repairing obligations, are included in our general work on the law of landlord and tenant under Item VIII of our First Programme and we have excluded them from consideration here.

Consultation

5. In order to assess the extent and validity of the criticism which is directed against the existing law we circulated two working papers, containing provisional proposals on which comment and criticism were invited. The first concerned the contractual position in relation to trade sales and long lettings of new dwellinghouses, which was at that time causing considerable concern to the public. The second related to sales and long lettings of other houses and to the general liability of vendors and lessors in tort. We received much helpful comment on these papers and we are grateful to those who gave us the benefit of their views.

6. More recently we invited interested departments and organisations to comment upon our draft Report and attached draft Bill.[1] In the result we received written comments and arranged a number of meetings at which the drafts were discussed. We have given these comments and points raised in our discussions consideration in framing this Report.

7. There is general agreement that some changes in the law are needed. A purchaser of a new house should have greater assurance that he is getting a soundly built property, although whether this can best be achieved by legislation is a matter which we discuss later. There are also certain areas in this field where the law of tort has not developed satisfactorily. For this reason the law is capable of causing injustice to innocent persons who suffer injury and damage and it has been subjected to criticism by judges and by text-book writers.

8. In this Report we put forward four recommendations, each of which would in our view materially improve the rights of purchasers, tenants or third parties who sustain injuries or suffer loss as a result of the defective state of premises. At the same time we do not think that the additional duties would impose an unreasonable burden upon those who would become subject to them.

---

[1] A list of those consulted forms Appendix B to this Report.

Questions for Consideration

9. In investigating this subject the four basic problems which we had in mind were:—

(*a*) What rights, if any, should a purchaser of premises have if it subsequently turns out that, because of defects in their condition, they are less suitable for his purpose or of less value than they appeared to be when he bought them?

(*b*) Should any special consideration apply when the premises are newly erected and they were bought or leased from the builder, or from someone associated with him?

(*c*) In what circumstances should a person who sells or lets premises be liable for injury or damage suffered by some other person by reason of a defect which existed in those premises at the date of the sale or letting?

(*d*) In what circumstances should a person who lets premises be liable for injury or damage suffered by some other person by reason of a defect in the premises which arises after the commencement of the letting?

10. This Report covers the various aspects of these problems under four different headings:—

B. Liability in Contract—Defects of Quality.

C. Dangerous Defects created by the Vendor or Lessor.

D. Dangerous Defects not created by the Vendor or Lessor.

E. Liability of a Landlord during the letting.

Our recommendations are summarised in Part F and in Appendix A we attach a draft Bill to give them effect, together with explanatory notes on clauses.

B. LIABILITY IN CONTRACT—DEFECTS OF QUALITY

The Present Law

11. On the sale of premises which include a completed building there is no implied warranty of any kind as to the condition of the premises or their suitability for any particular purpose; and this rule applies where the vendor is himself the builder. Under the doctrine of *caveat emptor* the prospective purchaser must take the premises as he finds them unless he makes express provision regarding the condition of the premises in his contract with the vendor. In the absence of such a provision he will have a remedy only if he can establish fraud, negligent mis-statement or, under the Misrepresentation Act 1967, non-fraudulent misrepresentation.

12. The same principle applies in general to the letting of unfurnished premises. In certain lettings of small houses, however, a condition is implied, by section 6 of the Housing Act 1957, that the house is at the

commencement of the tenancy fit for human habitation.[2] In the letting of a furnished house or apartment a similar condition is implied at common law as to fitness for occupation at the commencement of the tenancy.

13. In a contract for the sale or letting of premises to be constructed or completed by the vendor or the lessor there is, however, *prima facie* an implied term that the work will be done in an efficient and workmanlike manner, that the builder will supply and use proper materials and, in some circumstances, that the building will be fit for the particular purpose for which, to the knowledge of the builder, it is to be constructed. The implication as to fitness for purpose is most readily made in the case of a dwellinghouse, and in such cases, unless the surrounding circumstances clearly exclude it,[3] the implication is that the house will be fit for human habitation. These implied terms may, however, all be varied or excluded by the terms of the contract, either by express exclusion or, more usually, by particular specifications which oust their implication.[4]

Operation of the Law

14. We are not aware of any substantial criticism of the present law as it applies to commercial or industrial premises. In such cases the parties are normally in a position to protect their own interests with the help of their professional advisers. The appropriate terms for inclusion in the contract in such cases are the subject of negotiation. Considerable disquiet has, however, been expressed in recent years as to the operation of the law in relation to the purchase of dwellings.

15. The traditional justification for the principle *caveat emptor* is that a purchaser[5] of a completed building can see what he is buying and does not rely upon the skill or knowledge of the vendor. If he wishes to satisfy himself as to its condition he is as well able as the vendor to have it surveyed and to ascertain its condition. Moreover, he knows, and the vendor may not, to what use he intends to put the premises. He can judge their suitability for his purpose and negotiate the price accordingly.

16. While this justification may still apply to the sale or letting of commercial or industrial premises it is necessary to reconsider whether at the present time it has the same force in relation to dwellings. For the last 25 years there has been a shortage of living accommodation and the purchaser's bargaining position has become correspondingly weaker. When

---

[2] Under section 32 of the Housing Act 1961, there is implied in most lettings of dwelling-houses for terms of less than seven years a covenant by the lessor to keep the structure, exterior and certain installations in repair. This no doubt obliges the lessor to put the premises in repair, in the relevant respects, at the commencement of the lease.

[3] See *Young & Marten Ltd.* v. *McManus Childs Ltd.* [1969] 1 A.C. 454; *Gloucestershire County Council* v. *Richardson* [1969] 1 A.C. 480.

[4] See *Lynch* v. *Thorne* [1956] 1 W.L.R. 303 (C.A.) where it was held that a builder's compliance even with his own specification that external walls should be built of 9 inch bricks, which resulted in unfitness for habitation, deprived the owner, who had agreed to that specification, of the benefits of the implied term of fitness for habitation.

[5] We generally use the expression " purchaser " to cover any person who acquires an interest in property on a sale, a letting or a charge.

we started our examination of this subject, therefore, we circulated two working papers which were designed, *inter alia*, to sound public opinion on the extent to which the principle *caveat emptor* was still thought to be appropriate in relation to the sale or letting of dwellings in general, and whether any special considerations should apply to the sale or letting of new dwellings by builders, development companies and others in the course of a business.

(a) Sales and Lettings of Dwellings in General

17. From the comments which we received as a result of the circulation of these papers it appears that *caveat emptor* is still regarded as the appropriate principle on which the rights of the seller and purchaser of a dwellinghouse should generally be based. It is strongly supported in the case of sales of dwellinghouses by private owners, for in such cases a change in the law might merely lead to duplication of expense. House purchase is a transaction of such importance to the ordinary citizen that even if he had the benefit of a warranty by the vendor as to the condition of the premises he might not feel able to dispense with a survey. A possible right of action against the vendor, assuming that he could be traced some years later when the defect became apparent, would be no real substitute for a thorough examination of the premises before contract. Indeed, it was represented to us that anything which encouraged house purchasers to dispense with a proper survey would be contrary to the public interest.[6]

18. From the vendor's[7] point of view, the imposition of a statutory warranty would be a serious matter. It might lead him also to incur the expense of a detailed survey to satisfy himself that he would not have to face a substantial claim in the future at a time when he would probably have laid out his money in the purchase of another house.

19. It was further forcefully suggested to us in the course of our consultations that the principle *caveat emptor* should continue to apply not only to sales by private owners but also to the sale of dwellings which have previously been occupied and are later sold by property owning companies and other traders. It is contended that this principle best serves the interest of both parties in all these cases. They know where they stand and make their financial arrangements on the basis that, unless the vendor has been guilty of fraud or misrepresentation, the risk that the premises may contain some defect of quality must be borne by the purchaser. We find this line of reasoning convincing and, subject to separate consideration of the problem of newly built dwellings, we do not recommend any change in the principles of the present law so far as concerns the contractual position regarding defects of quality.

---

6 Where the purchase is financed in part by a loan secured by a mortgage on the premises the mortgagee will have a valuation made but this is done for his own purposes and his valuer's report is not normally made available in detail to the prospective mortgagor. Even if the report were fully available to him, it would not necessarily provide much information as to defects since its purpose is to assess the value of the relevant property as a security.

7 We generally use the expression " vendor " to include anyone who disposes of an interest in premises.

(*b*) *Newly Built Dwellings*

20. In relation to newly built dwellings, however, the position is, in our view, entirely different. There is no reason why a person who acquires a dwelling from the builder should have to examine it in detail to see whether it is in a sound condition. He should be entitled to rely on the diligence and skill of those whose work has gone into the provision of the dwelling and he should have a remedy if the dwelling proves to be defective.

21. As a result of our consultations we have found general agreement that the purchaser[8] in such circumstances should have greater protection from the law than he has at present in respect of defects of quality in premises. There was, however, some difference of opinion on how this could best be achieved. The majority view was that it would be better to direct attention to imposing obligations to build properly upon those who are engaged in the provision of new dwellings rather than to propose the introduction of rights of action against those who sold dwellings when they themselves might not have engaged in carrying out or procuring the carrying out of building work. The first approach would justify applying the same principles of liability to the builder/vendor or the developer/vendor, as to the builder who builds to the order of another. It is this course which we have adopted.

(*c*) *Liability of the Builder*

22. We have no doubt that, since we have started our examination of this subject, the position of new house purchasers has been considerably improved through the efforts of the National House-Builders Registration Council. These have been directed both to the improvement of building standards and to the protection of a purchaser[9] who has a genuine complaint about the condition of the new house which he has bought for occupation by himself or his family from the builder. In 1965 the N.H.B.R.C. introduced a ten year protection scheme, which, in its present form and assuming that the builder is a registered builder[10] and adopts the standard form of agreement (which is mandatory[11] save in certain excepted cases),[12] contains the following main features:—

(*a*) The builder warrants that the dwelling has been built, or agrees that it will be built, in an efficient and workmanlike manner and of proper materials and so as to be fit for habitation, and so as to qualify for a certificate by the N.H.B.R.C. This certificate states

---

8 See note 5 as to the meaning of this expression.

9 Under this scheme a person who acquires a leasehold interest in or who takes a lease of a dwelling is treated as a purchaser.

10 Subject to note 12 below, for the purposes of this scheme " registered builders " include persons and organisations engaging in or arranging for the construction of dwellings for sale or letting directly or indirectly to the public as well as actual builders.

11 As between the registered builder and the N.H.B.R.C. the builder is under an obligation to use the standard form breach of which would lead to disciplinary proceedings; but vis-a-vis a prospective purchaser the builder has no such obligation in law.

12 The builder's obligation to submit to periodical inspections or tender the standard form of agreement does not apply in respect of dwellings built for any local authority for letting and in certain other cases, e.g., where the purchaser's own architect is engaged to supervise the building work.

that the dwelling has been inspected periodically during construction and that, so far as was seen, the standards of workmanship and materials are substantially in accordance with the Council's requirements.

