

## THE LAW REFORM COMMISSION

THE LAW RELATING TO THE LIABILITY OF BUILDERS,  
VENDORS AND LESSORS FOR THE QUALITY AND FITNESS  
OF PREMISES

## CHAPTER I PRESENT LAW IN IRELAND

1. If one is to undertake a study of the law relating to the liability of builders, vendors and lessors for defects in their premises, one necessarily comes into contact with principles of contract and principles of tort. It is rightly pointed out by the Law Reform Commission in England, (Law Com. No. 40) therefore, that "defective premises" in this context may have two different meanings. "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."<sup>1</sup> The distinction is a valuable one and is adopted in this Report.

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<sup>1</sup> Civil Liability of Vendors and Lessors for Defective Premises (Law Com. No. 40, para. 2).

2. The object of the Report is merely to determine what shortcomings, if any, appear in the principles, and to provide a basis for discussion for reform. Accordingly, references and citations are kept to a minimum.

3. The Report will deal successively with the position of the Vendor, the Lessor and the Builder in our law, and will examine the liability of each in contract and in tort.

A. The Vendor of Real Property

(i) Contract.

4. The vendor of real property is under no duty to the purchaser to see that the premises are free from defects of quality. This is one area where the full chill of Caveat Emptor still prevails. Apart from express contractual terms to the contrary the purchaser must look out for himself. Moreover, there are no statutory implied terms, in the case of a conveyance, analogous to those implied in the case of the sale of goods by §§12-15 of the Sale of Goods Act, 1893. In the sale of real property the purchaser is presumed to have examined the property and to have taken it with knowledge of all its defects. Furthermore, the vendor is further protected by the rule of evidence which limits proof as to the terms of the contract to the written document itself. In the present context, it is well to note that this is the rule even when the real property sold supports a completed building: in the absence of a warranty (express, or implied from the conduct of the parties), the vendor is under no duty to see that the house is sound and fit for human habitation.<sup>2</sup> Moreover, when such a warranty does

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<sup>2</sup> McGowan v. Harrison [1941] I.R. 331. This case followed Otto v. Bolton and Norris [1936] 2 K.B. 46.

exist, it is clear that third parties cannot avail themselves of the warranty made by the vendor to the purchaser. The purchaser can always challenge the contract on the grounds of fraud, of course, and may also claim that he was injured by a negligent misrepresentation. Short of these, however, not always easily proved, the purchaser is without remedy.<sup>3</sup>

5. The Courts may, of course, in the appropriate circumstances imply warranties in relation to the building, but will not do so automatically. A lot will undoubtedly depend on the intentions and the conduct of the parties.<sup>4</sup> There may, however, be a tendency for the courts, in the case of building contracts at any rate, to do so nowadays. In the most recent edition of Salmond on Torts the matter is put in the following way:

"The courts began to favour the purchaser. It was therefore held that in every building contract there was to be implied (in the absence of express words to the contrary) a threefold undertaking by the builder: (i) that he will do his work in good and workmanlike manner; (ii) that he will supply good and proper materials, and (iii) that the house will be reasonably fit for human habitation."<sup>5</sup>

6. One exception to this general rule that there are no implied terms in the case of the sale of real property arises in the case of a vendor-builder who sells an uncompleted

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<sup>3</sup> Ibid. See also In re Flynn and Newman's Contract [1948] I.R. 104.

<sup>4</sup> See Davitt P., in Browne v. Norton [1954] I.R. 34. See also Doyle v Youll 72 I.L.T.R. 253.

<sup>5</sup> At p. 300, 16th ed., footnotes citing Billyack v. Leyland Construction Co. Ltd. [1968] 1 W.L.R. 471 and Lynch v. Thorne [1956] 1 W.L.R. 303 omitted.

house. In Brown v. Norton, Davitt, P., sketches the limits of this exception: "... where there is an agreement to purchase a house in the course of erection, and it is clearly understood by the parties that what the purchaser is contracting to buy and the vendor contracting to sell is a dwellinghouse in which the purchaser can live as soon as it is completed by the vendor, the Court may hold, in the absence of any circumstances negating such an implication, that the vendor impliedly agrees (1) that he will complete the building of the house; (2) that as regards what has already been done at the date of the agreement the quality of the work and materials *is* such, and as regards what then remains to be done the quality *will be* such, that the house when completed will be reasonably fit for immediate occupation as a residence; and (3) that as regards what then remains to be done the work will be carried out in a good and workmanlike manner and with sound and suitable materials".<sup>6</sup> The question whether a house is a "completed house" or one in "the course of erection" is a question of fact.<sup>7</sup>

(ii) Tort.

