THE LAW REFORM COMMISSION

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

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REPORT ON DEFECTIVE PREMISES

IRELAND

The Law Reform Commission,
River House, Chancery Street, Dublin 7

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LAW REFORM COMMISSION

REPORT ON DEFECTIVE PREMISES

1. In its Working Paper No.1 - 1977 the Law Reform Commission considered the law relating to the liability of builders, vendors and lessors for the quality and fitness of premises. It made a number of recommendations designed to increase the liability of vendors, lessors and builders and to render them more amenable to current notions of civil liability. A General Scheme of a Bill to amend the law was contained in the Working Paper.

2. As regards persons who undertake or execute building work the Commission recommended that they should owe a duty to the person commissioning the work, and to every person who at any time acquires an interest in the premises, to see to it that the work which they undertake or execute is executed in a good and workmanlike or professional manner and with suitable and proper materials so that, if the building work relates to a dwelling house, it will be reasonably fit for habitation and, if it relates to other premises, that they will be reasonably fit for the purpose for which they were intended. This duty was to be owed not only by persons immediately concerned with building work such as builders and architects but also by developers (including public authorities) and financial institutions which participate in the management, control or conduct of the work in question. An exception was made in cases where a person undertakes or executes building work for another on terms that he is to execute it in accordance with the latter's instructions; in that case liability should only

arise where the work is not carried out properly in accordance with those instructions or where there is a duty which is unfulfilled to give a warning of any defects in the instructions. Another exception was made in cases of compulsory acquisition of property. In such cases no action was to lie at the suit of the acquiring authority against the person executing the building work; furthermore the liability of the latter was to be transferred to the acquiring authority except where that work was executed in the course of business by the person in occupation at the time of the compulsory acquisition. The damages recoverable for defective building work were to include an amount for any economic loss suffered by the plaintiff.

3. As regards those who sell, lease or license premises it was recommended that they should owe a duty to all persons likely to be affected by defects in the condition of the premises to take reasonable care to see that such persons are kept reasonably secure from personal injuries or from damage to their property caused by any defect which existed at the time of the sale, lease or licence and were known or ought to have been known to the vendor, lessor or licenser as the case may be. In determining whether this duty has been discharged regard was to be had to all the circumstances including, where premises are let, whether the lessor was obliged or entitled to repair. However, any warning given to the purchaser, tenant or licensee was not to be treated as absolving the person under a duty unless it is sufficient to enable the person warned to be reasonably safe from personal injuries or from damage to his property resulting from the condition of the premises and to discharge his own duty of care in respect of the condition of the premises. This is in accord with the modern view in the law of torts as to the effect of warnings.

4. The Commission also recommended an increase in the

contractual liability of vendors, lessors and licensers by providing that,where the purchaser, lessee or licensee makes known to the vendor, lessor or licenser the particular purpose for which the premises are being taken, a condition should be implied that the premises are reasonably fit for that purpose, unless it is shown that the purchaser, lessee or licensee did not rely,or that it was unreasonable for him to rely,on the skill or judgment of the vendor, lessor or licenser. However, this recommendation was limited to cases where the sale, lease or licence was in the course of business or where the premises were less than 12 years old.

5. Finally, the Commission recommended that the obligations imposed by the suggested legislation should be in addition to any duty a person may owe independently of that legislation and should not be capable of exclusion or limitation by contract in an individual case.

6. The Commission has received observations on the Working Paper in response to the request contained in the Paper. On 21 April 1980 it received a deputation from the Construction Industry Federation. The Federation drew attention to their National House Building Guarantee Scheme and suggested a modification of the Commission's proposals which would have the effect of excluding from the scope of any proposed legislation building work which was covered by the Guarantee Scheme. The Commission was unable to accept that this scheme, however desirable in itself, would be an adequate substitute for legislation of the kind proposed in the Working Paper. It was pointed out that the scheme did not have the force of law and could not be enforced in any court; it did not apply in respect of building work carried out by persons who were not members of the Federation; and it did not cover all defects in building work but only those which ranked as "grave structural defects". The Commission

also rejected criticism of its proposals to the effect that they could result in an increase in the cost of housing. Economies achieved at the cost of defective building work were not in the interests of purchasers or lessees of houses. The acquisition of a house is by far the largest single item of expenditure the vast majority of people make in their lives. That they should enjoy a lesser guarantee of quality than that enjoyed by purchasers of goods, which is the present legal position, is anomalous, to say the least.

7. The Royal Institution of Chartered Surveyors expressed the opinion that the legislation should extend only to residential property as was the case under the English Defective Premises Act 1972. They pointed out that purchasers and lessees of commercial and industrial property are generally business organisations who usually take professional advice before entering into any major commitment. There was no need to extend legislative protection to commercial organisations which did not observe the normal standards of commercial prudence in purchasing or leasing premises. The effect of such legislation, argued the Institution, would be to create an unwarranted increase in both costs and administrative delays which would be disproportionate to any amelioration of present conditions; it might also result in a loss of productive employment. The Commission accept that the need for legislative change is most acute in the residential sector. But it is sensible of the fact, admitted by the Institution, that commercial and industrial property has been developed and sold which falls short of reasonable standards. It is not convinced that a clearcut distinction as to need for consumer protection can be drawn between residential property and non-residential property. Many purchasers and lessees of non-residential property are not large business organisations and need protection just as much as their counterparts in the

residential property market. Moreover, it has to be borne in mind that the duty owed under some parts of the proposed legislation extends beyond purchasers and lessees to all persons who might be affected by defects in the state of premises. /See, for example, section 7(2) of the draft Bill./

The Royal Institution of Chartered Surveyors also questioned the imposition of a duty in relation to building work on banks and financial institutions which participate in the "management, control or conduct of the work in question". They expressed the opinion that extreme care should be exercised to avoid creating conditions which would discourage these bodies from providing finance for residential development. The Commission considers that the policy ends of the proposed legislation cannot be achieved unless those in ultimate control of building work are made liable where it is defective. In some cases the actual builder may not be a mark for damages and may indeed be little more than the creature of the controlling financial interests. It would be unjust if a purchaser or lessee were then left without an effective remedy because he could not sue the person for whom that builder was working. If a financial institution wishes to avoid liability under the proposed legislation, it will be able to do so if it does not acquire rights of management, control or conduct of the building work and confines its participation to making a loan at a normal rate of interest.

8. The Dublin Solicitors Bar Association, while expressing general agreement with the points made by the Commission in its Working Paper, took the view that the provision in the proposed legislation implying a condition of fitness for the purpose in sales, leases or licences goes further than is reasonable in so far as it affects transactions not in the

course of business. They had reservations about imposing upon private vendors or lessors the duty of providing a guarantee that there were no latent defects in premises. In practice, the duty imposed may not be as high as is assumed by the Association as no condition will be implied when the purchaser, lessee or licensee does not or ought not to rely on the skill or judgment of the person from whom he takes the premises in relation to their fitness. Generally, a person purchasing a house or taking a long lease would be expected to take independent professional advice to satisfy himself or herself of the fitness of that house.