(*b*) The builder undertakes to make good any defects which are consequent on a breach by him of the Council's requirements and are reported to him in writing during the first two years after the agreement, the effects of wear and tear and normal drying out excepted.

(*c*) The N.H.B.R.C. undertakes to honour any judgment or award made against the builder under (*b*) above if he fails to do so; and it also undertakes to make good any major structural defect, and any damage caused by it, up to the end of the tenth year.

(*d*) The Council's liability is limited to £5,000 in respect of any one dwelling. After the sixth year the first £15 of each claim is excluded.

(*e*) The agreement is made with "the purchaser", which is expressed to include his successors in title to the dwelling and mortgagees in possession.[13]

(*f*) Whereas the benefits of the scheme are available to a purchaser in respect of defective workmanship and materials emanating from the default of a sub-contractor engaged by a registered builder, neither the purchaser, nor that builder, nor the Council itself (which has remedies over against a registered builder in default) has any direct claim against a defaulting sub-contractor.

(*g*) The scheme does not, at present, apply to the conversion of property nor, in any case, where the defects are due to defects of design and that design was provided by the purchaser.

(*h*) The scheme does not apply to dwellings built for local authorities for letting.

23. We are told that almost all the new houses which are now being built for private sale or letting are being built under the N.H.B.R.C. scheme. There is no doubt that the policy of the Building Societies Association to make advances only in respect of dwellings built under the scheme, to which the Association's members generally adhere, has contributed to this result. It seems unlikely, however, that coverage of the scheme can be materially increased for it would be over-optimistic to hope that every builder and developer in the country will one day be registered with that Council.

24. It is apparent that the benefits of such a scheme must exceed those which can be derived from any change in the law affecting the contractual rights between vendor and purchaser. Whereas a right of action against a builder is of value only to the extent that the builder remains solvent, the purchaser's rights under the N.H.B.R.C. scheme are backed by the resources of that Council and by insurance which the Council arranges. The question we have had to consider, therefore, is whether, in the light of

[13] Whether or not the benefits of the scheme pass in law to the successors of the original purchaser without an express assignment is, however, a matter of controversy between commentators.

this scheme, it would be right to recommend a change in the general law. In considering this question we have taken into account that, according to our information, it is unlikely that Building Societies would weaken in their support for the scheme merely because reform in the law would create statutory obligations of a broadly similar character.

25. We do not think there is any need to alter the law in relation to commercial or industrial premises. In relation to the provision of new dwelling accommodation, however, it seems to us unsatisfactory that a builder should be able by the provisions of his contract to depart from the basic common law obligation (or if he is also the vendor not be subject to any implied obligation) that his work should be done properly, with suitable materials, and in such a way as to provide a habitable dwelling. We do not think that the N.H.B.R.C. scheme, accepting that it will remain a permanent feature, provides a complete answer to these criticisms. We take the view that legislation is required for five reasons:—

(*a*) The scheme does not, at present, apply to cases in which new dwellings are provided by the conversion of existing premises.

(*b*) However beneficial the scheme may be in practice, it is as well that it should be backed by a satisfactory basis in law. Moreover, it could happen, in relation to a defect of an unusually serious nature, that the purchaser's loss exceeded the limit of the N.H.B.R.C. guarantee. The purchaser would then have to rely upon his rights at law outside the terms of the agreement.

(*c*) The scheme does not apply to dwellings built for local authorities for letting and in various other cases.[14]

(*d*) There will always be some builders and probably more developers who arrange for the construction of dwellings for sale or letting to the public,[15] who are not registered with the N.H.B.R.C. and will be operating outside the provisions of the scheme.[16]

(*e*) The scheme does not give the head contractor a remedy against a sub-contractor who is responsible for the defect of which the purchaser complains.

Our Recommendations

26. Amendment of the law should be directed at improving the legal position of the purchasers of dwellings and should in our view be designed to achieve the following results:—

(*a*) that a builder of a dwelling (i.e., anyone who provides a dwelling by constructing a new building or converting or enlarging an existing one) should be placed under a duty, similar to his common law obligations, to build properly and should not be able to contract out of this duty;

---

14 See note 12 above.

15 We are thinking of transactions for cash or where the necessary finance is provided by a building society which does not follow the Building Societies Association's general policy regarding the scheme.

16 Such a builder may falsely represent that he is operating within the scheme: see *Breed* v. *Cluett* [1970] 3 W.L.R. 76. We also believe that a few registered builders do, from time to time, undertake work for new dwellings otherwise than in accordance with the scheme.

(*b*) that this duty should be imposed not only on builders, but also on anyone else, in particular any sub-contractor or professional man, who takes on work for or in connection with the provision of a new dwelling (see further paragraph 31 below);

(*c*) that a right of action in respect of faulty building of a dwelling should be available during a limited period—

(i) if the builder builds to the order of a client, to that client;

(ii) if the builder sells to a purchaser, to the purchaser; and

(iii) in either event, to anyone who subsequently acquires an interest in the dwelling;

(*d*) that those who (without being builders or otherwise concerned with work taken on for or in connection with the provision of the dwelling) arrange in the course of their business for the construction of dwelling for sale or letting to the public, should be placed under the same duty as builders towards persons who acquire interests in those dwellings.

27. As a method of achieving these results we do not favour the implication of a term into a contract. The essence of our recommendation is that the builder or developer should be under an obligation of more than strictly contractual force since the benefit will pass to subsequent owners. We propose, therefore, a statutory duty, not susceptible of contracting-out, a breach of which should be actionable at the suit of anyone who acquires an interest in the premises and suffers loss through that breach.[17]

28. A further reason for avoiding a strictly contractual form of duty is that the relevant obligation should be applicable to work done by sub-contractors. If the purchaser's right of action lay only against the head builder or developer with whom he was in contractual relationship, the purpose of the provision could be defeated where the head builder or developer became bankrupt, or where the defect of which the purchaser complains is not attributable to any breach of the statutory obligation on the part of such head developer or builder. The purchaser might be left with no remedy on his contract, notwithstanding that the quality defect of which he complains relates to work which had been carried out by a substantial sub-contractor.

29. The proposed obligation is imposed on those " taking on work for or in connection with the provision of a dwelling " and, as we have explained, developers and sub-contractors engaged in such work are embraced within this definition. But the content of the proposed obligation relates and relates only to that work which has been " taken on ". Thus, when a builder takes on work under a contract which obliges him to build to a given design provided by or on behalf of the other party to the contract or in accordance with plans and specifications so provided to him, then his obligation will be discharged if he builds in a workmanlike manner and with proper materials as specified. It is, of course, not uncommon

---

[17] There may be cases in which a breach results in personal injury to a person who has acquired an interest in the dwelling. In such circumstances damages for personal injury would be recoverable as flowing from the breach.

in "tailor made" building or conversion for the "building owner" or his architect or surveyor to provide plans and specifications or to nominate the sub-contractors and specify the materials required for the performance of the builder's contract. The builder will not be liable if he adheres to instructions of these kinds which become terms of his contract provided that so far as his own work is concerned it is done in accordance with his instructions and is done properly.

30. We do not think, however, that the easing of the statutory obligation in the case of those who take on work on the terms that they comply with instructions given by or on behalf of another, which is discussed in the preceding paragraph, should be available in such cases as *Lynch* v. *Thorne*.[18] We therefore propose that a *mere agreement* to accept plans, specifications or other instructions prepared by or on behalf of the other party to the contract should not enable the latter to escape the rigour of the statutory obligation. Where, however, the person accepting such specifications has done so after obtaining independent advice or in reliance upon his own judgment then to that extent there will be an easing of the statutory obligation.

31. The effect of applying the proposed obligation to all those who "take on work" involves giving special consideration to a number of classes of persons who are not builders, in the ordinarily accepted meaning of that term. These are:—

(*a*) professional men who provide designs, plans and specifications and may also undertake supervision of building work on behalf of their own clients;

(*b*) sub-contractors, particularly specialists who, as well as taking on sub-contract work or the supply of materials, are frequently concerned with the planning and design of integral parts of dwellings;

(*c*) suppliers of components which are specially constructed for use in particular dwellings;

(*d*) suppliers of mass-produced components or general building materials for use in dwellings.

The position of these classes under our recommendation will be as follows:—

(*a*) *Professional men* will be under an obligation to do the work which they take on in a professional manner, that is with all due care and skill; they will be under no obligation to "use proper materials" in the building (unless as might rarely occur they supply materials); where they specify materials, their obligation will be to select them with due care and skill; and they will be under the general obligation to provide designs, plans and specifications which will include only methods and materials which, if followed, used and applied by the builder or sub-contractor, will result, together with the work which the professional man himself undertakes, in the fitness of the dwelling for habitation.[19]

---

18 See note 4 above.

19 See further as to the obligation of professional men para. 35 below.

(*b*) *Sub-contractors* will be under a similar obligation to builders so far as they take on work and supply materials.[20] Where they provide plans or other details relating to their sub-contract, they will be under the same obligation in respect of those plans and details.

(*c*) *Suppliers of "purpose built" components* will be under a similar obligation to builders so far as their components are concerned.

(*d*) *Suppliers of mass-produced components and general building materials* will not be placed under any obligation by our recommendations concerning the provision of new dwellings. They will, of course, continue to owe a general duty of care towards persons who may sustain injury or damage to property by reason of defects in their "goods" but, subject to this duty, their position is the normal one of a trade seller of goods. If what they supply to a builder or sub-contractor turns out to be defective, in circumstances in which the builder or sub-contractor is subjected to a purchaser's claim for breach of the obligation we propose, that claim can be passed back to the seller. We are aware, of course, that suppliers' contracts for sale in this area are often subject to exemption clauses. In our Report on Exemption Clauses on the Sale of Goods and attached Clauses (Law Com. No. 24) we have made certain recommendations as to the control of exemption clauses. We do not, therefore, deal in this Report with the position of suppliers in this class.

32. Those persons on whom the obligations are to be imposed should not, however, be left at risk for an indefinite period. There should be a limit of time within which an action could be brought, running from the date when the work was completed.

33. As regards the content of the proposed obligation, we have considered the terms of the obligation implied in building contracts by the common law (in the absence of terms to the contrary effect); and, in particular, whether it is necessary to provide both that the work should be done efficiently, and with proper materials, and that the house should be fit for habitation. In *Hancock* v. *B. W. Brazier* (*Anerley*) *Ltd.*,[21] Diplock L.J. described the requirement of fitness for habitation as being merely an alternative way of formulating the requirement for good work and proper materials. This is not, however, the view normally taken, and the implied obligation is generally thought to have a threefold application covering:—

(*a*) good workmanship, and

(*b*) proper materials, and

(*c*) fitness for habitation,

all three of which requirements must be met.[22] We think that there are good reasons for the latter view.

---

[20] See para. 28 above.

[21] [1966] 1 W.L.R. 1317 at p. 1327.

[22] See Lord Denning M.R. in *Hancock* v. *B. W. Brazier* (*Anerley*) *Ltd.* (supra) at p. 1332, who uses the adverb "reasonably" to qualify fitness; as does Edmund Davies L.J. in *Billyack* v. *Leyland Construction Co. Ltd.* [1968] 1 W.L.R. 471 at p. 478. There is nothing in the cases to suggest, nor do we think, that "reasonably" alters in any way the content of the obligation.