7. The general rule of Negligence that a person has a duty to take care that his actions do not injure his 'neighbour' appears to have no application in the case of the vendor of real property. The liability of the vendor of real property for dangerous defects seems to represent "a rock which has escaped the flood tide of liability

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<sup>6</sup> [1954] I.R. 34 at 56. Followed most recently in Northern Ireland in McGreary v. Campbell and Dungannon District Council, Q.B. Div., (Lowry L.C.J.). Unreported as yet, 20 May 1974. Noted 26 N. Ir.L.Q. 31. See also Doyle v. Youll, 72 I.L.T.R. 253.

<sup>7</sup> Browne v. Norton [1954] I.R. 35 at 56.

released by Donoghue v. Stevenson".<sup>8</sup> Earlier beliefs that this immunity was not confined to the vendors (and lessors) of real property but extended to all activities on land would appear to be no longer supported in England in view of recent decisions there which seem to move in harmony with general tort trends in this area.<sup>9</sup> Accordingly, it appears clear that nowadays the builder does not as such inherit the immunity of the vendor. Although such restrictive interpretation of the scope of the rule, which limits the immunity to vendors (and lessors) of real property only, has not been considered by the Irish Courts, it has been adopted in the Northern Ireland case of Gallagher v. N McDowell, Ltd.<sup>10</sup> In this case a dwelling house was erected by the defendants, a firm of building contractors, for the Northern Ireland Housing Trust. It was inspected by the Housing Trust's architect, and the plaintiff's husband was the first tenant. The plaintiff was injured shortly afterwards, when the heel of her shoe went through a floor board. The floor board, when being laid, had a defect which was improperly repaired by the insertion of a plug of wood which gave way under the plaintiff's heel. The Court of Appeal held, reversing the trial judge, that the defendants were under a duty to the plaintiff, as a lawful user of the house they had constructed, to take reasonable care in the repair of the hole in the defective floor board. Lord McDermott L.C.J., having examined all the authorities, held that while the immunities of vendors and lessors were well established,

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<sup>8</sup> Salmond on Torts, 15th ed., at 378.

<sup>9</sup> See Lord Denning's judgment in Miller v. South of Scotland Electricity Board 1958 S.C. (H.L.) 20, especially at p. 37; Clay v. A.J. Crump and Sons Ltd., [1964] 1 Q.B. 533; Sharpe v. E.T. Sweeting and Son Ltd., [1963] 1 W.L.R. 665.

<sup>10</sup> [1961] N.I. 26.

they must be confined to vendors and lessors: others could be liable for defects in realty. And the suggestion that Donoghue v. Stevenson never applied to realty was a proposition with which he could not agree. At p. 38 of the Report he says

"In my opinion, the cases since Donoghue v. Stevenson show that the land-owner's immunities, which I have described as settled before that decision, have not been disturbed by it. But the fact that these immunities arise in relation to defects and dangers on land does not mean that the law imposes no neighbourly duty of reasonable care as respects defects and dangers of that kind. The immunities attach to land-owners as such, and I do not think one is at liberty to jump from that to saying that the law of negligence in relation to what is dangerous draws a clear distinction between what are chattels and what, by attachment or otherwise, form part of the realty. Why should it? Such a distinction does not justify itself, and it is not required by the immunities I have mentioned when one is not dealing with land-owners as such."

8. One may conclude, therefore, from cases like Brown v. Norton<sup>11</sup> and Gallagher v. McDowell<sup>12</sup> that although caveat emptor still applies to the purchaser of real property and although the general principles of Negligence established in Donoghue v. Stevenson seem not to affect

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<sup>11</sup> Supra. It should be noted that Donoghue v. Stevenson was not cited or argued in Brown v Norton.