The Association also expressed reservations in relation to the provision in the proposed legislation under which a person who sells or lets premises owes a duty to all persons likely to be affected by the state of the premises to take reasonable care to see that such persons are reasonably safe from personal injuries or from damage to their property caused by such defects. It was their view that, unless a definition could be found of precisely what duty is owed and precisely how and at what stage of negotiation such duty can be discharged, considerable litigation would result from this provision. They suggested that it would be preferable to create a positive straightforward duty of putting the purchaser, lessee or licensee on clear notice of any potential defect in the premises before any contract is made. This would not only put the person taking the property on notice of the defect so far as injuries or damage might be concerned but would also enable him to negotiate better terms. The Commission believes that the mere giving of a warning to the persons taking the premises should not always absolve the vendor, lessor or licenser, although it would undoubtedly do so in most cases under the proposed legislation. But it is important to cater for cases where a warning is not given

in sufficiently specific terms and where a duty to repair rests on a person letting or licensing property. The duty owed under the relevant provision of the draft Bill, viz. section 7(2), is not excessively onerous as it applies only in relation to defects which were known or ought to have been known to the vendor, lessor or licenser.

9. Accordingly, the Commission has decided to adhere in general to the recommendations made in Working Paper No.1-1977. Appendix B to this Report contains the draft Defective Premises Bill proposed by the Commission and the Explanatory Memorandum to the draft Bill is set out in Appendix C. In reaching its conclusions in this matter the Commission has been reinforced by developments in the law since the Working Paper was published. In Siney v Dublin Corporation /1980/ I.R. 400 the Supreme Court held that, where a flat was let by the Corporation pursuant to its powers and duties under the Housing Act 1966, there was implied in the tenancy agreement a warranty that the flat was fit for human habitation at the date of the letting. It was also held that, on the principles enunciated in Donoghue v Stevenson /1932/ A.C. 562, the Corporation was liable in negligence to the defendants to whom they owed a duty to take reasonable care to ensure that the flat was free from concealed defects rendering it unfit for human habitation. The decision in Siney v Dublin Corporation was based on the specific provisions of the Housing Act 1966 and the Court did not consider whether the plaintiff would have been entitled to succeed if the flat had not been provided under the Act. Having remarked that the Supreme Court had never pronounced on the point and having referred to "long standing judicial authorities which hold that a condition as to habitability is not to be implied in the letting of an unfurnished dwellinghouse" Henchy, J. went on:

> "If those authorities are to be set aside, it would probably be better to do so by statute, with prospective effect, rather than by judicial decision with its necessarily retrospective effect. If statutory effect in relation to tenancies is given to the legislative proposals in this respect set out in the Law Reform Commission's Working Paper No.1 (The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises), the decision of this Court on the point is not likely to be called for".

10. While adhering to the general thrust of the recommendations in Working Paper No.1 - 1977 the Commission has decided that it would be advisable to make some changes from the General Scheme of a Bill contained in that Paper. Many of these changes are mainly of a drafting nature but a number go beyond this. These are contained in sections 3(6), 5, 8 and 10 of the draft Bill.

11. Section 3(6) places a person who has the power or duty to inspect building work under the same liability for defects as the person undertaking or executing such work. This is in line with recent developments in the law. Thus, in Siney v Dublin Corporation [1980] I.R.400 the defendant corporation was held liable in negligence on account of a failure to inspect the work carried out by the National Building Agency. In the judgments of the Supreme Court in that case reference was made to the English case of Anns v Merton London Borough Council [1978] A.C. 728 where it was held by the House of Lords that a local authority which had not exercised a statutory power to inspect a building in which defects were later discovered could be liable in negligence to a subsequent lessee of those premises.

12. The Commission has re-considered the question of the period within which actions under the proposed legislation

must be brought. In the General Scheme of the Bill attached to Working Paper No.1 - 1977 it was provided that for the purpose of the Statute of Limitations a cause of action against a person undertaking or executing building work should be deemed to have accrued:

(a) where the work undertaken was executed to the order of any person, at the time when that person notified the person responsible for the work (whether or not he undertook the work in question) that he first accepted the work as conforming to the order or at the time when the first person took possession of the premises, whichever is the earlier;

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

The limitation period for actions against vendors, lessors and licensers under section 2 of the General Scheme of a Bill contained in the Working Paper was to be governed by the general law.

The Commission has accepted the submission made by the Dublin Solicitors Bar Association that these provisions could lead to injustice where defects in building work first manifest themselves long after the work is completed. It was mindful of the fact that it is not uncommon for such defects to remain hidden for many years. Accordingly, the Commission now recommends that time should not begin to run for the purposes of the Statute of Limitations until the prospective plaintiff knew or ought to have known of the injury or damage suffered. The relevant provisions are

contained in sections 5 and 8 of the draft Bill. Before making this recommendation the Commission took account of representations from the Construction Industry Federation that no action should lie after a period of ten years had elapsed from the date of doing the work. But the importance of protecting defendants from stale or dilatory claims was, in the Commission's view, outweighed by the injustice of denying to a plaintiff a right of action for injury or damage just because that injury or damage had not manifested itself within a given period.

13. Section 10 of the draft Bill is designed to remove an anomaly which might arise due to the fact that under section 3 those undertaking or responsible for building work are liable only to those with an interest in the premises built. The reason for this limitation is to avoid the prospect of an open-ended liability to an indeterminate class of persons. However, a defect in building work may result in a vendor, lessor or licenser being liable to a person who has no interest in the premises, such as an invitee who suffers personal injury or damage to property. It would be anomalous if under the proposed legislation that vendor, lessor or licenser could not recover from the persons responsible for the defect in the building work to the extent of their fault, especially as the latter would probably be liable to the person suffering injury or damage at common law under the rule in Donoghue v Stevenson. To remedy this anomaly it is proposed that the persons responsible for the building defects should be deemed to be concurrent wrongdoers with a vendor, lessor or licenser who is sued under section 7 (duty of disponer of premises).

14. The persons and bodies who submitted observations on the Working Paper No.1 - 1977 on the Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises are listed in Appendix A. The Commission wishes to express its gratitude to them for their assistance.

APPENDIX A

Persons and Bodies who submitted observations on Working Paper No. 1 - 1977 on the Law relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises

1. The Construction Industry Federation

2. Dr Jeremy Phillips, Lecturer in Law, Trinity College Dublin

3. The Royal Institution of Chartered Surveyors

4. Dublin Solicitors Bar Association

5. Michael J. McGuigan, Principal Officer, Department of the Environment

APPENDIX B

DEFECTIVE PREMISES BILL 1982

ARRANGEMENT OF SECTIONS

SECTION

1. Short title and commencement
2. Interpretation and saving
3. Duty to build premises properly
4. Application of section 3 to financial institutions
5. Date of accrual of cause of action under section 3
6. Exemption from the remedy under section 3
7. Duty of disponer of premises
8. Date of accrual of cause of action under section 7
9. Duty imposed by this Act to be additional to duty otherwise owed
10. Recovery of contribution under Civil Liability Act 1961
11. Term of agreement excluding operation of any provision of this Act to be void
12. Application of Civil Liability Act 1961

ACTS REFERRED TO

Building Societies Act 1976	1976	No. 38
Central Bank Act 1971	1971	No. 24
Civil Liability Act 1961	1961	No. 41
Statute of Limitations 1957	1957	No. 6

DEFECTIVE PREMISES BILL 1982

BILL

ENTITLED

An Act to amend the law relating to the liability of builders, vendors, lessors and others for the quality and fitness of the premises; and for connected purposes.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Short title and commencement

1.-(1) This Act may be cited as the Defective Premises Act 1982.