34. It may be that proper work with good materials will usually produce a house which is fit for habitation, but it is possible to imagine cases in which, however skilful the work and however good the materials, there is some defect of design or lay-out which makes the resulting dwelling unsuitable for its purpose. We propose, therefore, that the statutory obligation should follow the form last outlined and should contain each of those three requirements.

35. We appreciate that the imposition of obligations covering the matters dealt with in the preceding paragraphs effects a change in the basis of liability so far as professional men are concerned. We see no reason why a lower standard of duty should be appropriate to professional men; they are engaged in connection with housebuilding to assist in producing a house which is fit for habitation. There are, however, two further points which should be mentioned in this context. The first is that a builder or sub-contractor who takes on work on the terms that he is to comply with instructions given by or on behalf of the building owner will discharge his obligations if he does properly that which he is instructed to do (see paragraph 29 above). But it may happen that owing to a defect in those instructions, the dwelling when completed is unfit for habitation. We think in such a case it would be wrong to deprive a purchaser of his rights against the person who has given the instructions compliance with which has resulted in unfitness of his dwelling. The second is that professional men and those who, like specialised sub-contractors, hold themselves out as possessing skill in designing dwellings and their components have almost certainly a responsibility under the existing law to warn those who employ them if the plans or schemes which they prepare for the purpose of use in house-building may result in unfitness for habitation. The imposition upon such persons of the proposed statutory obligation will recognise this responsibility.

36. The reasons for imposing the same obligations upon " developers "[23] as upon builders are first, that, so far as the provision of new dwellings is concerned, purchasers make no distinction in the reliance they place upon sound workmanship between acquiring from a builder or from a developer who has employed that builder; and secondly, unless developers were subject to the obligation there would be serious risks of evasion. These reasons lead us to conclude that the remedies of purchasers in respect of quality defects in new dwellings should not depend upon whether their interest was acquired from a builder on the one hand or a developer on the other.

37. To sum up our recommendations on this aspect of the subject, we propose:—

(*a*) The creation of a statutory duty, to be owed by:—

(i) any person who takes on work in connection with the provision of a new dwelling, or

(ii) any person who in the course of his trade or business or pursuant to statutory powers arranges for such work to be undertaken,

---

[23] By " developers " we mean those who, in the course of their trade or business or pursuant to statutory powers, arrange for the construction of dwellings for sale or letting.

that the work should be done in an efficient manner with proper materials and that, so far as his particular work is concerned, the dwelling when completed should be fit for human habitation.

(*b*) The duty should be owed to any person who acquires an interest in the dwelling.

(*c*) The duty should apply in all circumstances, whether the dwelling is built on the land of the "purchaser" or of a third party or of the builder and, in the last case, whether the building is erected under a contract or, independent of any contract, for disposal as a completed dwelling.

(*d*) The duty should be taken as discharged where a person has taken on work for another on the terms that he will do it in accordance with plans, specifications or other instructions given by or on behalf of that other to the extent that he does that work in accordance with such instructions, subject, however, to his discharging any duty which he may owe to that other to warn him of any defects in those instructions.

(*e*) The protection afforded by (*d*) above to a person who takes on work for another on the terms that he will do it in accordance with plans, specifications or other instructions given on behalf of that other should not, however, extend to cases (such as are referred to in paragraph 30 above) where the person taking on the work has himself provided the plans, specifications or other instructions which the other party to the contract has merely accepted.

(*f*) There should be a limitation period of six years from the completion of the work. While the present law of limitation remains unchanged, the limitation period would be reduced to three years for any damages claimed for personal injury.

C. DANGEROUS DEFECTS CREATED BY THE VENDOR OR LESSOR

The Present Law

38. Turning now to defects of the dangerous, as opposed to the qualitative kind, we start by considering the immunity which now appears to be enjoyed by a vendor or lessor of land from liability for his own negligent acts committed before the sale or letting.

39. It was at one time thought that such an immunity was a necessary part of a wider principle under which operations on land were excluded altogether from the general duty of care formulated by the House of Lords in *Donoghue* v. *Stevenson*,[24] but this view can no longer be held. Although that duty was first expressed in relation to the manufacture and sale of chattels it has been made clear by subsequent decisions of the courts that the duty applies equally over a wide range of activities; and there can be

24 [1932] A.C. 562.

no doubt that it applies, in principle, to land as well as to chattels. In relation to land the position was stated by Lord Denning in *Miller* v. *South of Scotland Electricity Board*[25] as follows:—

> "We are concerned with the duty of care that is owed by a person doing work—or anything else—on land: and that duty is today best found by resort to the general principle enunciated by Lord Atkin in *Donoghue* v. *Stevenson*. Such a person—be he occupier, contractor, or anyone else—owes a duty to all persons who are so closely and directly affected by his work that he ought reasonably to have them in contemplation when he is directing his mind to the task."

40. That case was concerned with the removal of the power supply from unoccupied premises. In *Clay* v. *A. J. Crump and Sons Ltd.*,[26] Lord Denning's statement of the law was applied by the Court of Appeal so as to make the building contractors, the demolition contractors and the supervising architect liable for negligence in leaving a dangerous wall standing during work of redevelopment. On the same principle builders who were not the owners of the land, but were building under contract with the landowner, have been held liable to third parties for injuries caused by negligent work in *Gallagher* v. *McDowell Ltd.*[27] and *Sharpe* v. *E. T. Sweeting and Son Ltd.*[28]

41. From the decisions in those cases it is apparent that the generally accepted immunity of the vendor or lessor must be regarded as an exception to the general rule, "a rock which has escaped the flood tide of liability released by *Donoghue* v. *Stevenson*".[29] It is necessary, therefore, to consider briefly the origin of this immunity and the decisions on which it is founded.

42. Although there are earlier cases on the subject it is sufficient to begin with *Robbins* v. *Jones*[30] in which Erle C.J. said, at page 239:—

> "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term: for, fraud apart, there is no law against letting a tumbledown house: and the tenant's remedy is upon his contract, if any."

In *Cavalier* v. *Pope*[31] the law was stated in similar terms by Lord Atkinson at page 432:—

> ". . . it is well established that no duty is, at law, cast upon a landlord not to let a house in a dangerous or dilapidated condition, and further, that if he does let it while in such a condition, he is not thereby rendered liable in damages for injuries which may be sustained by the tenant, his (the tenant's) servants, guests, customers, or others invited by him to enter the premises by reason of this defective condition."

In neither of those cases had the lessor done anything more positive than allow the premises to fall into a dilapidated condition before letting them.

---

25 1958 S.C. (H.L.) 20 at p. 37.
26 [1964] 1 Q.B. 533.
27 [1961] N.I. 26.
28 [1963] 1 W.L.R. 665.
29 *Salmond on Torts*, 15th ed., at p. 378.
30 (1863) 15 C.B. (N.S.) 221.
31 [1906] A.C. 428.

In *Bottomley* v. *Bannister*[32] however, the law was considered on the assumption that a gas boiler had been carelessly installed by the vendor of a newly built house and had thereby caused the deaths of the purchaser and his wife, although there was some doubt of this on the facts. Scrutton L.J. said at page 468, in rejecting a claim for damages by the personal representatives:—

> "Now it is at present well established English law that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself or is aware of their existence."

43. In *Otto* v. *Bolton and Norris*[33] the Court of Appeal had to consider whether the old cases had been overruled by *Donoghue* v. *Stevenson* and decided that they had not. In the result a builder who sold a newly built house was held not liable for injury caused to the purchaser's mother by the collapse of a ceiling which he had put up carelessly. Similar decisions were reached in *Davis* v. *Foots*[34] and in *Travers* v. *Gloucester Corporation*.[35] In the former, the lessor's son, who was taken to be acting as the lessor's agent, disconnected a gas fire so carelessly, two days before the beginning of the tenancy, that gas escaped. The lessor was held not liable for the death of the tenant and the illness of his wife which resulted from that careless act. In the latter case, a local authority was held not liable for the death of a lodger in a council house caused by the negligent installation of a geyser on the direction of its architect.

44. Without attempting any closer analysis of the line of reasoning running through these cases, we think it fair to comment that, once the duty of care is accepted as being applicable to land as well as to chattels, the conclusion in *Otto* v. *Bolton and Norris* does not seem to follow inescapably from the propositions expounded in *Robbins* v. *Jones* and *Cavalier* v. *Pope*. Nevertheless in *Sharpe* v. *Sweeting* (supra) Nield J. said that the vendor's or lessor's immunity "is too deeply embedded in the common law to be capable of disturbance" by a court of first instance. It seems unlikely that the immunity would be abolished by judicial decision below the House of Lords, but if the point were taken that far it could be argued with some chance of success that the decision in *Otto* v. *Bolton and Norris* was inconsistent with the true scope of the principles in *Donoghue* v. *Stevenson* as they are now understood.

Operation of the Law

45. It is clear from the cases mentioned above that the immunity can cause great injustice and the law is applied by courts of first instance with considerable regret. The rights of an injured person may depend upon distinctions which can only be regarded as capricious. If, for example, a

32 [1932] 1 K.B. 458.
33 [1936] 2 K.B. 46.
34 [1940] 1 K.B. 116.
35 [1947] K.B. 71.

prospective purchaser is injured as a result of negligent work while he is inspecting a newly-built house he can sue the owner/builder; but if he is injured as a result of the same undetectible defect after he has bought the premises he will have no right of action. Again, vis-à-vis the builder the rights of a customer who suffers injury in a newly-built shop, through a structural defect, will depend on whether the builder has sold or let the premises or still retains them.

46. We think that these distinctions are indefensible and that the law should be amended by statute. Fortunately the development of the law described above has made the legislative task very much easier than it would have been thirty years ago because, in the light of Lord Denning's statement of principle in *Miller* v. *South of Scotland Electricity Board*,[36] the extent of the present anomaly is plain to see. Any person who does work on land is under the general duty of care at the time when he does the work, but if he subsequently sells or lets the premises on which he did the work, his potential liability for breach of that duty comes to an end. The transaction of sale or letting alone confers the immunity. It is only necessary, therefore, to provide that a sale or letting shall have no effect upon a pre-existing duty arising from the doing of work and the general principles of negligence will apply. A person who does work on his own land, just as a person who does work on someone else's land, will be liable for injury or damage which can be properly attributed to his negligent act, subject to the usual defences, such as contributory negligence, which are generally applicable.

Our Recommendations

47. We recomend, therefore, that the vendor's and lessor's immunity from liability for the consequences of his own negligent acts should be removed by a statutory provision to that effect.