<sup>12</sup> [1961] N.I. 26.

the immunity conferred on the vendors of real property, the tendency is, in recent case law to construe this exceptional immunity in a restrictive fashion.

B. Lessor of Real Property

(i) Contract

9. The landlord in making a lease is under no general obligation to ensure that the premises are suitable or fit for habitation. In this the tenant is in much the same position as the purchaser of real property: caveat emptor (or more properly in this case, caveat lessee) applies and he must look out for himself. Moreover, the law will not normally inject into the lease implied terms in favour of the tenant relating to the quality of the premises. Unless there is an express provision in the lease, therefore, the tenant (and *a fortiori* any of the tenant's family) cannot recover for injury or damage caused by defects in the premises.<sup>13</sup>

10. There are, however, some instances where terms are implied into certain leases, either by the court or by statute, and these may be considered as exceptions to the general rule stated above. These exceptions relate to the following cases:

- (a) Where the lessor sells by way of a lease a house in the course of construction certain implied terms may be inserted into the lease by the Court relating to (i) the completion of the building, (ii) the

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<sup>13</sup> Chambers v. Lord Mayor etc of Cork, 93 I.L.T.R. 45; Deale, The Law of Landlord and Tenant in the Republic of Ireland, p. 214. See also Davitt P. in Brown v. Norton [1954] I.R. 34, at 44-45.

materials already used and to be used in the completion of the building and (iii) the quality of the workmanship to be used in the completion of the structure.<sup>14</sup> This exception is also recognised in the case of vendors of real property and is more fully referred to above at A(i).

- (b) In a lease for furnished premises to be used for residential occupation, the landlord impliedly covenants that the premises are fit for such occupation at the commencement of the tenancy.<sup>15</sup>
- (c) Various statutory provisions also impose repairing obligations on the lessor and these can be mentioned briefly at this juncture. Under the Housing (Miscellaneous Provisions) Act, 1931 (Sec. 31(1)) and the Housing Act, 1966 (Sec. 114) certain lettings of small houses carry an implied condition that the house is at the commencement, and will be maintained by the landlord during the tenancy, in all respects reasonably fit for human habitation.<sup>16</sup> A similar covenant was implied by Section 75 of the Housing of the Working Classes Act, 1890, for houses to which

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<sup>14</sup> Brown v. Norton /1954/ I.R. 34. Perry v. Sharon Development Co. Ltd. /1937/ 4 All E.R. 390. Law Com. No. 40, para. 13, supra fn. 1.

<sup>15</sup> See Davitt P. in Brown v. Norton /1954/ I.R. 34 at 45 where he cites with approval the English cases Collins v. Hopkins /1923/ 2 K.B. 617 and Wilson v. Finch Hatton (1877) 2 E.D. 336; Deale, The Law of Landlord and Tenant in The Republic of Ireland, p. 214-215. Cf. an unfurnished house, Murray v. Lace (1872) I.R. 8 C.L. 396; Beaver v. McFarlane /1932/ L.J.Ir. 128.

<sup>16</sup> See Deale, op. cit., 216-217. McGowan v. Harrison /1941/ I.R. 331; O'Neill v. Cork Corp. /1947/ I.R. 103; Conway v. Smith /1950/ Ir. Jur. Rep. 3. See also Wylie, Irish Land Law, pp. 750-751.



that Act applied. Although this Act is now repealed it still has relevance for lettings made up to 12th July 1966.<sup>17</sup> Such statutory implied terms apply notwithstanding any stipulation to the contrary.

The landlord of a controlled dwelling, for the purposes of Sections 10(2)(b), 14, 15 and 40 of the Rent Restrictions Act, 1960, is deemed to be responsible for any repairs for which the tenant is not under any liability, whether expressed in the contract, or implied under Section 42 of Deasy's Act.<sup>18</sup> Where the landlord is in default of this obligation the Court may order him to pay to the tenant such sum as will enable the tenant to put the premises into good and tenantable repair.<sup>19</sup>

Houses which in the opinion of a housing authority are unfit for human habitation can be made the subject of a repairs notice under the Housing Act, 1966, Sec. 66, which will then oblige the owner of such houses to make such repairs on the houses as are necessary to make them fit for habitation. Moreover, where a housing authority itself proposes to make a sale or letting of a dwelling under Section 90 of the Housing Act, 1966, it shall, where necessary, carry out such works as shall be necessary to put the dwelling into good structural condition.<sup>20</sup>

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<sup>17</sup> Sec. 121(1)(b) of the Housing Act, 1966.