(2) This Act shall come into operation on the day of 1982.

Interpretation and saving

2.-(1) In this Act -

"personal injuries" includes any disease and any impairment of a person's physical or mental condition, and "injured" shall be construed accordingly;

"premises" includes buildings, land on which buildings are erected, land immediately surrounding buildings and land on which there are no buildings;

(2) In this Act -

(a) a reference to a section is to a section of this Act, unless it is indicated that a reference to some other enactment is

intended;

(b) a reference to a subsection, paragraph or subparagraph is to the subsection, paragraph or subparagraph of the provision in which the reference occurs, unless it is indicated that reference to some other provision is intended;

(c) a reference to any other enactment shall, except where the context otherwise requires, be construed as a reference to that enactment as amended by or under any other enactment, including this Act.

(3) Nothing in this Act shall have effect in relation to building work undertaken or executed before the commencement of this Act, whether or not the premises were completed on or after such commencement.

Duty to build premises properly

3.-(1) A person who undertakes or executes any work (hereinafter referred to as building work) for or in connection with the provision of any premises (whether the premises are provided by erection or by the conversion or enlargement of a building) owes a duty -

(a) to the person who commissioned the work; and

(b) without prejudice to paragraph (a), to every person who acquires an estate or interest in the premises,

to see that the work that he undertakes or executes is executed in a good and workmanlike or, as the case may be, professional manner with suitable and

proper materials and so that,

(i) in the case where the premises consist of a dwelling, they will be reasonably fit for human habitation when completed; and

(ii) in the case of premises other than a dwelling, they will be reasonably fit when completed for the purpose for which they were intended.

(2) A person who undertakes or executes any building work for another on terms that he is to execute it in accordance with instructions given by or on behalf of that other shall, to the extent to which he does it properly in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by subsection (1) 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) as having given instructions for the execution of building work merely because he has agreed to the work being executed in a specified manner, with specified materials or to a specified design.

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

(5) A person who -

(a) in the course of a business that consists of or includes providing, or arranging for

the provision of, premises or of installations in or on premises; 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 undertake work for or in connection with the provision of premises shall be treated for the purposes of this section as included among the persons who have undertaken the work.

(6) Breach of the duty imposed by this section shall include failure to inspect building work or negligence in the inspection of such work where the power, right or duty of inspection is conferred by or by virtue of any enactment or otherwise.

(7) Damages recoverable for breach of the duty imposed by this section shall include an amount for economic loss (if any) suffered by the plaintiff.

Application of section 3 to financial institutions

4.-(1) For the purposes of section 3, a person who undertakes or executes any building work includes a natural person and a financial institution where that person or institution -

(a) participates in the management, control or conduct of the building work; or

(b) receives or is entitled to receive fees in respect of the building owrk in addition to the normal interest or loan fees associated with his or its business.

(2) In this section -

"financial institution" means any bank, building society, company or body of persons (whether corporate

or unincorporated);

"bank" means the holder of a licence under section 9 of the Central Bank Act 1971;

"building society" means a society incorporated under the Building Societies Act 1976;

"company" means any body corporate;

"body of persons" includes a partnership.

Date of accrual of cause of action under section 3

5.-(1) Subject to subsection (2), any cause of action in respect of a breach of the duty imposed by section 3 shall be deemed, for the purposes of the Statute of Limitations 1957 or any other limitation enactment, to have accrued -

(a) on the date on which the premises were completed; or

(b) on the date when any person entitled to occupy the premises, whether as first or subsequent owner or occupier, knew, or ought reasonably to have known, of any defect in the building work attributable to a breach of the duty imposed by section 3.

whichever is the later.

(2) Where after the completion of any building work a person who has done work for or in connection with the building work does further work to rectify the work he has already done, any cause of action in respect of that further work shall be deemed, for the purposes referred to in subsection (1), to have accrued -

(a) on the date on which the further work was

finished; or

(b) on the date when any person entitled to occupy the premises, whether as first or subsequent owner or occupier, knew, or ought reasonably to have known, of any defect in the further work attributable to a breach of the duty imposed by section 3,

whichever is the later.

Exemption from the remedy under section 3

6.- Where an estate in premises is compulsorily acquired -

(a) no action shall be brought by the acquiring authority for breach of the duty imposed by section 3 in respect of the premises; and

(b) if any work for or in connection with the provision of the premises was executed otherwise than in the course of a business by the person in occupation of the premises at the time of the compulsory acquisition, the acquiring authority and not that person shall be treated as the person who executed the work and accordingly as owing the duty.

Duty of disponer of premises

7.-(1) In this section -

"disposal", in relation to premises, includes a sale, a letting, a fee-farm grant (whether the grant does or does not create the relationship of landlord and tenant), 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 cognate words

shall be construed accordingly;

"tenancy" means -

(a) a tenancy created either immediately or derivatively out of the freehold, whether by a lease or sublease, by an agreement for a lease or sublease or by a tenancy agreement, but does not include a mortgage term or any interest arising in favour of a mortgagor who attorns tenant to his mortgagee;

(b) a tenancy at will or a tenancy at 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) Subject to subsection (3), a person who disposes of premises owes a duty to all persons who might reasonably be expected to be affected by defects in the state of the premises (whether or not these defects have been created by the acts or omissions of the disponer) to take reasonable care to see that such persons are reasonably safe from personal injuries or from damage to their property caused by such defects.

(3) Subsect ı (2) shall not apply unless the defects existed at the time of the disposal and were known or ought reasonably to have been known to the disponer.

(4) In determining whether the disponer has discharged the duty imposed on him by this section in respect of the state of any premises, regard shall

be had to all the circumstances; and any warning given in respect of any defect in the premises shall not be treated as absolving the disponer from the duty imposed on him by this section unless the warning was sufficient to enable the person to whom it was given to be reasonably safe from personal injuries or from damage to his property resulting from the state of the premises.

(5) In determining whether the lessor of premises has discharged the duty imposed on him by this section regard shall be had, where the premises are let under a tenancy, to the fact (if it is a fact) that the lessor was obliged or entitled to maintain or repair the premises.

(6) Where a person -

(a) in the course of business, disposes of premises; or

(b) otherwise than in the course of business, disposes of premises that were completed less than twelve years before the date of the disposal,

and the disponee expressly or by implication makes known to the disponer the particular purpose for which the premises are intended to be used, there shall be an implied condition in the contract of disposal that the premises are reasonably fit for that purpose except where the circumstances show that the disponee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the disponer in relation to the fitness of the premises.

(7) This section does not apply -

(a) in the case of premises that 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, where 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.

Date of accrual of cause of action under section 7

8.- Any cause of action in respect of a breach of the duty imposed by section 7 shall be deemed, for the purposes of the State of Limitations or any other limitation enactment, to have accrued -

(a) in the case of personal injuries, on the date on which it would have accrued if the rule applicable were a rule of the common law;

(b) in the case of damage to property -

(i) on the date on which the damage occurred; or

(ii) on the date (if later) on which the person to whom the duty was owed knew or ought reasonably to have known of the damage to the property.

Date imposed by this Act to be additional to duty otherwise owed

9.- Any duty imposed by any provision of this Act shall be in addition to any duty a person may owe to another independently of this Act.