D. DANGEROUS DEFECTS NOT CREATED BY THE VENDOR OR LESSOR

The Present Position

48. In Part B of this Report we have proposed that the builder or business provider of a new dwellinghouse should be under a statutory obligation (not subject to exclusion by contract) in respect of the materials used, the work done and the fitness for habitation of the dwelling. In Part C of this Report we have proposed that any person who does work in connection with any premises and subsequently sells or lets the premises should be under the same general duty of care in respect of that work as that to which he would be subject apart from such sale or letting. But neither of these proposals would make the vendor or lessor of premises liable for defects in the premises which were not due to work which he had carried out. With regard to liability for such defects, we think that a distinction should be drawn between those which are actually known to the vendor and those which are not.

---

36 1958 S.C. (H.L.) 20.

49. Where these defects are not known to the vendor or lessor even if ascertainable by reasonable inspection, we do not think there is any sufficient cause for introducing a new potential liability after the sale or letting. It seems, in general,[37] a fair assumption underlying the relationship between a vendor and a purchaser (we use these expressions in the sense indicated in footnotes (5) and (7)) that the former does not, having transferred the premises (when the defects become as readily discoverable by the latter as by the former), undertake liabilty to the purchaser for such defects. Moreover, it has been strongly represented to us in the course of our consultations that if the vendor were to be liable, it would have the undesirable side-effect of increasing the cost of the transfer of property, in that both the transferor (to guard against his potential liability) and the transferee would normally each consider it necessary to arrange for a separate survey of the property.

50. Liability of the vendor *to third parties* for unknown defects not due to his work raises somewhat different considerations. It is equally relevant, as in the situation discussed in the preceding paragraph, to mention the danger of increasing the cost of the transfer of property. But it is not possible, as it would be between a vendor and a purchaser, to rely on any reasonable assumption underlying the relationship between the vendor and the third party, when the latter is in no contractual connection with the former and may indeed be injured by a defect (e.g., an insecure chimney) when he is not even on the property transferred by the vendor. However, the third party is not necessarily without a remedy. If a visitor to the property, he will have a claim against the occupier who has failed to observe the common duty of care in respect of the defect under the Occupiers' Liability Act 1957 ; and if not visiting the property (as, for example, when he is a visitor on neighbouring property), he will still have a claim against an occupier who has failed to observe the general duty of care in respect of the defect under the common law.[38] It is not uncommon for occupiers to insure against liability to third parties in respect of claims of this nature. Moreover, if the third party is in a position to bring a claim in nuisance,[39] he will have a claim against a landlord who has let premises with a nuisance on them at the time of the letting where the landlord ought to have known of the existence of the nuisance, whether or not he in fact knew of it.[40] It may seem unsatisfactory that a third party's rights vis-à-vis the transferor of premises should depend on whether the latter is a vendor or a lessor and, if a lessor, on whether the third party satisfies the technical requirements for bringing an action in nuisance.[41] There is much to be said for imposing on the transferor of premises a general duty to exercise reasonable care in respect of defects existing at the time of the transfer of which he ought

[37] i.e., other than in special circumstances covered by legislation of the type mentioned in para. 12 above.

[38] See *Cunard* v. *Antifyre Ltd.* [1933] 1 K.B. 551.

[39] i.e., if he is an occupier of land, enjoyment of which is interfered with by the nuisance or (if a public nuisance is involved) if he suffers damage over and above that inflicted on the public in general.

[40] See *St. Anne's Well Brewery Co.* v. *Roberts* (1928) 140 L.T. 1, 7. In *Brew Bros. Ltd.* v. *Snax (Ross) Ltd.* [1970] 1 Q.B. 612 Sachs L.J. (at p. 638) and Phillimore L.J. (at p. 644) make it clear that the landlord cannot evade his liability to a third party by taking a covenant to repair from his tenant.

[41] As to these requirements see note 39 above.

reasonably to have known, whether or not he in fact knew of them. But in the light of our consultations we do not feel able to make such a proposal, having regard to the undesirability of increasing the cost of the transfer of real property and the fact that the third party will normally have a remedy against the transferee or occupier. Moreover, our investigations suggest that at the present time it would be difficult for a vendor to obtain satisfactory insurance cover against " open-ended " liabilities continuing after he has disposed of the property.

The Case for Liability for Non-disclosure of Known Defects

51. On the other hand, we think that a vendor or lessor of premises should owe a duty of care in respect of defects which are actually known to him, and that he should owe this duty not only to the immediate transferee but also to all persons who may reasonably be contemplated as likely to be endangered by them. As far as the vendor or lessor is concerned, if his liability is limited to defects of which he in fact knows, he cannot complain that he is being subjected to a heavy burden of surveying costs. And it seems desirable that the duty of care should be not only to the immediate transferee but also to other persons, because the known defects (especially when they have been concealed by the vendor) may not be capable of discovery on reasonable examination by the occupier, thus depriving persons affected of any alternative remedy they might otherwise have against that occupier; even if the concealment amounted to actionable misrepresentation as between the vendor and purchaser it would not as such provide a remedy to a person to whom such misrepresentation was not made.

52. The duty of care which, under this proposal, would rest on the vendor in respect of defects known to him would be capable of discharge by his showing that the transferee had sufficient information regarding the defect to enable him to take precautions for his own safety and to discharge his duty of care as occupier to others. A warning by the vendor would not of itself be sufficient unless it was specific enough for those purposes.

53. If, by reason of the proposed duty in respect of known defects, a vendor were induced to repair a possible source of serious danger rather than leave it to the purchaser to take remedial action after the sale, we would regard this result as decidedly beneficial in the interests of the public. It may, however, be said that from the point of view of a purchaser of premises other than a new dwelling, an inconsistency would be created. Whilst, under the maxim *caveat emptor*, he would have to negotiate the price on the basis of his own examination of the property, when the time came for completion he might be told of a serious defect of which the vendor had known all along. This would be rare if the purchaser had commissioned a proper survey but in any event, although the purchaser might well feel in such a case that he had been, in a sense, misled we do not think that this can be avoided. It arises inevitably once it is accepted that there are good reasons why a vendor's duty in contract in respect of quality defects to such a purchaser may in some respects be less exacting than his duty in tort towards the world at large (including the purchaser) as regards dangerous defects.

Our Recommendation

54. To sum up our conclusions under Part D of the Report, we recommend that a vendor or lessor of premises should in respect of defects known to him be under a duty to all persons who may reasonably be expected to be affected by those defects; that this duty should be to take reasonable care to see that such persons are reasonably safe from personal injury or damage to their property caused by the defects; and that the duty should not be discharged merely by a warning given to the transferee unless the warning was adequate to enable the latter to take remedial action both to protect himself and his property and to discharge his duty of care in respect of the state of the premises towards other persons.

55. Although our proposal, for the reasons we have given, does not extend liability of a vendor or lessor to cover injury or damage caused by defects not known to him, we consider that our actual recommendation involves a worthwhile reform of the law in this context. If it is adopted, it will go some way towards removing an anomaly in the present law and at the same time will substantially increase the protection that the law confers upon the general public in relation to injuries caused by reason of defective premises, particularly when the person in occupation or control of such premises is not himself in breach of his duty of care.

E. LIABILITY OF A LANDLORD DURING THE LETTING

Visitors to the Premises

56. At common law a landlord was under no liability to the tenant's family or visitors for injury suffered by reason of the condition of the premises. It was considered that the letting transferred to the tenant all rights of control over the premises and third parties must look to the occupier for any remedy in law. The fact that the landlord was under a covenant with the tenant to repair the premises would confer no rights on third parties, for the lease was regarded as *res inter alios acta*. In the leading case on this subject, *Cavalier* v. *Pope*,[42] the argument that the landlord ought to be liable in these circumstances was rejected by Lord Atkinson at page 433 in the following terms:—

> "It was insisted upon by the appellant's counsel that the premises were under the control of the landlord because of his agreement to repair. I have been quite unable to follow the reasoning by which that conclusion has been arrived at . . . [Control] implies the power and the right to admit people to the premises and to exclude people from them. But this power and this right belong to the tenant, not to the landlord, and the latter's contract to repair cannot transfer them to him."

57. That strict view of the matter could not survive with the general development of the concept of negligence, and the position has now been altered by statute. Section 4 of the Occupiers' Liability Act 1957 provides, in effect, that a landlord who is under a repairing obligation to the tenant

42 [1906] A.C. 428.

owes the common duty of care, as regards the discharge of that obligation, to those who lawfully visit the premises or have goods on the premises.

58. The practical usefulness of that section is, however, at present reduced by subsection (4), under which a landlord is not deemed to be in default under his obligation unless his default would be actionable at the suit of the tenant. Since a landlord is not usually liable to his tenant unless he has received from him notice of a defect (*McCarrick* v. *Liverpool Corporation*),[43] the visitor's rights against the landlord may depend on whether or not the tenant has given the landlord notice of the relevant defect.[44]

59. In our Working Paper on this subject we suggested that this was unsatisfactory and that the Act should be amended so that the landlord's liability to visitors should depend on the general test of whether, in carrying out his obligation, he has shown reasonable care for the safety of those visitors who ought to be within his contemplation. This suggestion was approved by most of those whom we consulted and, even if no other change were proposed in relation to a landlord's liability, we would recommend that the law as laid down in the Occupiers' Liability Act should be changed to accord with this general test.

Persons Not on the Premises Let

60. Although, at common law, the courts refused to hold a landlord liable by virtue of a repairing covenant in the lease to those who came on to the premises at the tenant's invitation, it has long been recognised that a landlord may be liable, in nuisance, to occupiers of other property and those exercising a right of passage over a highway:—

- (*a*) if he has let premises in a defective condition of which he knew or ought to have known, or
- (*b*) if he is under a repairing obligation to the tenant and the relevant defect arose from a breach of that obligation: *Payne* v. *Rogers*;[45] *Nelson* v. *Liverpool Brewery*.[46]

It was formerly an open question whether a landlord could escape liability in nuisance for known defects by taking from the tenant a repairing covenant which covered that defect. The Court of Appeal has recently decided, by a majority, that he cannot escape liability in this way—*Brew Bros. Ltd.* v. *Snax (Ross) Ltd.*[47]

61. Over the last 40 years a series of cases has extended the landlord's liability in nuisance to circumstances in which, although he is under no obligation to repair, he has an express or implied right to enter and do repairs. The cases are:—

(1) *Wilchick* v. *Marks and Silverstone*.[48] The tenancy was weekly and oral with no repairing obligation on either party, but there was a rent book in which it was stated that the owner reserved the right to

---

43 [1947] A.C. 219.

44 Notice of defect is not a condition of the liability of a landlord under the law of Scotland. We understand that this does not give rise to any problems in practice.

45 (1794) 2 H.Bl. 350.

46 (1877) 2 C.P.D. 311.

47 [1970] 1 Q.B. 612. See further para. 63 below.

48 [1934] 2 K.B. 56.

do repairs. The owner had done repairs from time to time. It was held by Goddard J. that the owner was liable to a passer-by on the highway who was injured by a defective shutter, the defect being known to the owner. Liability was based on the right of control and the foreseeability of injury to passers-by if the control was not exercised; but it was added that there would be no liability to the tenant or his visitors since there was no contract to repair.