<sup>18</sup> Sec. 39 of the Rent Restrictions Act, 1960.

<sup>19</sup> Sec. 40(1) of the Rent Restrictions Act, 1960.

<sup>20</sup> Sec. 106 of Housing Act, 1966.

In cottier tenancies, as defined in Section 81 of the Landlord and Tenant Law Amendment Act, Ireland, 1860, hereinafter referred to as Deasy's Act, 1860, the landlord is bound to keep and maintain the dwelling in a "tenantable condition and repair".<sup>21</sup>

Sanitary authorities are empowered by legislation<sup>22</sup> to require the owner or occupier of a house to carry out necessary works which promote health and hygienic objectives in relation to water closets, ashpits, drainage, etc. Similar powers are provided in relation to factories in the Factories Act, 1955, and in relation to offices in the Offices and Premises Act, 1958. Again, under Section 144 of the Public Health Act, 1878, knowingly to let a house or part of one in which any person has been suffering from a dangerous infectious disease without disinfecting the house and contents to the satisfaction of a medical practitioner is made an offence.

#### Tenant's Obligation to Repair

11. For the purpose of the present Report the tenant's obligation under the lease need only be discussed in the context of his obligation to repair and a further word on this would not be inappropriate. Apart from express contract, and apart from statutory provisions, the common law in general imposes no obligation on either the landlord or the tenant to execute repairs on the demised premises. This uncertainty is unfair to both parties and a good deal of disputes are caused because of the uncertainty. Even where contractual provision is made, disputes frequently arise because the obligations are obscurely phrased or are badly drafted.

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<sup>21</sup> Sec. 83 of Deasy's Act, 1860.

<sup>22</sup> Public Health (Ir.) Act, 1878, and amendments, and Local Government (Sanitary Services) Act, 1948.

12. From the tenant's point of view, therefore, unless there is a specific contractual agreement or a statutory obligation he is under no obligation to repair.<sup>23</sup> This general rule, however, is subject to two qualifications at common law. First, it was held that there was a duty on every tenant to use the premises in a "tenant-like manner", and secondly, a tenant for a term of years or from year to year was under an additional "implied obligation, which has never been satisfactorily defined, but has been said to include the duty to keep the premises wind and water tight, fair wear and tear excepted."<sup>24</sup> The vagueness of these obligations, however, does little to provide the legal security or certainty that is desirable in this area of the law. When an express term is used the phrase most frequently resorted to requires the tenant to keep the premises "in good and tenantable repair". Because of its vagueness, however, this phrase has also caused some uncertainty and has been subjected to a good deal of judicial examination.<sup>25</sup>

13. One of the more important statutory provisions in relation to the tenant's obligation to repair occurs in Section 42 of Deasy's Act, 1860. This Section reads:

"Section 42. Every lease of lands or tenements made after the commencement of this Act shall (unless otherwise expressly provided by such lease) imply the following agreements on the part of the tenant for the time being, his heirs, executors, administrators, and assigns, with the landlord thereof; i.e.,

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<sup>23</sup> The tenant's liability for waste, having little relevance for the present study, is not dealt with in this Report.

<sup>24</sup> Law Com. 67, para. 111. Footnote citing Warren v. Keen [1954] 1 Q.B. 15 omitted.

<sup>25</sup> See Deale, *The Law of Landlord and Tenant in The Republic of Ireland*, 223-226.

- (1) that the tenant shall pay, when due, the rent reserved and all taxes and impositions payable by the tenant, and shall keep the premises in good and substantial repair and condition:
- (2) that the tenant shall give peaceable possession of the demised premises, in good and substantial repair and condition, on the termination of the lease (accidents by fire without tenant's default excepted), subject, however, to any right of removal (or of compensation for improvements) that may have lawfully arisen in respect of them, and to any right of surrender in case of the destruction of the subject matter of the lease as hereinbefore mentioned."