Recovery of contribution under Civil Liability Act 1961

10.-(1) In an action for damages for breach of the duty imposed by section 7, if the defendant can show that the damage was caused by the breach by another of the duty imposed by section 3 or partly by that breach and partly by the breach by the defendant, then, subject to subsection (2), that other person shall for the purposes of the recovery of contribution under the Civil Liability Act 1961 be deemed to be a concurrent wrongdoer.

(2) Notwithstanding anything contained in section 31 of the Civil Liability Act 1961, an action against a person deemed under subsection (1) to be a concurrent wrongdoer shall not be brought after the expiration of two years from the date on which the liability of the claimant for contribution is ascertained or from the date on which the injured person's damages are paid, whichever is the later.

Term of agreement excluding operation of any provision of this Act to be void

11.- Any term (whether express or implied) contained in an agreement that purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any provision of this Act, or any liability arising by virtue of any such provision, shall be void.

Application of Civil Liability Act 1961

12.- A breach of the duty -

(a) imposed by section 3; or

(b) imposed by section 7,

shall be a wrong within the meaning of the Civil Liability Act 1961; and the provisions of that Act relating to breach of statutory duty shall apply accordingly.

APPENDIX C

DEFECTIVE PREMISES BILL 1982

EXPLANATORY MEMORANDUM

PURPOSE OF THE BILL

1. The purpose of the Bill is to put into legislative form a series of proposals made by the Law Reform Commission on the Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises. These proposals are contained in the Commission's Working Paper No. 1 - 1977. See, in particular, Chapter V of that Paper (Suggested Reforms).

2. The main proposals made by the Commission and implemented in the Bill are four. First, there should be imposed on every builder of premises a statutory duty to build the premises properly. Second, there should be imposed on every vendor, lessor or other disponer of premises a statutory duty to take reasonable care to see to it that persons likely to be affected by defects in the state of the premises are reasonably safe from personal injuries and from damage to their property caused by any such defects. Third, the duties being imposed should be in addition to any common law duty arising independently of the legislation. Fourth, it is proposed to state the law as regards the date of accrual (for the purposes of the Statute of Limitations 1957) of causes of action arising because of (1) breach of the statutory duty to build properly and

(2) breach of the statutory duty to ensure the safety (from personal injuries and from damage to their property) of persons who might reasonably be expected to be affected by defects in the state of the premises.

PROVISIONS OF THE BILL

Section 1: Short title and commencement

3. Section 1 is a standard provision setting out the short title of the proposed Act and the date of commencement or the date of coming into operation of the Act. This date is important having regard to the provisions of section 3 (duty to build premises properly) and section 7 (duty of disponer of premises). (See subsections 2(3) and 7(7).)

Section 2: Interpretation and saving

4. Section 2 is the interpretation section. The definition in subsection (1) of "personal injuries" is as contained in, for example, the Statute of Limitations 1957 (No. 6) and the Civil Liability Act 1961 (No. 41).

5. Subsection (2), which provides for references in the proposed Act to a 'section', 'subsection', etc. and to 'any other enactment', is a standard interpretation provision.

6. Subsection (3) provides that nothing in the proposed Act will affect building work undertaken or executed before the Act comes into operation. Accordingly, the statutory duty to build properly imposed by section 3 will not apply in respect of

premises where that work was taken on, or completed, before the operative date.

Section 3: Duty to build premises properly

7. Subsection (1) imposes on builders, architects, sub-contractors et al who have taken on building work a duty to carry out that work in a good and workmanlike or, as the case may be, in a professional manner so that, in the case of a dwelling, it will be reasonably fit for human habitation and, in the case of other premises, that they will be reasonably fit for the purpose for which they were intended. It is to be noted that in England and in Northern Ireland the statutory duty to build properly is confined to dwellings. (See section 1 of the English Defective Premises Act 1972 (c. 35) and Article 3 of the Defective Premises (N.I.) Order 1975 (No. 1039).) The expression "fit for human habitation" is taken from section 114 of the Housing Act 1966 (No. 21). (As to effect of this Act see Siney v Dublin Corporation [1980] I.R. 400.) The duty will be owed not only to the person who commissioned the work but also to every person who acquires an estate or interest in the premises.

8. Subsections (2), (3) and (4) provide that the duty to build properly shall be discharged where the building work has been undertaken or executed in accordance with instructions (including plans and specifications) except where the builder, for example, fails to discharge any duty he owes to the person who commissioned the work to warn the latter of any defects in the instructions. However, the duty will not be discharged merely because the person who commissioned the work has agreed to its being done in a specified manner, with specified materials or to a specified design. This could arise where the builder had himself issued the instructions governing the carrying out of the work.

9. Subsection (5) is designed to extend that statutory duty to build properly to persons such as developers and local authorities who are involved (whether in discharge of a statutory duty or otherwise) in the provision of premises. As to the common law liability of a local authority in respect of houses provided by the authority see Siney v Dublin Corporation (supra) and the Northern Ireland and English cases cited and discussed therein by Chief Justice O'Higgins.

10. Subsection (6) proposes to make failure to inspect and negligent inspection a breach of the statutory duty imposed by the section. The subsection covers "the power, right or duty" of inspection; and will apply to public authorities in appropriate cases. The old common law rule appears to be that a public authority is liable for misfeasance but not for non-feasance. However, the rule now appears to have been eroded somewhat by the Supreme Court decision in Siney (supra). Section 60 of the Civil Liability Act 1961 (No. 41) makes a road authority liable for "failure to maintain adequately" a public road. The section has not yet been brought into operation. In Anns v Merton London Borough Council [1977] 2 All E.R. 492 (cited in Siney) the expression used is "right to inspect", and one of the judges in that case pointed out that it is irrelevant to the existence of a duty of care at common law whether what is created by statute is a duty or a power: "the duty of care may exist in either case".

11. Subsection (7) proposes that the plaintiff's damages for breach of the duty imposed by the section shall include an amount for economic loss. This is to make it clear that where economic loss has been sustained as a result of the breach of the statutory duty imposed by the section damages in respect of that loss may be recovered by the plaintiff. Such loss need not involve personal injury to, or damage to the property of,

the plaintiff. For example, the plaintiff may have had to pay damages to an invitee because of a defect in his premises caused by a breach of the duty imposed by subsection (1) on the builder-defendant. (As to economic loss, see Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All E.R. 575 and Irish Paper Sacks Ltd v John Sisk and Son (Dublin) Ltd (unreported, High Court, 18 May 1972). It is proposed to overrule the latter case in so far as economic loss not directly resulting to the plaintiff from a breach of the statutory duty imposed on a builder is concerned. Accordingly, the negligence of the builder need "not directly injure the plaintiff's person or property".) It should be noted that, as far as injury to an invitee in the example given is concerned, the builder is not a concurrent wrongdoer within the meaning of the Civil Liability Act 1961 (No. 41) for the simple reason that the invitee has no cause of action against the builder under section 3 of the Bill as no duty is owed to him under that section. He has, of course, his common law rights under the rule in Donoghue v Stevenson [1932] A.C. 562, as enlarged and developed by subsequent Irish cases such as Purtill v Athlone U.D.C. [1968] I.R. 205 (Supreme Court) and McNamara v E.S.B. [1975] I.R. 1 (Supreme Court).