(2) *Wringe* v. *Cohen*[49] goes further. A house was let on a periodical tenancy with no specific repairing obligation on either party, but the landlord had always done repairs and agreed that he was liable for them. A gable fell off the house and damaged an adjoining shop. The defect was not known to the landlord nor was he guilty of negligence in not knowing it. He was held liable in nuisance nevertheless; but it was said that he would not necessarily be liable for damage caused by the act of a trespasser or by a latent defect which could not be attributed to want of repair.

(3) *Heap* v. *Ind Coope and Allsopp Ltd.*[50] Premises were let on a yearly tenancy, the tenant being bound to do interior repairs but neither party being bound to do exterior repairs. The landlord reserved a right to enter and do exterior repairs and was in the habit of doing them. A passer-by was injured by walking over the defective cover of a light shaft. The landlord was held liable in nuisance whether or not he knew or ought to have known of the defect. He had reserved the right to do repairs and had not properly done them.

(4) *Mint* v. *Good.*[51] The plaintiff was injured on a public footpath by the collapse of a wall separating the path from two houses, each of which was let on a weekly tenancy. In neither case was there any repairing obligation on landlord or tenant, nor any express right reserved for the landlord to enter and do repairs. It was held that a right of entry must be implied in the circumstances in relation to property of that kind. The landlord was liable in nuisance to the person injured on the footpath since the defect could have been ascertained by a competent examination of the wall.

62. However, in *Sleafer* v. *Lambeth Borough Council*[52] the Court of Appeal refused to hold a landlord liable *to his tenant* where the lease contained no repairing obligation but the landlord was entitled to enter and do repairs. They rejected arguments based in contract (i.e., that a right of entry necessarily imported also an obligation to repair) and in tort, that a landlord who knows of a defect is liable for any injury which he ought reasonably to have foreseen, including an injury to the tenant.

63. The cases were reviewed in *Brew Bros. Ltd.* v. *Snax* (*Ross*) *Ltd.*[53] where, as already mentioned, it was decided that, as regards a known defect existing at the beginning of the lease, the landlord was liable in nuisance to the

49 [1940] 1 K.B. 229 (C.A.).
50 [1940] 2 K.B. 476 (C.A.).
51 [1951] 1 K.B. 517 (C.A.).
52 [1960] 1 Q.B. 43.
53 [1970] 1 Q.B. 612.

adjoining occupier although he had taken a repairing covenant from the tenant which covered the defect in question. Sachs L.J.[54] said, in relation to a landlord's liability in nuisance:—

> "The development of this branch of the law has since the judgment of Goddard J. in *Wilchick* v. *Marks and Silverstone* [1934] 2 K.B. 56, proceeded on lines in some respects parallel to that of the law of negligence. Both in the judgment of Goddard J. in that case and in those in subsequent cases reference is made to 'proximity' as bearing on the relevant issues. Where there is proximity and an ability to remedy the danger, is the injured person to be left only to a remedy against the tenant?"

and later on:—

> "Instead of liability of an owner of premises let to a tenant depending substantially or perhaps even wholly on the terms of a tenancy agreement—a criterion rightly criticised by Megaw J. in the present case—it has come to depend on more rational considerations. If the nuisance arises after the lease is granted, the test of an owner's duty to his neighbour now depends on the degree of control exercised by the owner in law or in fact for the purpose of repairs: see the judgment of Denning L.J. in *Mint* v. *Good* at p. 528, as fully agreed by Birkett L.J. at p. 529. As regards nuisances of which he knew at the date of the lease, the duty similarly arises by reason of his control before that date. Once the liability attaches I can find no rational reason why it should as regards third parties be shuffled off merely by signing a document which as between owner and tenant casts on the latter the burden of executing remedial work. The duty of the owner is to ensure that the nuisance causes no injury—not merely to get somebody else's promise to take the requisite steps to abate it."[55]

64. The principle generally adopted as the basis of a landlord's liability in nuisance, where he has not himself created the nuisance, is that of "authorisation". For example, where the premises are let for a purpose which *necessarily* involves the creation of a nuisance by noise or vibration, the landlord can reasonably be said to have authorised it. And the landlord's liability for defects in the state of the premises was originally regarded as an extension of that principle. It appears from the judgment of Sachs L.J. cited above that the courts have moved away from the idea of authorisation in this context and have founded the landlord's liability on the test of control and the foreseeability of injury to others if the control is not properly exercised—an approach which more naturally belongs to the law of negligence.

The Case for a General Duty of Care

65. Nevertheless, although the basis of liability may now be similar to that adopted in the law of negligence, the law of nuisance contains its own limitations. In particular, an action is available only to those who pass on the highway or occupy other property. If a landlord were placed under the

---

[54] At p. 638.

[55] At pp. 638–639.

general duty of care, based on the normal " proximity " test, by reason of his right or obligation to repair the demised premises he would be liable for injury or damage suffered by anyone who might reasonably be regarded as endangered by his failure to do the relevant repairs properly. By contrast with the comprehensive area of liability which would be covered in that way, the present law, described above, contains the following distinctions:—

(*a*) Under section 4 of the Occupiers' Liability Act 1957 the landlord's liability to third parties may depend not solely on whether he has exercised proper care in discharging his repairing obligation but also on whether the tenant has given notice of a particular defect.

(*b*) Where a landlord is under a liability in nuisance he owes a duty to the occupier of other premises and to persons on the highway.

(*c*) There is no liability under (*a*) or (*b*) above to a person *on other premises* who is not the occupier of them.

(*d*) If the landlord has a right to enter and do repairs, but is under no repairing obligation, he is under no liability to the tenant or his visitors who are injured on the demised premises, although he will be liable to the occupiers of other premises and to users of the highway.

(*e*) There is, moreover, some doubt whether the action of private nuisance covers personal injuries as well as damage to property. Thus persons on the highway may clearly recover for personal injury, but the rights of an adjoining occupier are uncertain in this respect.

66. Adoption of the " foreseeability " test in this area of the law would accord with the general development of the law of tort. It would be a logical extension of the circumstances in which a person is regarded as properly liable to his " neighbour " who, by reason of some act or omission of his, suffers injury or damage which ought to have been foreseen. It also seems from the cases referred to above that the idea of control by reason of an obligation or right to repair property is more easily accepted today than it was in 1906 when the argument was rejected in the House of Lords.[56]

67. Looked at by comparison with a general duty of care some of the distinctions in the present law seem decidedly artificial. For example, if a defective chimney falls and causes damage to the occupier of the adjoining property and also to his lodger, the landlord may be liable to the former but not to the latter. Again, if a falling tile injures a person on the highway the landlord who has a right but no obligation to repair may be liable in nuisance, but he would not be liable if the tile injured a person walking up the garden path to visit the tenant.

68. There is, in our view, a strong case for removing anomalies of this kind. It is plainly accepted by the courts that a landlord who has no more than a right to enter and do repairs should owe a duty to some persons who may be affected if those repairs are not done. It is difficult to justify a position whereby the law protects some third parties but not others who should equally have been in the landlord's contemplation. We have already suggested that in discharging a repairing obligation a landlord should be under the general

[56] See para. 56 above.

duty of care in respect of matters falling within the scope of that obligation so far as visitors to premises are concerned. Two further steps are required to cover the whole area of potential liability. The first is to extend the category of protected persons to cover all those who should have been in the landlord's contemplation ; the second is to extend the liability to cases in which the landlord has only a right to repair. We think that these steps should be taken. There is, however, one necessary restriction on the generality of such a provision. It may happen that under the terms of the lease the landlord's right to repair arises only when the tenant has made default in carrying out an obligation which is primarily placed on him. In such a case the landlord should not become liable to the tenant himself for the consequences of a defect arising substantially from his own default.

Our Recommendations

69. We recommend, therefore, that the law should be amended to provide that where the landlord has an obligation or right to repair the demised premises, he should in the discharge or exercise of that obligation or right be under a general duty of care to see that injury or damage is not suffered by those who are likely to be affected by any failure to discharge that obligation or exercise that right with reasonable diligence. There should be an exception in the case of injury suffered by the tenant as a result of his own default in carrying out a repairing obligation laid upon him by the tenancy. Section 4 of the Occupiers' Liability Act 1957 would, on this basis, be unnecessary and should be repealed.

F. SUMMARY OF RECOMMENDATIONS

70. In this Report we have made four recommendations for amendment of the law. The first of these deals with liability for defects of quality in newly built dwellings. The remainder deal with liability for dangerous defects in premises of any description sold or let. These recommendations may be summarised as follows:—

(1) Those who build, or undertake work in connection with the provision of, new dwellinghouses (whether by new construction, enlargement or conversion) should be under a statutory duty, owed to any person who acquires a proprietary interest in the property, as well as to the person (if any) for whom they have contracted to provide the dwelling, to see that the work which they take on is done in a workmanlike or professional manner (as the case may be), with proper materials and so that the dwelling will be fit for habitation. The same duty should be owed by those who in the course of trade or business or under statutory powers arrange for such work to be undertaken. (Paragraphs 26 to 37).

(2) The vendor's and lessor's immunity from liability for the consequences of his own negligent acts should be abolished ; that is to say "*caveat emptor*" should no longer provide a defence to a claim against a vendor or lessor which is founded upon his negligence. (Paragraph 47).

(3) A person who sells or lets premises should be under the general duty of care in respect of defects which may result in injury to persons or damage to property and which are actually known to him at the date of the sale or letting. (Paragraph 54).

(4) A landlord who is under a repairing obligation or has a right to do repairs to premises let should be under the general duty of care in relation to the risk of injury or damage arising from a failure to carry out that obligation or exercise that right with proper diligence; but a landlord should not, by reason of a right to enter and repair on the tenant's default, be liable to the tenant for injury suffered by the tenant's default. (Paragraph 69).

71. In Appendix A there is a draft Bill to give effect to these recommendations, which contains four substantive clauses and three subsidiary clauses. We think it advisable to repeat at this point what we said in the Introduction. The Bill contains four independent provisions aimed at specific defects in, or omissions from, the existing law. In any given situation it may be that only one of the provisions will apply, but equally it may happen that their effect may be cumulative. For example, clauses 1 and 2 may both be relevant when a newly built house has been sold. And clauses 3 and 4 may both apply to the same letting. Such consequences are inevitable when clauses are designed for a number of specific purposes which may or may not occur together.

72. Next we draw attention to three points on the subsidiary clauses:—

(*a*) It is provided in clause 6(2) that the duties imposed by the Bill shall not be capable of exclusion or restriction by contract or otherwise. The underlying purpose of our recommendations is to improve the rights of third parties as well as those of a purchaser or tenant and it seems to us essential that exclusion of the duties should not be permitted. The courts have latterly moved decisively in the direction of restricting "contracting-out" in regard, for example, to the builder's common law obligations.[57] Further, where the N.H.B.R.C. scheme applies such "contracting-out" is precluded. The prohibition of "contracting-out" does not, however, mean that a builder who takes on work in accordance with designs, plans and specifications provided by or on behalf of a building owner (or a first purchaser) will be under any statutory obligation to do otherwise than what he has contracted to do.[58]

(*b*) Under clause 7(2) the Bill is designed to come into force twelve months after it is enacted. This should not only give sufficient time for its effect to be appreciated, but will also enable appropriate adjustments to be made in relevant insurance policies as and when they fall due for renewal.