This obligation does not apply in cases of controlled dwellings under the Rent Restrictions (Amendment) Act, 1967.<sup>26</sup> The section does not affect oral contracts or leases made before 1861, and any express covenant, even of a limited nature, will exclude the implied covenant.<sup>27</sup>

14. There are other statutory provisions of less importance which may impose obligations in relation to the repair of premises on the tenant also, and which can be briefly referred to. A tenant seeking a new tenancy under the Landlord and Tenant Act, 1931 (Sec. 29(h)) or applying for a reversionary lease under the Landlord and Tenant (Reversionary Leases) Act, 1958, may be obliged to execute a specified sum on repairs before the new lease or the reversionary lease will be granted. Furthermore, the tenant as occupier may be obliged to carry out certain repairs for public health reasons under the Public Health (Ireland) Act, 1878, and under the Local Government (Sanitary Services) Act, 1948.

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<sup>26</sup> Sec. 11(8).

<sup>27</sup> Cowan v. Factor [1948] I.R. 128 and 83 L.L.T.R. 99.

15. Finally, however, it is important to note that apart from the repairing obligations mentioned above, the lessor does not normally warrant that the premises are suitable or fit for habitation. Moreover, where there is a breach of a repairing covenant by the landlord, the tenant is usually the only person who can avail himself of such a breach, although if there is a breach of a statutory obligation to repair it seems that a person injured because of such a breach might have an action for breach of statutory duty provided he was one of the class for whose benefit the Act was passed and provided the evil was the kind contemplated by the statute.

(ii) Tort

16. The position of the lessor with regard to liability for dangerous defects in premises let is similar to the position of the vendor of real property: he is not liable under ordinary negligence principles. In Robbins v. Jones<sup>28</sup>, Erle C.J. stated the rule as follows: "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."<sup>29</sup>

17. Lord Atkinson in Cavalier v. Pope<sup>30</sup> put the rule in the following language: "... 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

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<sup>28</sup> (1863) 15 C.B. (N.S.) 221.

<sup>29</sup> Id., at 239.

<sup>30</sup> [1906] A.C. 428.

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".<sup>31</sup>

18. In both of these cases, it is true, the defects in the premises were caused by inactivity on the part of the landlord, but any doubt that the immunity was confined to negligent omissions was dispelled in Bottomley v. Bannister,<sup>32</sup> where on the assumption that the vendor of a newly built house had negligently installed a gas boiler which caused the deaths of the purchaser and his wife, Scrutton L.J. in giving a judgment for the defendants said: "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."<sup>33</sup>

19. That these decisions and the immunities they conferred on vendors and landlords survived the purge of Donoghue v. Stevenson in England was amply attested to in cases such as Otto v. Bolton and Norris,<sup>34</sup> Davis v. Foots<sup>35</sup>

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<sup>31</sup> Id., at p. 432. Some of the worst aspects of this rule were abolished in England by the Occupiers' Liability Act, 1957, Sec. 4(4). This section was in turn repealed and replaced by wider provisions in the Defective Premises Act, 1972, Sec. 6 and Sec. 4.

<sup>32</sup> [1932] 1 K.B. 458.

<sup>33</sup> Id., at p. 468.

<sup>34</sup> [1936] 2 K.B. 46. Followed in McGowan v. Harrison [1941] 1 R. 331.