Section 4: Application of section 3 to financial institutions

12. The object of section 4 is to extend the duty to build premises properly to natural persons and to financial institutions, such as banks and building societies, where the person or institution takes part in the management, control or conduct of the building work or receives fees in respect of the building work in addition to the normal interest or loan fees. The type of case envisaged by the section is that in which a bank or building society advances money for the building of a dwelling or other premises subject to a right of approving the plans and of seeing to it, by inspection by its own architect

or otherwise, that the building work is being executed in a good and workmanlike manner. (In Yianni v Edwin Evans [1981] 3 All E.R. 592 it was held by the English High Court that a person who purchases a house through a building society has a cause of action for damage suffered as a result of the negligence of the society's surveyors.)

Section 5: Date of accrual of cause of action under section 3

13. Section 5 specifies the date of accrual of the cause of action (the terminus a quo) in the case of a breach of the duty (imposed by section 3) to build properly. In other words, it fixes the date from which time begins to run against the plaintiff. That date will be the date on which the premises are completed or the date on which the first or subsequent owner or occupier of the premises knew, or ought reasonably to have known, of any defect in the building work attributable to a breach of the duty imposed by section 3, whichever is the later. What is known as "the date of knowledge" or "the date of discoverability" has given rise to much discussion in England in cases involving a breach of common law duty. In Cartledge v E. Jopling & Sons Ltd [1963] 1 All E.R. 341 it was held by the House of Lords that the date of accrual of the cause of action (where workers had, by inhaling noxious dust, contracted pneumoconiosis) was the date when they first inhaled the dust - and this although the symptoms had not appeared for many years after the inhalation. In effect the decision meant that the claims of the workers were statute-barred before they could have known that they had been injured. The Law Lords declined to follow the decision of the United States Supreme Court in Urie v Thompson, Trustee (1948) 337 U.S. 163 on the ground that the U.S. Act (the Federal Employers Liability Act) was a special Act whereas the English Limitation Act 1939 (corresponding in this respect to our Statute of Limitations 1957) was a general

Act. However, Lord Reid indicated in his speech that, if the date of accrual of the cause of action were a matter for the common law, the "discoverability" test would be applied because, as he put it, "[t]he common ought never to produce a wholly unreasonable result". Subsequently, Lord Denning M.R. in the Sparham-Souter case [1976] 2 All E.R. 65, 69 quoted what Lord Reid had said of cases governed by the common law and he adopted the "discoverability" or "knowledge" principle, which, as he said, "underlies the Limitation Acts 1963 and 1975". However, these Acts were confined to personal injuries cases, whereas Sparham-Souter was a damage to property case. The Acts were enacted following on the decisions in Cartledge (supra) and in Central Asbestos Co Ltd v Dodd [1972] 2 All E.R. 1135, and, as far as England and Wales are concerned, they are now consolidated in the Limitation Act 1980 (c. 58). There were special sections (8 to 13) in the 1963 Act applying to Scotland and these have been consolidated in the comprehensive Prescription and Limitation (Scotland) Act 1973 (c. 52). The provisions in regard to "date of knowledge" contained in the English 1963 and 1975 Acts were followed in the Limitation Act (Northern Ireland) 1964 (c. 1) and in the Limitation (Northern Ireland) Order 1976 (No. 1158).

14. There are some significant differences between Northern Ireland and English law as regards limitation of actions and Scots law as regards prescription and limitation of actions. The law in England, Northern Ireland and Scotland now gives the court a general power to override the statutory time-limit in actions for personal injuries or death if it considers it equitable to do so - section 33 of the English Limitation Act 1980, Article 3 of the Limitation (Northern Ireland) Order 1976 and section 23 of the Law Reform (Misc. Provs) (Scotland) Act 1980 (c. 55). However, Scots law provides for the extinction of practically all obligations to pay reparation (damages)

after a prescriptive period of 20 years. In Scotland this is a rule of what is called "long negative prescription" and it corresponds to the rules in sections 12 and 24 of the Statute of Limitations 1957 (No. 6) in regard, respectively, to the extinction of the title of the owner of converted goods and to the extinction of the title to land after the expiry of the relevant limitation period for the bringing of the appropriate action. In actions for damage to property (as well as in actions for personal injuries) there is in Scotland a "knowledge" or "discoverability" test in the case of latent defects or injuries - sections 11(3), 18 and 19 of the Prescription and Limitation (Scotland) Act 1973. Whether there is a "knowledge" or "discoverability" test in English law where damage to property is concerned depends on the conclusion (if any) that may be drawn from the English cases referred to supra. (See also the English High Court decision in Eames London Estates Ltd v North Hertfordshire District Council (1980) 259 Estates Gazette 491 & the English Court of Appeal decision in Pirelli General Cable Works Ltd v Oscar Faber and Partners (The Times, 8 February 1982).)

15. The British House of Lords had in Cartledge (supra at para. 13) relied on the fact that section 26 of the English Limitation Act 1939 (sections 71 and 72 of the Statute of Limitations 1957) had provided specifically for a "discoverability" test in the case of fraud and mistake. (See speeches of Lord Reid and Lord Pearce at pp. 343, 351 and 352.) However, this line of reasoning did not prevent Lord Denning M.R. in Sparham-Souter (supra at para. 13) from introducing a "discoverability" test in damage to property cases by adopting the principle that "underlies the Limitation Acts 1963 and 1975", thus, in effect, applying the statutory rules as to personal injuries actions to damage to property actions

(which are governed by common law). The English Court of Appeal decision in Sparham-Souter was followed by the House of Lords in Anns v London Borough of Merton [1977] 2 All E.R. 492. (See speech of Lord Wilberforce.) In England, the Lord Chancellor's Law Reform Committee in their Final Report on Limitation of Actions (1977) "found difficulty in extracting the ratio decidendi of Anns and, in particular, were uncertain as to the extent to which the House of Lords had approved the decision in Sparham-Souter". (See the Consultative Document on Latent Damage issued in July 1981 by the Sub-Committee set up by that Committee and the decision in the Pirelli General Cable Works case (supra at para. 14).)

16. As has been indicated in paragraph 14 supra, there is in Scots law a long negative prescriptive period of 20 years in respect of practically all obligations. Under sections 7 and 8 of the Scottish 1973 Act, once an obligation (what is known in the Statute of Limitations as a cause or right of action) or a right relating to property (whether heritable or moveable) has subsisted for 20 years the obligation or the right is extinguished. This means that, where a person has contracted lung disease by inhalation of noxious dust but has not known of or discovered this for over twenty years, the obligation to make reparation to him will have been extinguished by the long negative prescription before the limitation period (three years) has begun to run. This cannot happen in the case of any other obligation to make reparation (whether the obligation arises because of a delict (tort) or a breach of contract). The reason for this is that obligations to make reparation (other than obligations in respect of personal injuries) become "enforceable on the date when the loss, injury or damage occurred" or on "the date when the creditor [plaintiff] first became, or could with reasonable diligence have become" aware of the loss, injury or damage caused by the act, neglect or default of the debtor [defendant], whereas in the case of

personal injuries the appropriate date is the date when the personal injuries occurred - sections 6, 7 and 11 of the 1973 Act.