(*c*) We also draw attention to the saving provisions in clause 2(2) which are designed to prevent the clause operating retrospectively on contracts which have previously been negotiated.

---

[57] See *Hancock* v. *B. W. Brazier (Anerley) Ltd.* [1966] 1 W.L.R. 1317 (C.A.) and *Billyack* v. *Leyland Construction Co. Ltd.* [1968] 1 W.L.R. 471.

[58] See para. 29 above.

73. Finally, we must say something about the form of legislation which we are recommending. We have given thought to the extent to which it is necessary to spell out in clauses 3 and 4 detailed provisions relating, for example, to the persons to whom a duty should be owed, to the defences which might be available to the vendor or lessor and to the possibility of guide lines indicating the factors which should be taken into account in determining whether the duty has been broken. We have concluded, however, that since we are amending a developing body of common law the statutory provisions should be as simple as possible. In those clauses, therefore, we suggest the imposition of the general duty of care in appropriate circumstances, and for the most part we leave the general principles of common law to be applied. In this way any future development of the common law will be free to take effect in relation to the obligations imposed by our draft Bill.

(*Signed*) LESLIE SCARMAN, *Chairman.*
CLAUD BICKNELL.
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*
16 *November* 1970.

APPENDIX A

Draft Defective Premises Bill

DRAFT

OF A

BILL

TO

IMPOSE DUTIES in connection with the provision of dwellings and otherwise to amend the law of England and Wales as to liability for injury or damage caused to persons through defects in the state of premises.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Duty to build dwellings properly.

1.—(1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—

(*a*) if the dwelling is provided to the order of any person, to that person ; and

(*b*) without prejudice to paragraph (*a*) above, to every person who acquires an interest (whether legal or equitable) in the dwelling ;

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.

(2) A person who takes on any such work for another on terms that he is to do it in accordance with instructions given by or on behalf of that other shall, to the extent to which he does it in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by subsection (1) above except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty.

(3) A person shall not be treated for the purposes of subsection (2) above as having given instructions for the doing of work merely because he has agreed to the work being done in a specified manner, with specified materials or to a specified design.

(4) In subsections (2) and (3) above "instructions" includes plans and specifications and references to the giving of instructions shall be construed accordingly.

EXPLANATORY NOTES

Clause 1 (General Note)

This clause will impose a threefold statutory duty upon:—

(*a*) any person who takes on work for or in connection with the provision of a new dwelling ; and

(*b*) any person who, in the course of a business or in the exercise of statutory powers of providing or arranging for the provision of new dwellings, arranges for others to take on such work.

Thus, the duty is imposed upon builders, sub-contractors and professional men, such a architects, surveyors and engineers who themselves take on work of the nature described in the clause and upon developers, local authorities and others who arrange for builders and other persons to take on such work. The duty is to the effect that the work taken on shall be done in a workmanlike or professional manner, with proper materials (where the work taken on involves the use of materials) and so that, in respect of the contribution which that work makes to the dwelling, the dwelling shall be fit for habitation. Where building contractors undertake the provision of dwellings, the common law implies a term into their contracts which has the same content as the threefold statutory duty, unless all the circumstances are such as to exclude its implication. It is not, however, uncommon for this implied term to be excluded by express provision or by the inclusion in the building contract of inconsistent provisions. Under the clause the obligation imposed by the implied term will become a statutory duty which cannot be excluded or restricted by contract (see clause 6(2)). Further, whereas only a party to the contract can benefit from the common law implied term, the statutory obligation will (subject to the limitation provisions in subsections (6) and (7) of this clause) be owed not only to the person who is party to the contract under which the dwelling is built, but also to any person who acquires an interest in the dwelling.

(*Clause* 1 *continued*)

(5) A person who—

(*a*) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings ; or

(*b*) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment ;

arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work.

(6) Subject to subsection (7) below, any cause of action in respect of a breach of the duty imposed by this section shall be deemed, for the purposes of the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963, to have accrued—

(*a*) where the dwelling was provided to the order of any person, at the time when that person notified the person responsible for the provision of the dwelling (whether or not he took on the work in question) that the former accepted the dwelling as conforming to the order, or when the former took possession of the dwelling, whichever was the earlier ;

(*b*) in any other case, at the time when the dwelling was completed or at the first time thereafter when an interest in it was acquired by any person, whichever was the later.

(7) Where by virtue of subsection (6) above the time at which any such cause of action is deemed for those purposes to have accrued is the time when possession was taken of the dwelling or the first time after completion of the dwelling when an interest in it was acquired by a person, and after that time a person taking on work of any description for or in connection with the provision of the dwelling does further work of that description, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished.

(Clause 1, subsections (1), (2), (3) and (4))

1.—(1) *A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—*

(*a*) *if the dwelling is provided to the order of any person, to that person ; and*

(*b*) *without prejudice to paragraph* (*a*) *above, to every person who acquires an interest (whether legal or equitable) in the dwelling ;*

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.

(2) *A person who takes on any such work for another on terms that he is to do it in accordance with instructions given by or on behalf of that other shall, to the extent to which he does it in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by subsection (1) above except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty.*

(3) *A person shall not be treated for the purposes of subsection (2) above as having given instructions for the doing of work merely because he has agreed to the work being done in a specified manner, with specified materials or to a specified design.*

(4) *In subsections (2) and (3) above "instructions" includes plans and specifications and references to the giving of instructions shall be construed accordingly.*

EXPLANATORY NOTES

Notes to Subsections

(1) Subsection (1) imposes the statutory duty upon persons who themselves take on work of the nature described above. In addition to stating the content of the obligation, it specifies the persons to whom it is owed. The subsection not only covers work taken on for the provision of a new dwelling, such as the work normally undertaken by builders and sub-contractors, but also work taken on in connection with its provision, such as work normally undertaken by professional men working in this area,* by specialist sub-contractors and by those who manufacture equipment to order for installation in specific new dwellings, but the subsection does not cover suppliers or manufacturers of general building materials or mass produced components whose obligations are and will remain governed by the law relating to the sale of goods and to negligence.

(2) Subsection (2) safeguards the position of those persons who take on work of the nature described above for another person on terms that it shall be done in accordance with instructions (which by subsection (4) includes plans and specifications) given by or on behalf of that other person. Their safeguard is that to the extent that they do their work in accordance with such instructions the statutory obligation imposed under subsection (1) is taken to be discharged subject to the qualification dealt with in subsection (3) (see paragraph (3) below). Thus, for example, a builder who agrees to construct a new dwelling in accordance with plans and specifications provided by the building owner's architect will be taken to have discharged his statutory obligation to the extent to which, but only to the extent to which, he does his work in a workmanlike manner and with proper materials in accordance with the plans and specifications which the contract requires him to follow. Similarly, a sub-contractor who takes on special contract work on the terms that he is to follow plans and specifications provided for him by the head contractor will be taken to have discharged his obligation to the extent to which the special contract work is done in accordance with such plans and specifications. This safeguard, however, does not derogate from any duty which the person taking on work in these circumstances may owe to warn the person for whom the work is taken on that the instructions given to him are defective. Such a duty to warn may be held to arise under the common law when instructions to do work in a particular field are given by a layman to a person who holds himself out as possessing skill and expertise in that field. The concluding exception in subsection (2) saves this duty and provides that, where there has been a failure to carry it out, the safeguard discussed above shall be excluded.

(3) Subsection (3) qualifies the safeguard provided by subsection (2) in cases where the person taking on the work has himself provided the instructions which become the terms governing how the work taken on is to be done. Thus, the safeguard provided by subsection (2) will not operate in favour of the builder or developer where he prepares or causes to be prepared plans and specifications which are submitted to a purchaser or prospective purchaser of a new dwelling who, without independent advice or the exercise of his own judgment on the matter, accepts them either because he relies on the builder or developer having used proper skill in relation to such plans and specifications or because he is offered a deal on the terms that he " takes it or leaves it ".

(4) Subsection (4) provides that for the purposes of the two preceding subsections instructions include plans and specifications.

---

* Thus in relation to an architect taking on the work of designing a house and supervising the implementation of his design by the building contractor the clause imposes a duty to design and supervise in a professional manner and so as to produce in those respects a house fit for habitation.

(Clause 1, subsections (5), (6) and (7))

(5) *A person who—*

(*a*) *in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings ; or*

(*b*) *in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment ;*

arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work.

(6) *Subject to subsection (7) below, any cause of action in respect of a breach of the duty imposed by this section shall be deemed, for the purposes of the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963, to have accrued—*

(*a*) *where the dwelling was provided to the order of any person, at the time when that person notified the person responsible for the provision of the dwelling (whether or not he took on the work in question) that the former accepted the dwelling as conforming to the order, or when the former took possession of the dwelling, whichever was the earlier ;*

(*b*) *in any other case, at the time when the dwelling was completed or at the first time thereafter when an interest in it was acquired by any person, whichever was the later.*

(7) *Where by virtue of subsection (6) above the time at which any such cause of action is deemed for those purposes to have accrued is the time when possession was taken of the dwelling or the first time after completion of the dwelling when an interest in it was acquired by a person, and after that time a person taking on work of any description for or in connection with the provision of the dwelling does further work of that description, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished.*

(Notes to Subsections continued)

(5) Subsection (5) extends the statutory duty imposed by subsection (1) upon builders and the like, to others, such as developers and local authorities who in the course of a business or in the exercise of statutory powers provide or arrange for the provision of dwellings and who arrange for others to take on work for or in connection with the provision of dwellings.

(6) Subsection (6) operates on the Limitation Acts so as to fix the time within which actions for damages for breach of the statutory obligation imposed by the clause must normally be brought. For the purposes of those Acts, the subsection provides that the cause of action accrues:—

(i) in the case of dwellings provided to the order of a person, when that person accepted the dwelling or went into possession, whichever is the earlier ; or

(ii) in other cases (such as speculative building or building for subsequent letting) when the dwelling was completed or when an interest in it was first acquired by anyone, whichever is the later.

Subject to these special provisions, the other rules of the Limitation Acts will operate in their normal way.

(7) Subsection (7) deals with the special but not uncommon case of the builder or sub-contractor who, after a dwelling has been accepted or completed, takes on further work in that dwelling for the purpose, for example, of remedying shortcomings or defects, so that so far as further work is concerned the limitation period will run from the date when it is finished.

(8) The clause will come into operation twelve months after the coming into force of the Act (see clause 7(2)) and will, therefore, only impose obligations where work is first taken on after that date.

Duty of care with respect to work done on premises not abated by disposal of premises.

2.—(1) Where work of construction, repair, maintenance or demolition or any other work is done on or in relation to premises, any duty of care owed, because of the doing of the work, to persons who might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work shall not be abated by the subsequent disposal of the premises by the person who owed the duty.