<sup>35</sup> [1940] 1 K.B. 116.

and Travers v. Gloucester Corporation,<sup>36</sup> and in Ireland, in Chambers v. Lord Mayor, Alderman and Burgesses of Cork.<sup>37</sup>

20. The immunity of the lessor, in these circumstances, has not gone without criticism, however. The Law Commission in England in its Report entitled Civil Liability of Vendors and Lessors for Defective Premises (Law Com. No. 40) suggests that it is difficult to justify in theory or in principle the decision in Otto v. Bolton & Norris<sup>38</sup> in view of "the true scope of the principles in Donoghue v. Stevenson as they are now understood". It suggests that an argument before the House of Lords to that effect might have "some chance of success", but that the landlord's immunity is unlikely to be abolished at a lower point in the judicial hierarchy.<sup>39</sup>

21. Judicial trends in Ireland, in so far as they may be gleaned from cases like Purtill v. Athlone U.D.C.<sup>40</sup> and McNamara v. E.S.B.<sup>41</sup> would also seem to suggest that an attempt to upset these immunities in Ireland would have a greater chance of success. It is unlikely now, however, that the reversal of such well established immunities would be effected at a level lower than the Supreme Court.

22. Some limitations on the landlord's immunity have been developed at common law, however, and they require brief attention.

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<sup>36</sup> [1947] K.B. 71.

<sup>37</sup> (1959) 93 I.L.T.R. 45. See also Beaver v. McFarlane [1932] L.J.Ir. 128.

<sup>38</sup> [1936] 2 K.B. 46.

<sup>39</sup> See para. 44, Law Com. No. 40.

<sup>40</sup> [1968] I.R. 205.

<sup>41</sup> [1975] I.R. 1.

- (a) Activity duty (or liability for current operations).  
(Defects created after demise.)

23. The immunity conferred on a landlord for injuries caused by defects in the premises does not extend to injuries caused by the activities or current operations of a landlord on the premises after the letting has been created. In such a case the principles covering the case are the ordinary principles of Negligence enunciated in Donoghue v. Stevenson.<sup>42</sup> Moreover, the immunity conferred on the landlord must be considered personal in the sense that builders or contractors employed by him are liable for their negligence. The landlord's immunity does not extend to their acts.<sup>43</sup>

- (b) Liability as Occupier of buildings. (Occupier's Liability).

24. Under the heading of Occupier's Liability, the occupier may be liable for injuries caused by defects on the premises if he has sufficient control over the premises. The principles applicable here relating to the liability of owners not in possession have been set

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<sup>42</sup> Salmond on Torts, 16th ed., 300-301; McMahon, Occupier's Liability in Ireland: Survey and Proposals for Reform in Prl. 4403, at pp. 10-11. But see Beaver v. McFarlane /1932/ L.J.Ir. 128. This last case must be considered suspect now, although it can be argued that the plaintiff failed in that case because of contributory negligence.

<sup>43</sup> Gallagher v. McDowell (supra); A.C. Billings & Son v. Rider /1958/ A.C. 240; Sharpe v. E.T. Sweeting & Son, Ltd., /1953/ L.W.L.R. 665; 2 All E.R. 455; See also Spencer /1971/ C.L.J. 54.



out in McMahon, Occupier's Liability in Ireland: Survey and Proposals for Reform.<sup>44</sup> The relevant passages are quoted here:

"As well as the occupier, however, the owner may also be liable, on the grounds that, although not in possession, he has sufficient control to attract liability, and in this connection it may be noted that there is a certain tendency, at least on the part of the Irish Courts, to hold that the owner, as well as the occupier, is liable in this situation. In considering the position of the owner not in possession, it is necessary, at the outset, to determine whether the owner has given a tenancy of the premises or not.

If the owner has merely given the occupier a right to use the premises (a licence) without giving him exclusive possession (as in a tenancy) it seems that the owner will be liable, especially if he has retained some degree of control, provided, of course, that the other conditions are fulfilled. And it matters not whether the injury occurred in the rooms hired or on passages through which access was permitted. So in *Boylan v. Dublin Corporation* the plaintiff was injured while using a passage into rooms hired for an afternoon by a charitable organisation from the defendant corporation. The Supreme Court held that the plaintiff was an invitee of the corporation and since the danger was unusual and there was evidence upon which the jury could have found that the defendants ought to have known of it, a new trial was ordered.

If, however, there is a contract of tenancy, a further question requires to be asked, in the absence of express provisions in the contract or of provisions implied by law (e.g. Deasy's Act or the Rent Restrictions Acts), namely, did the injury occur on the demised premises or on a passage, staircase, etc., retained by the owner?