17. In addition to providing for a long negative prescription of twenty years (which is referred to in England as a "long-stop"), Scots law also provides for a short negative prescription of five years in respect of obligations other than obligations to pay damages for personal injuries (where the limitation period is three years). However, in the case of all obligations there is a "discoverability" test, whereas in England and Northern Ireland a "discoverability" test is provided for only in personal injuries actions. Moreover, in all these jurisdictions the judge is given a discretion to override the time-limits for personal injuries actions, thus in effect making the statutory provisions in respect of those limits to a considerable degree redundant. (See Professor David Walker's Law of Prescription and Limitation of Actions in Scotland (3rd ed., 1981) (chapter 5) and the General Notes to the English Limitation Act 1980 contained in Current Law Statutes Annotated 1981.)

18. An international provision corresponding to both long negative prescription and short negative prescription in the law of Scotland is to be found in Article 8/9 of the EEC Council draft Directive concerning liability for defective products. This Article proposes that the rights conferred upon an injured person by the Directive "shall be extinguished upon the expiry of a period of ten years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer". The draft Directive also provides for a limitation period of three years for the recovery of damages from the producer. This limitation period "shall begin to run from the day on which the plaintiff became aware

or could or should reasonably have become aware of the damage, the defect and the identity of the producer" (emphasis supplied). If the draft Article remains as it is, it appears that it will be necessary to amend the law in England, Northern Ireland and Scotland as well as our law. In England and in Northern Ireland there is no "long stop" provision and, except in the case of personal injuries, no statutory "knowledge" or "discoverability" test. In the case of damage (other than latent disease or personal injury) common law applies, but there is quite some doubt as to the exact conclusion to be drawn from recent English decisions such as Sparham-Souter and Anns (supra). As has been indicated already, the Prescription and Limitation (Scotland) Act 1973 contains a "discoverability" or "knowledge" test in the case of actions for reparation (whether arising from personal injuries or otherwise). In the case of these actions, there is, as has been mentioned supra, a long negative prescription period of 20 years starting on the day "when the loss, injury or damage occurred".

Section 6: Exemption from the remedy under section 3

19. Section 6 of the Bill proposes to exempt from the application of section 3 (duty to build premises properly) premises compulsorily acquired. In addition, the acquiring authority (and not the occupier of the premises acquired) will be liable in respect of any work for or in connection with the premises carried out - otherwise than in the course of business - by the occupier. The section will thus ensure that the builder will not be liable where his premises are compulsorily acquired by, for example, a public or local authority. It will also ensure that liability of an occupier in respect of work executed by him otherwise than in the course of his business will be transferred to that authority.

Section 7: Duty of disponer of premises

20. This section provides for the statutory duty to be imposed on those who dispose of premises. Subsection (1) defines "disposal" as including a sale, a letting, a fee-farm grant, an assignment of a tenancy and a licence. A fee-farm grant may arise whether or not the grant creates the relationship of landlord and tenant. (The wording in the subsection is taken from section 2(1) (s.v. rentcharge) of the Statute of Limitations 1957 (No. 6).) Also defined in subsection (1) is a tenancy that arises where a mortgagor (on the legal estate in the property being vested by the mortgagor in the mortgagee) attorns tenant to (i.e. becomes the tenant of) the mortgagee. Where this happens, the mortgagee would not in any real sense be so letting the premises as to create a statutory liability to the mortgagor. Accordingly, it is necessary to provide that the section will not apply to a mortgage term or an interest in favour of a mortgagor who, by what is known as attornment, agrees to become the tenant of the mortgagee (the legal owner) or acknowledges himself to be such tenant. (As to "attornment", see section 151 of the English Law of Property Act 1925 (c. 20) and John C.W. Wylie's Irish Land Law (1975) at para. 17.020.)

21. Subsection (2) of section 7 proposes to impose on vendors, lessors et al a statutory duty to see to it that persons who might reasonably be expected to be affected by defects in the state of the premises (e.g. invitees) are reasonably safe from personal injuries. The subsection puts in statutory form, in so far as defective premises are concerned, what is known as the rule in Donoghue v Stevenson [1932] A.C. 562. (As to the application of this rule, see judgment of O'Higgins C.J. in Siney v Dublin Corporation (supra), Purtill v Athlone U.D.C. [1968] I.R. 205, McNamara v E.S.B. [1975] I.R. 25 and para. 11 supra.) The proposed statutory rule will not apply unless the defects in the premises existed at the time of the sale or

letting of the premises and were known or ought reasonably to have been known to the disponer - subsection (3). Thus, where defects do not manifest themselves until after the premises have been sold, the vendor or lessor will not be liable unless he had knowledge (actual or constructive) of the defects. However, the builder would be liable under section 3 to the purchaser or lessee if the defects were due to a breach of his duty to build properly and he would, of course, also be liable at common law.

22. Subsection (4) of section 7 will allow a vendor or lessor to be absolved from his duty under subsections (2) and (3) where he has given a warning sufficient to enable the person to whom it is given to be safe from personal injury or from damage to his property. The duty imposed by section 7 is not limited to a duty to particular persons. Rather is it "a duty to all persons who might reasonably be expected to be affected by defects in the state of the premises", and this, of course, would include invitees and licensees - and in some cases trespassers. (See McNamara v E.S.B. (supra) and McMahon and Binchy, Irish Law of Torts (1981) at pp. 5, 6 and 251 to 262.)

23. In determining whether a vendor or lessor of premises has discharged the duty imposed on him by section 7, regard must be had to all the circumstances, and as indicated supra a warning in respect of any defect will not absolve from the duty unless the disponer has taken sufficient care to enable the persons concerned to be reasonably safe from personal injury or damage to their property. "What amounts to sufficient care must vary remarkably with the circumstances, the nature of the danger, and the age and knowledge of the person likely to be injured" - per Walsh J. in Purtill v Athlone U.D.C. (supra) at pp. 212-213 (Supreme Court). In the case of a lessor one of the circumstances to be taken into account will be the fact (if it is a fact) that he is obliged or entitled to maintain or repair

the premises - subsection (5).

24. Subsection (6) of section 7 provides that, where a person sells or leases premises in the course of business or where, otherwise than in the course of business,he sells or leases premises within twelve years of their being completed and the purchaser or lessee makes known to the vendor or lessor the purpose for which he wants the premises, there is to be implied in the contract of sale or in the lease a condition that the premises are reasonably fit for that purpose. However, this condition will not be implied where the circumstances are such as to show that the purchaser or lessee does not rely (or that it is unreasonable for him to rely) on the skill or judgment of the vendor or lessor. (As to existing law, cf. decision of Maguire P. in Maguire v Harrison [1941] I.R. 331 and judgment of Henchy J. in Siney (supra); and see paras 28 and 34 infra.)

25. Subsection (7) of section 7 is a transitory provision designed to ensure that the section will not apply in the case of a lease where the tenancy was commenced or the tenancy agreement entered into before the date specified in section 1 for the coming into operation of the proposed Act. In the case of a sale of the premises, the relevant date will be the date the sale was completed or the date the contract of sale was entered into. If the sale or letting is entered into in pursuance of an enforceable option, the section will not apply if the consideration for the sale or lease was fixed before the legislation comes into operation.