(2) This section does not apply—

(*a*) in the case of premises which are let, where the relevant tenancy of the premises commenced, or the relevant tenancy agreement of the premises was entered into, before the commencement of this Act ;

(*b*) in the case of premises disposed of in any other way, when the disposal of the premises was completed, or a contract for their disposal was entered into, before the commencement of this Act ; or

(*c*) in either case, where the relevant transaction disposing of the premises is entered into in pursuance of an enforceable option by which the consideration for the disposal was fixed before the commencement of this Act.

EXPLANATORY NOTES

Clause 2

(1) A person who does work to any premises or to anything fixed on any premises is under a duty at common law to take reasonable care for the safety of others who might reasonably be expected to be affected by defects in the state of premises arising from such work having been done. This is an illustration of the normal principle of liability for negligence. Where, however, the person who has undertaken the work disposes of the premises himself, for example, by selling or letting them, the law at present precludes his being held liable in negligence for personal injury or damage to property suffered after the disposal arising from the work which he has done before that time. A purchaser or a tenant taking premises in such circumstances is affected by the doctrine of *caveat emptor* (i.e., he takes the premises with all defects) and neither he nor anyone else can make a claim for negligence against the vendor or lessor. Subsection (1) is concerned solely with removing this special immunity of vendors and lessors from liability for negligence. Under its provisions anyone who does work to premises or fixtures on them will, if he subsequently sells or lets or disposes of them be in the same position, as respects his liability in negligence, as persons such as building contractors or architects who have carried out work on or in connection with other persons' premises but who have done so negligently ; that is to say, they will continue to be under a common law duty after their occupation or control of the premises has ceased.

(2) Subsection (2) excludes from the operation of subsection (1) transactions which have been entered into before the Act comes into operation. Such exempted transactions will be those which have taken the form of sale, letting, other disposal or grant of an enforceable option to buy or to lease for an amount fixed before the Act comes into operation. The reason for these exclusions is that the parties to these transactions have bargained upon the basis of the existing law, which recognises the application of the immunity rule (see paragraph (1) above), so that it would not be right to change retrospectively the terms of their bargains.

(3) The clause contains no provision relating to the Limitation Acts, since, subject to the exclusions set out in subsection (2), it is merely removing an immunity from liability for negligence which is in certain circumstances enjoyed by vendors and lessors of premises but not by others. The limitation period under these Acts will normally run from the time when injury or damage is suffered.

Duty of care with respect to defects known on disposal of premises.

3.—(1) A person who disposes of premises, knowing at the material time or at any time thereafter while he retains possession of the premises that there are defects in the state of the premises, owes a duty to all persons who might reasonably be expected to be affected by those defects to take reasonable care to see that they are reasonably safe from personal injury or from damage to their property caused by any of those defects.

(2) In determining whether a person has discharged the duty placed on him by this section in respect of the state of any premises regard shall be had to all the circumstances, and, in particular, a warning given by him to the person to whom the premises are disposed of is not to be treated as absolving him from liability unless in all the circumstances it was enough to enable the latter to be reasonably safe himself and also to discharge his own duty of care in respect of the state of the premises.

(3) For the purposes of this section the material time is the earliest of the following times occurring after the commencement of this Act, that is to say—

(*a*) in relation to a letting of premises, the time when the tenancy commences, the time when the tenancy agreement is entered into or the time when possession is taken of the premises in contemplation of the letting ;

(*b*) in relation to any other disposal of premises, the time when the disposal of the premises is completed or the time when possession is taken of the premises in contemplation of the completion of their disposal.

EXPLANATORY NOTES

Clause 3 (General Note)

A person who sells or lets premises which he knows, in fact, to be affected by defects is, at present, in law under no duty to disclose to or warn a purchaser or incoming tenant of their existence ; nor is he under a duty of care, in relation to such defects, for the safety of purchasers or tenants or anyone else. Whereas clause 2 removes the previous immunity from the law of negligence enjoyed by the vendors and lessors of premises in respect of defects thereon arising out of work which they have done, this clause carries the matter a little further by exposing vendors and lessors to liability in negligence where premises are known to them to be affected by defects at the material time (see subsection (3) of this clause).

(Clause 3, subsections (1) and (2))

3.—(1) *A person who disposes of premises, knowing at the material time or at any time thereafter while he retains possession of the premises that there are defects in the state of the premises, owes a duty to all persons who might reasonably be expected to be affected by those defects to take reasonable care to see that they are reasonably safe from personal injury or from damage to their property caused by any of those defects.*

(2) *In determining whether a person has discharged the duty placed on him by this section in respect of the state of any premises regard shall be had to all the circumstances, and, in particular, a warning given by him to the person to whom the premises are disposed of is not to be treated as absolving him from liability unless in all the circumstances it was enough to enable the latter to be reasonably safe himself and also to discharge his own duty of care in respect of the state of the premises.*

EXPLANATORY NOTES

Notes to Subsections

(1) Subsection (1) imposes a duty of care on persons who dispose of premises knowing at the material time (see paragraph (3) below) that they are defective. This duty is expressed in terms familiar to the common law, that is:—

(*a*) it is a duty owed to all persons who might reasonably be expected to be affected by the existence of the known defects;

(*b*) it is a duty to take reasonable care to achieve a prescribed standard of safety for such persons; and

(*c*) the standard is one of reasonable safety from injury or damage caused by the known defects.

Unless, therefore, it can be shown that the vendors or lessors in fact knew at the material time of the existence of defects, no question of applying the clause will arise. If, however, the clause, *prima facie,* applies because of the existence of actual knowledge at the material time of dangerous defects, then the tests for imposing liability on the vendor or lessor will be those which are the standard ones in claims based upon negligence, namely:—

(i) is the plaintiff one who fell "within the area of risk", that is, is he a person whom the vendor or lessor should reasonably have foreseen as likely to be affected by the dangerous defect in question; and

(ii) did the defendant (the vendor or lessor) take reasonable steps to protect the plaintiff against injury or damage arising from the dangerous defect in question; and

(iii) were the steps taken by the defendant effective to secure the reasonable safety of persons within the area of risk?

In addition, the court, as in all cases of negligence, will have to consider whether any particular accident was caused by the defendant's breach of duty and, in the light of the Law Reform (Contributory Negligence) Act 1945 and the Law Reform (Married Women and Tortfeasors) Act 1935, the possible existence of contributory negligence on the part of the plaintiff or the contributing negligence of other persons brought into the proceedings.

(2) Subsection (2) provides that in order to determine whether a vendor or lessor has discharged the duty imposed upon him by the clause, regard must be had to all the circumstances of the case. It makes reference, however, to a particular matter, the giving of a warning to the purchaser or lessee and provides that such a warning will not be treated as absolving the vendor or lessor from liability unless it was sufficient to enable the person to whom it was given himself to be reasonably safe and also to discharge his own duty of care in relation to the premises. This latter duty is the "common duty of care" imposed by the Occupiers' Liability Act 1957 upon occupiers in respect of the safety of their premises and owed to persons who lawfully come thereon. The reason for this specific provision, given the duty imposed by the clause, is to deal with a possible situation which might otherwise arise. Faced with this duty and knowing of the existence of dangerous defects, vendors and lessors might be tempted to utter a general warning to the purchaser or lessee in some such terms as "these premises are dangerous". Such a warning would be of little use in securing the safety of the person to whom it is given and it would almost certainly be inadequate to enable the purchaser or lessee to fulfil his own obligations in respect of the safety of those who visit the premises whilst he is their occupier. This subsection makes it clear that a warning must be sufficiently specific for it to be capable of taking effect so as to discharge the duty imposed by the clause.

(Clause 3, subsection (3))

(3) *for the purposes of this section the material time is the earliest of the following times occurring after the commencement of this Act, that is to say—*

(*a*) *in relation to a letting of premises, the time when the tenancy commences, the time when the tenancy agreement is entered into or the time when possession is taken of the premises in contemplation of the letting;*

(*b*) *in relation to any other disposal of premises, the time when the disposal of the premises is completed or the time when possession is taken of the premises in contemplation of the completion of their disposal.*

(Notes to Subsections continued)

(3) Subsection (3) defines the "material time" for the purposes of this clause. The duty imposed by the clause only relates to those defects which in fact existed at the material time and which were known by the vendor or lessor to exist at that time.

(4) The duty imposed by the clause will arise only in relation to sales or lettings after the Act has come into operation.

(5) Since the duty imposed by the clause is closely analogous to the common law duty of care and the occupier's duty of care provided for under the Occupiers' Liability Act 1957, there is no special subsection dealing with the application of the Limitation Acts. These will operate in their normal way upon claims arising under the clause; the period will usually run from the time when injury or damage is suffered.

Landlord's duty of care in virtue of obligation or right to repair premises demised.

4.—(1) Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.

(2) The said duty is owed if the landlord knows (whether as the result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect.

(3) In this section "relevant defect" means a defect in the state of the premises existing at or after the time which is the material time for the purposes of section 3 above and arising from, or continuing because of, a failure by the landlord to carry out his obligation to the tenant for the maintenance or repair of the premises.

(4) Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then, as from the time when the right becomes exercisable and so long as it remains exercisable, the landlord shall be treated for the purposes of subsections (1) to (3) above (but for no other purpose) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises; but the landlord shall not owe the tenant any duty by virtue of this subsection in respect of any defect in the state of the premises arising from, or continuing because of, a failure to carry out an obligation expressly imposed on the tenant by the tenancy.

(5) For the purposes of this section, obligations imposed or rights given by any enactment in virtue of a tenancy shall be treated as imposed or given by the tenancy.

(6) This section applies to tenancies commencing before as well as to tenancies commencing after the commencement of this Act.

(7) This section applies to a right of occupation given by contract and not amounting to a tenancy as if the right were a tenancy and "tenancy" and cognate expressions shall be construed accordingly.

Clause 4 (General Note)

(*a*) This clause is designed to replace section 4 of the Occupiers' Liability Act 1957 by provisions of greater scope (see paragraph (*b*) below). That section imposes on a landlord who is under an obligation to his tenant for the maintenance or repair of the premises the occupier's "common duty of care" towards lawful visitors to the premises in respect of dangers due to any default by the landlord in carrying out that obligation. Under subsection (4) of that section such a landlord is not to be treated as having defaulted in carrying out this obligation unless he could be sued for it by the tenant. This latter provision imports the common law rule that a landlord must first be notified of the defect in the premises needing to be remedied before he can be made liable for any injury or damage flowing from it.

(*b*) Clause 4 of the Bill is designed to change the law set out above in three respects, namely:—

(i) The duty of care imposed by the clause in replacement of the similar duty imposed by section 4 of the 1957 Act is to be owed not merely to visitors to the premises but to all those who might reasonably be expected to be affected by defects in the state of the premises, e.g., a passer-by on the highway or a neighbour in his garden.

(ii) Liability for breach of the duty of care imposed by the clause will no longer depend upon whether or not the landlord has been notified of the relevant defect in the premises, for subsection (2) provides that he owes the duty not only when he knows, but also when he ought to have known of the defect.

(iii) The duty thus imposed on the landlord is to be extended, by virtue of subsection (4) of the clause, to apply in cases where the landlord has a right (expressed or implied) to enter the premises to carry out any description of maintenance or repair but no obligation to do so. (See, however, page 49, paragraph (4) as to an exemption from this duty).