Section 8: Date of accrual of cause of action under section 7

25. Section 8 proposes to make specific provision for the date of accrual of the cause of action in the case of personal injuries and also in the case of damage to property arising out

of breach of the duty of care imposed on vendors, lessors et al. by subsections (2) and (3) of section 7. The provisions being proposed correspond with those proposed in section 5 of the Bill as respects the duty imposed on builders by section 3 (duty to build premises properly) to the person who commissioned the building work and to "every person who acquires an estate or interest in the premises". In so far as personal injuries are concerned the date of accrual will be the date on which the action would have accrued if the matter were governed by common law - paragraph (a). The provision in the paragraph is designed to avoid the situation that arose in Cartledge (supra) where the British House of Lords held in a pneumoconiosis case that there was no "knowledge" or "discoverability" test in personal injuries actions. The decision was over-ruled in England by the Limitation Act 1963 (c. 47) (subsequently replaced by the Limitation Act 1975 (c. 54) and now consolidated in section 33 of the Limitation Act 1980 (c. 58)). As to the law in Northern Ireland, in Scotland and in England, see para. 13 et seq. (supra).

26. As has been indicated at para. 13 supra the British House of Lords in Cartledge [1963] 1 All E.R. 341 (a pneumoconiosis case) in deciding that the claims of the injured workers were statute-barred before they could have known that they were injured relied on the fact that the English Limitation Act 1939 was a general Act whereas, in their view, a United States Act (which had been interpreted in a United States Supreme Court decision as implying a "knowledge" or "discoverability" test) was a special Act. However, Lord Reid at the beginning of his speech (p. 343) pointed out that "[i]f this were a matter governed by the common law" he would apply a "discoverability" test. Earlier he said that it appeared to him "to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and therefore before it is possible to raise any action". In the subsequent case of Sparham-Souter

(supra) (an action against a local authority for negligence in approving foundations of a house) the dictum of Lord Reid was followed. (See judgment of Lord Denning, M.R.). Accordingly, for personal injuries cases paragraph (a) of section 8 applies the common law rule as stated in Cartledge and adopted in Sparham-Souter. However, where damage to property is concerned the date of accrual will be the date on which the damage occurred or the date (if later) of the plaintiff's knowledge, whether actual or constructive. (For an Irish case where a plaintiff was held to have lost her cause of action before she discovered the damage to her property, see majority decision in Carroll v Kildare County Council [1950] I.R. 258 (Supreme Court) as to the effect of the Public Authorities Protection Act 1893 (c. 61) (now repealed by the Public Authorities (Judicial Proceedings) Act 1954 (No. 27).) It was pointed out in that case that the wording of the Act (as up to then interpreted in the courts) led to "the absurdity whereby a plaintiff's cause of action might be barred before any cause of action existed"; and it might, of course, also have been barred before the plaintiff discovered it. (See dissenting judgments of Murnaghan J. and Black J.)

Section 9: Duty imposed by this Act to be additional to duty otherwise owed

28. Section 9 proposes to preserve any duty that a person may owe to others apart from the duties imposed by the proposed legislation. Accordingly, the duties of care arising out of the rules in Donoghue v Stevenson and Siney v Dublin Corporation (supra) are being maintained. The latter case did not decide whether the Corporation would be liable either in contract or in negligence if the flat in question had been provided otherwise than under the Housing Act 1966 (No. 21). Mr Justice Henchy stated in the Supreme Court in Siney that "[i]f, however, statutory effect in relation to tenancies is given to the

legislative proposals in this respect set out in the Law Reform Commission's Working Paper No. 1 ...., the decision of this Court on the point is not likely to be called for". He was speaking of liability in contract. Later on, when discussing liability in negligence if the flat had not been provided under the Act, he said: "That broader question will be given a legislative solution if the proposals in the Law Reform Commission's Working Paper No. 1 are given effect to by Parliament". A builder or a housing authority may, of course, be liable both under contract and in negligence. (See Finlay v Murtagh [1979] I.R. 249 referred to by Henchy J. in Siney.)

Section 10: Recovery of contribution under Civil Liability Act 1961 (No. 41)

29. The object of section 10 is to make specific provision in the proposed Act so that a housing authority, for example, will be liable to pay contribution to an occupier where the act, neglect, default or other omission of the authority in carrying out its duty under section 3 has been responsible or partly responsible for the damage suffered by the plaintiff. Section 7 (duty of disponer of premises) does not make the authority a concurrent wrongdoer within the meaning of the Civil Liability Act 1961; and the section does not, in terms, cover the case where an invitee, for example, suffers damage because of a defect in the premises resulting from the negligence of a local authority in carrying out an inspection of those premises when they were being constructed. In other words, the invitee has no cause of action under the Bill against the authority, although the authority may be liable to him at common law under the Donoghue v Stevenson rule. As the disponer of the premises and the local authority are not concurrent wrongdoers (not being both responsible under the Bill to a third person (i.e. the injured person) for the same damage)

subsection (1) of section 10 proposes that, for the purposes of the recovery of contribution, the local authority will be deemed to be a concurrent wrongdoer with the disponer where the latter is sued for a breach of the duty imposed on him by section 7. However, the disponer must show that the damage was caused (in whole or in part) by a breach by the local authority of the duty (to the disponer) imposed on it by section 3. And this is more or less the law as laid down in Hanson v Wearmouth Coal Company Ltd [1939] 3 All E.R. 47. Section 29(8) of the Civil Liability Act 1961 (No. 41) provides that it shall not be a defence to a claim for contribution to show that the injured person has failed in an action against the contributor to which the claimant was not a party. This was intended as a statement of the existing law. (See Explanatory Memorandum to the Civil Liability Bill 1960 (as passed by both Houses of the Oireachtas) para. 13 at top of page 12.)

30. Subsection (2) of section 10 provides for the limitation period where a claim for contribution is brought under subsection (1) of that section. The person who is bound to pay contribution to the defendant in a section 7 case is a concurrent wrongdoer with the defendant only in an artificial sense as he is not liable directly under the Bill to that person. Accordingly, section 31 of the Civil Liability Act 1961 (No. 41) (being confined to a case where the contributor is directly liable to the plaintiff) is not an appropriate provision and a special period of limitation has to be specified. The period being provided under subsection (2) is a period of two years from the date on which the liability of the claimant for contribution (the defendant in the action for damages) is ascertained or a period of two years from the date on which the plaintiff's damages are paid, whichever period last expires.

Section 11: Term of agreement excluding any provision of this Act to be void

31. This section is designed to prevent "contracting out" (in whole or in part) of the duties imposed by section 3 and section 7 of the Bill. Thus a builder or a vendor of premises will not be able lawfully to agree with the person who commissioned the work or with the purchaser of the premises (as the case may be) that any provision in the Bill or any liability arising from any such provision will not apply to the building contract or the contract of sale. In other words, a term (express or implied) in a contract providing, for example, that the duty imposed by section 3 to build the premises properly will not apply as between the builder and the person who commissioned the building work will be void. Section 11 will, of course, apply only as respects the agreement between the builder and the person who commissioned the premises or as respects the contract of sale between the vendor and the purchaser. A person may not in law contract out of a duty of care so far as that duty is owed to persons who are not parties to the agreement or contract: and it is immaterial whether the duty imposed is a statutory duty (such as that set out in section 3 and that set out in section 7) or a common law duty (such as that arising from the rule in Donoghue v Stevenson).

32. Provisions preventing contracting out are to be found in the following enactments:

(1) section 1(3) of the Law Reform (Personal Injuries) Act 1958 (No. 38) - voidance of any provision in a contract of service excluding liability of employer in respect of personal injuries caused to employee by negligence of persons in common employment with the employee;

(2) section 29(2) of the Juries Act 1976 (No. 4) - liability of employer in respect of payment of salary and wages of

a juror;

(3) section 27 of the Family Law (Maintenance of Spouses and Children) Act 1976 (No. 11) - voidance of agreement excluding or limiting operation of any provision of that Act;

(4) section 13 of the Unfair Dismissals Act 1977 (No. 10) - voidance of provision in agreement in so far as it purports to exclude or limit the application of, or is inconsistent with, any provision of the Act;

(5) sections 12(3), 13(9), 18(2), 40(1) and 46(1) of the Sale of Goods and Supply of Services Act 1980 (No. 16) and section 55 of the Sale of Goods Act 1893 (c. 71) (inserted by section 22 of the 1980 Act) - voidance of terms in contracts or agreements exempting from all or any of the provisions of the various sections of the 1980 and 1893 Acts etc.;

(6)- Article 2(4) of the Defective Premises (Northern Ireland) Order 1975 (No. 1039);

(7) section 2(4) of the English Defective Premises Act 1972 (c. 35); and

(8) section 13 of the Prescription and Limitation (Scotland) Act 1973 (c. 25).

The provisions in the Northern Ireland and English legislation are the same as that contained in section 11 of the Bill. The Scottish provision makes null any provision in an agreement purporting to provide that the sections of the Act (6, 7 and 8) dealing with the extinction of the relevant negative prescription shall have no effect. There is, it appears, no authority in Scotland to suggest that it was ever possible to contract out of negative prescriptions.

Section 12: Application of Civil Liability Act 1961 (No. 41)

33. This section has been inserted in the Bill as a codification provision and so as to make the Bill more or less self-contained. It is, in effect, a statement of what appears to be the existing law. By reason of the fact that the obligations imposed by section 3 and section 7 will be statutory duties, breach of them will, in the ordinary way, create a liability in tort, so that the provisions of the Civil Liability Act 1961 (No. 41) (including the provisions of that Act relating to breach of statutory duty) will apply accordingly. The latter provisions are to be found in section 2 (definition of "negligence" as including breach of statutory duty), section 43 (discretion of the court in cases of breach of strict statutory or common law duty without fault) and section 57(2) (abolition of defence of delegation to the plaintiff by the defendant of performance of statutory duty).

GENERAL

34. As has been indicated in connection with section 9 the common law rules in regard to defective premises will continue to exist side by side with the proposed statutory rules. There will, however, be significant differences between the position under the proposed Act and the position at common law. In general, it may be said that the legislative rules will give much more protection to a person who commissions a builder to construct premises as also to a person who purchases a badly built house. Not alone will the builder be liable; but the developer and the housing authority will be liable as well. Where the authority fails to inspect or negligently inspects (where it has a power, right or duty to inspect) it will be liable in respect of any defects in the premises that a proper

inspection would have shown. Whether at common law there is implied in every sale or letting of premises a condition as to habitability or as to suitability for the purposes for which they were intended has not so far been determined by the Supreme Court. Neither has it fallen to the Court to decide whether there is a liability in negligence as respects defects in premises not provided under a Housing Act. (See judgment of Henchy J. in Siney (supra).)

35. Sections 5 and 8 of the Bill provide for the date of accrual of the cause of action for breach of the statutory duties imposed by sections 3 and 7 whereas, in the case of an ordinary common law action for negligence, no specific date is provided for in the Statute of Limitations 1957 (No. 6) - the matter being left to the common law. Moreover, in England the conclusion to be drawn (as to the date of accrual of the cause of action) from the recent cases involving damage to property (e.g. Sparham-Souter and Anns (supra)) is by no means free from doubt. In personal injuries cases, on the other hand, there are specific provisions in the statute law in Northern Ireland, in England and in Scotland that introduce a "knowledge" or "discoverability" test and that, in addition, give the court a discretionary power to override the statutory time-limits. However, these provisions have come in for some very strong adverse criticism. (See, for example, Lord Reid's speech in Central Asbestos Co Ltd v Dodd [1972] 2 All E.R. 1135, at p. 1137, Memorandum No. 45 (April 1980) of the Scottish Law Reform Commission, and chapter 5 of Professor David M. Walker's The Law of Prescription and Limitation of Actions in Scotland (3rd ed., 1981).)

36. Where personal injury or damage to property arises from breach of contract, the cause of action accrues on the date of the breach and time begins to run from that date - and this is the law here, in Northern Ireland and in England. In Scotland,

however, time begins to run in the case of a claim for damages for breach of contract only when the creditor or pursuer (the plaintiff) had actual or constructive knowledge of the damage. (See paras 13 to 17 supra as to the effect of sections 6, 7, 11, 17, 18 and 19 of the Prescription and Limitation (Scotland) Act 1973 (c. 25).)

37. It should be noted that, under section 3 of the proposed legislation, liability will arise if the premises are unfit for habitation (in the case of a dwelling) or unfit for the purpose for which they were intended (in the case of premises other than a dwelling). Liability at common law may depend on whether the premises are safe - the test in the Donoghue v Stevenson rule - and also on whether they are provided by a local authority under a Housing Act or provided independently. The Supreme Court has not so far decided whether there still is what Chief Justice O'Higgins referred to in Siney (supra) as a logical basis to justify the general immunity accorded to all vendors and all lessors in relation to defects in premises sold or let. (See further on this question the Chief Justice's comments in that case as respects the observations of Lord MacDermott L.C.J. in Gallagher v N. McDowell Ltd [1961] N.I. 26, 38, and as respects recent judgments of the Supreme Court (Purtill and McNamara (supra)) on the application of the Donoghue v Stevenson rule in cases of defects or dangers on land.)

38. The proposed Act applies only in respect of premises provided for, built, sold or let after its commencement - sections 2(3) and 7(7). On the other hand, the common law rules are, of course, retrospective, and they are not being amended or overridden. The position is the same in England and in Northern Ireland, although there are differences in the statutory provisions in each jurisdiction. (As to the differences between the English Defective Premises Act 1972 (c. 35) and the Defective Premises (Northern Ireland) Order

1975 (No. 1039), see John C.W. Wylie's Irish Land Law (1975) and his Irish Conveyancing Law (1978). As to the differences between the English judicial rules and the English legislative rules, see judgment of Lord Denning M.R. in Sparham-Souter (supra, at p. 70) and Tony Weir's A Casebook on Tort (4th ed., 1979) at p. 30.

39. It should be noted that, except in so far as concerns (1) the condition to be implied in a contract of sale etc. as to fitness of premises for the purposes for which they are intended - section 7(6) and (2) the prohibition of contracting out provided for in section 11, the Bill does not deal with liability in contract. For instance, there is no provision specifying the date on which a cause of action for breach of contract accrues where defective premises are concerned. Liability under the Bill will in the main be a liability in tort arising from breach of the statutory obligations imposed by section 3 (duty to build premises properly) and section 7 (duty of disponer of premises). As to breach of statutory duty see section 2 (definition of negligence), section 43 (application to breaches of strict duty) and section 57(2) (abolition of defences) of the Civil Liability Act 1961 (No. 41) - referred to supra at para. 33. See also judgment of Mr Justice Walsh (expressing the majority opinion) in Doherty v Bowaters Irish Wallboard Mills Ltd [1968] I.R. 277, at p. 280 et seq., and Glanville Williams and B.A. Hepple, Foundations of the Law of Tort (1976) p. 97 et seq.

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