(*c*) None of these changes is as far reaching as at first sight appears. For in the first place a landlord may be liable in nuisance to persons such as the passer-by on the highway and the neighbour in his garden who are affected by the defective state of the premises he has let (although perhaps not for personal injuries suffered by the neighbour). In the second place his liability in nuisance is not confined to a liability for defects of which he actually knew, but extends also in respect of defects of which, as landlord, he ought to have known. And in the third place a landlord who has a mere right to enter and do repairs on the demised premises can be liable in nuisance under the existing law in respect of dangers arising or continuing because of his failure so to exercise his right as to prevent his premises from constituting a nuisance.

(*d*) Subsections (1) to (3) of this clause replace section 4(1) to (5) of the Occupiers' Liability Act 1957 and apply to cases where the tenancy expressly or by implication puts an obligation on the landlord for the maintenance or repair of the premises, or where (by virtue of subsection (5) of the clause) such an obligation is imposed by statute. Two examples of a statutory obligation of this kind are section 6 of the Housing Act 1957 and section 32 of the Housing Act 1961. The duty of care which is imposed by the clause on a landlord having a repairing

(*Clause 4* (*General Note*) continued)

obligation is framed, like that imposed by clause 3, in terms appropriate to the common law of negligence in that—

(i) it is owed to all persons who might reasonably be expected to be affected by the existence of the "relevant defect" (see further page 49, paragraph (3));

(ii) it is a duty to take reasonable care to achieve a prescribed standard of safety for such persons; and

(iii) this standard is one of reasonable safety from injury or damage caused by a relevant defect.

(Clause 4, subsections (1), (2), (3) and (4))

4.—(1) *Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.*

(2) *The said duty is owed if the landlord knows (whether as the result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect.*

(3) *In this section "relevant defect" means a defect in the state of the premises existing at or after the time which is the material time for the purposes of section 3 above and arising from, or continuing because of, a failure by the landlord to carry out his obligation to the tenant for the maintenance of repair of the premises.*

(4) *Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then, as from the time when the right becomes exercisable and so long as it remains exercisable, the landlord shall be treated for the purposes of subsections*

EXPLANATORY NOTES

Notes to Subsections

(1) Subsection (1) gives effect to the first change in the law mentioned in paragraph (*b*) of the General Note by providing that the duty of care is owed by the landlord to all persons who might reasonably be expected to be affected by defects in the state of the premises. In this context this means that the landlord must consider the risks which the state of his premises presents to any persons on or near them. Reference has been made in that paragraph to the sort of persons who, in addition to " visitors " to the premises, would fall within this duty.

(2) Subsection (2) gives effect to the second change in the law by providing that the landlord owes the duty if he knew or ought in all the circumstances to have known of the relevant defect. Thus if the landlord has actual notice of the defect whether as a result of being told by the tenant or by other means his duty of care in respect of that defect will arise; but where he does not in fact know, the decisive question will be whether a reasonable landlord ought, in all the circumstances of the case, to have known of its existence. For this purpose it will be important to consider such factors as the degree to which the defect is apparent, how long it has existed and how frequently the landlord has inspected the premises. The change in the law made by subsection (2) is not intended to affect, as between the landlord and tenant themselves, the operation of an express term of the tenancy which imposes a duty on the tenant to give notice to the landlord of any need for repair. If there is such a term and the tenant fails to give notice of the defect of which he knows then, in the event of a claim by the tenant against the landlord for injury or damage caused by that defect, the tenant will be in a position of having himself contributed to the injury or damage. And in those circumstances where a person other than the tenant makes a similar claim, the landlord will in almost all cases be able to recover any damages paid to that person under the clause by suing the tenant or joining him as a third party. He will be able to do this if the tenant is a joint tortfeasor, as for instance where the tenant is in breach of his duty as occupier to his visitor or is liable in nuisance and, perhaps, negligence to passers-by and neighbours. Nevertheless even in unusual cases where the tenant might not be regarded as joint tortfeasor, the landlord would be able to sue him for breach of his covenant to notify the lack of repair and on general principles would be able to recover by way of damages for the breach the amount paid to a third party under the clause, since a liability to pay that amount would be a reasonably foreseeable consequence of the breach.

(3) Subsection (3) is designed to make clear that a landlord who is under the duty imposed by subsection (1) by virtue of his repairing obligations is responsible only for such defects as fall within the scope of those obligations. Thus, for example, a landlord who is responsible only for structural repairs will not be under a duty in respect of a failure to repair which does not affect the structure (such as broken window panes). But where defects do fall within the scope of his repairing obligations, his duty will relate to them whether they existed at the time when the tenancy began or subsequently arose or continued because of his failure to carry out those obligations. (See as to the " material time " clause 3(3)(*a*) and paragraph (3) of the note on clause 3, page 43).

(4) Subsection (4) is designed to give effect to the third change in the law discussed in paragraph (*b*) of the General Note to this clause, namely the extension of the landlord's liability to the case where under the terms of the tenancy he has a right to enter the premises for the purpose of carrying out works of repair and maintenance. But where he would otherwise be liable in such a case the subsection exempts him from liability *to the tenant*

(Clause 4, subsections (4) (continued), (5) (6) and (7))

(1) *to* (3) *above (but for no other purpose) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises; but the landlord shall not owe the tenant any duty by virtue of this subsection in respect of any defect in the state of the premises arising from, or continuing because of, a failure to carry out an obligation expressly imposed on the tenant by the tenancy.*

(5) *For the purposes of this section, obligations imposed or rights given by any enactment in virtue of a tenancy shall be treated as imposed or given by the tenancy.*

(6) *This section applies to tenancies commencing before as well as to tenancies commencing after the commencement of this Act.*

(7) *This section applies to a right of occupation given by contract and not amounting to a tenancy as if the right were a tenancy and " tenancy " and cognate expressions shall be construed accordingly.*

(Notes to Subsections continued)

if the landlord's right to repair arises only when the tenant has made default in carrying out an obligation which is primarily placed on him and the tenant has failed to carry out the obligation. The exemption will not apply to claims by anyone other than the tenant, but if such a claim is made, the landlord will in most cases be able to recover any payments to meet them from the tenant either in the latter's capacity as a joint tortfeasor or by way of damages for breach of covenant (see paragraph (2) above).

(5) Subsections (5) to (7) reproduce provisions already contained in section 4(7) and (8) of the Occupiers' Liability Act 1957. Subsection (5) has the effect of applying the clause to cases where the obligation or right to repair is imposed or conferred by statute and not by the terms of the tenancy (see the examples given in paragraph *(d)* of the General Note to this clause). Subsection (6) makes it clear that the clause applies to existing tenancies, although, of course, the duties imposed are duties to be performed after the Bill comes into operation and accordingly the clause will not give a remedy for damage which has already been suffered. Under subsection (7) the clause will apply where the right of occupation in question is given by contract but is something less than a tenancy, i.e., where it derives from a licence.

Application to Crown.

5. This Act shall bind the Crown, but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947.

Supplemental.

6.—(1) In this Act—

"disposal", in relation to premises, includes a letting, and an assignment or surrender of a tenancy, of the premises and the creation by contract of any other right to occupy the premises, and "dispose" shall be construed accordingly;

"personal injury" includes any disease and any impairment of a person's physical or mental condition;

"tenancy" means—

(*a*) a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement, but not including a mortgage term or any interest arising in favour of a mortgagor by his attorning tenant to his mortgagee; or

(*b*) a tenancy at will or a tenancy on sufferance; or

(*c*) a tenancy, whether or not constituting a tenancy at common law, created by or in pursuance of any enactment;

and cognate expressions shall be construed accordingly.

(2) Any duty imposed by any provision of this Act is in addition to any duty a person may owe apart from that provision and cannot be excluded or restricted by any contract or otherwise.

(3) Section 4 of the Occupiers' Liability Act 1957 (repairing landlords' duty to visitors to premises) is hereby repealed.

Short title, commencement and extent.

7.—(1) This Act may be cited as the Defective Premises Act 1970.

(2) This Act shall come into force on the first anniversary of the day on which it is passed.

(3) This Act does not extend to Scotland or Northern Ireland.

EXPLANATORY NOTES

Clause 5

This clause makes the Act bind the Crown but subject to the general restrictions on the Crown's liability in tort which are contained in the Crown Proceedings Act 1947. The effect of this is to put the Crown in its public capacity in general in the same position as a private person in respect of breaches of the statutory duties imposed by clauses 1, 3 and 4 committed by its servants or agents and in respect of the removal by clause 2 of the vendor's or lessor's immunity for negligence so committed. But the Crown is not liable in its private capacity, nor in respect of any Government other than the United Kingdom Government; and there are various procedural restrictions affecting proceedings against the Crown.

Clause 6

(1) Subsection (1) defines certain terms which are used in clauses 2, 3 and 4.

(2) Subsection (2) has two purposes: first, it preserves any legal duty which a person may owe to others apart from the duties arising under the Act. The second purpose of the subsection is to prohibit contracting-out (in whole or part) of the obligations imposed by clauses 1, 3 and 4. The effect in relation to clauses 3 and 4 is more limited than might at first sight appear since it is not possible in law to contract-out of duties of care so far as these are owed to persons who are not parties to the contract in question.

(3) Subsection (3) repeals section 4 of the Occupiers' Liability Act 1957 which is superseded by clause 4.

Clause 7

This clause provides the short title of the Act, deals with the date when it is to come into force, and limits its operation to England and Wales.

APPENDIX B

List of Government Departments and Other Bodies Invited to Comment on Law Commission's Working Papers and Draft Report on Civil Liability of Vendors and Lessors for Defective Premises.

Lord Chancellor's Office.
Ministry of Housing and Local Government.
Ministry of Public Building and Works.
Treasury Solicitor.
Department of Health and Social Security.
General Council of the Bar.
The Law Society.
Society of Public Teachers of Law.
National Federation of Building Trades Employers.
Federation of Associations of Specialists and Sub-Contractors.
The National Association of Property Owners.
Property Owners Protection Association Ltd.
Federation of Registered House Builders.
National Federation of Housing Societies.
Consumer Council.
Building Societies Association.
National House-Builders Registration Council.
College of Estate Management (Legal Department).
The Royal Institution of Chartered Surveyors.
Royal Institute of British Architects.
Incorporated Society of Auctioneers and Landed Property Agents.
Association of Municipal Corporations.
Association of Local Authority Valuers and Estate Surveyors.
Lloyds Advisory Department.
British Insurance Association.
The Committee of Associations of Specialist Engineering Contractors.

(311057) Dd. 164327 K18 12/70 St.S.

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB
13a Castle Street, Edinburgh EH2 3AR
109 St. Mary Street, Cardiff CF1 1JW
Brazennose Street, Manchester M60 8AS
50 Fairfax Street, Bristol BS1 3DE
258 Broad Street, Birmingham 1
7 Linenhall Street, Belfast BT2 8AY

Government publications are also available through booksellers

SBN 10 218471 2