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<sup>44</sup> Incorporated in Report of Advisory Committee on Law Reform: Reform of Occupier's Liability in Ireland, Prl. 4403. With regard to the liability of hotel proprietors see Hotel Proprietors Act, 1963.

## (i) Injury on Demised Premises:

Apart from express or implied contract the landlord is not liable to either the tenant or to third parties for such injuries, for "fraud apart, there is no law against letting a tumbledown house; and the tenant's remedy is upon his contract, if any". Moreover, it is clear that if the landlord has made a covenant to repair in the lease this cannot be availed of by third parties such as the tenant's wife, family or guests injured on the premises. Such third parties cannot claim the benefit of such a covenant since there is no privity between themselves and the landlord. The landlord may, however, be liable to outsiders in nuisance.

## (ii) Injury on Passage or Staircase, etc., retained by the Landlord-owner:

In this case the nature of the letting becomes irrelevant. The only question to be asked here is: was the injured person an invitee or a licensee of the landlord, or a trespasser? Once the injured person has been properly categorised, the landlord will be held to the appropriate standard due to such an entrant. So in Geraghty v. Montgomery, the wife of a tenant was held to be an invitee of the landlord while using a lavatory retained by the landlord and she benefited accordingly from the high standard due to such an entrant. Moreover, a delivery-man using such a passage-way may be at one and the same time an invitee of the tenant and a licensee of the landlord."<sup>45</sup>

25. The effect of the Supreme Court's decision in McNamara v. E.S.B.<sup>46</sup> on these principles need not be examined in detail at this juncture. Suffice it to say that if the holding in that case may be summarised as having imposed on the occupier a duty to take reasonable

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<sup>45</sup> Id., pp. 9-10. Footnotes omitted. See also Conway v. Davin (1935) 69 I.L.T.R. 33; Poole v. Siev (1942) 76 I.L.T.R. 191.

<sup>46</sup> [1975] I.R. 1.

care in respect of foreseeable trespassers the landlord who retains sufficient control to be regarded as an occupier will be held to this new standard also. Furthermore, it would seem, if this is the principle in *McNamara*, that the standard of reasonable care must now also supersede the common law standards in this matter in relation to lawful entrants e.g. invitees and licensees.<sup>47</sup>

26. Apart from injuries occurring on the demised premises and injuries occurring on common passages retained by the landlord, a third factual possibility also arises: where an injury is caused to a tenant or his guest while on the demised premises because of a defect in the condition of the premises retained by the landlord. If, for example, overhanging trees on property retained by the landlord cause damage to persons or property on the tenant's property, is the landlord liable? Or does the tenant, and any other claiming through him, take the property as it was demised? The earlier authorities suggest that no action lay against the landlord in these circumstances.<sup>48</sup> Salmond, however, suggests that "the principle laid down in these cases is confined to situations where the danger existed and was apparent at the date of the demise".<sup>49</sup> If the danger is created by the landlord after the demise, it seems that ordinary Negligence principles should apply.<sup>50</sup>

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<sup>47</sup> See *McMahon*, 91 L.Q. Rev. 323-329.

<sup>48</sup> *Cheater v. Cater* [1918] 1 K.B. 247; *Shirvell v. Hackwood Estates Ltd.*, [1938] 2 K.B. 577.

<sup>49</sup> Salmond on Torts, 16th ed., 299.

<sup>50</sup> *Ibid.*

27. Nevertheless, to accept a demised premises with such an inconvenience as an overhanging projection does not mean that the tenant or other person injured on the demised property by such a danger is in Ireland without remedy nowadays. In Victor Weston (Eire) Ltd. v. Kenny,<sup>51</sup> Davitt P. held that the owner of premises is "under a legal obligation to take reasonable care to prevent any part of the premises which he retained from becoming a source of danger or damage to the adjoining occupiers, his tenants, and so to prevent water from escaping from his top lavatory and doing damage /to tenants lower down7".<sup>52</sup> He held that the owner was negligent for not examining and remedying defects in a toilet wash basin which remained in his control and which overflowed damaging the plaintiff tenant's stock. This straight Negligence approach was favoured by the same judge in a similar case six years later: Scully v. Marjorie Boland Ltd., & Another.<sup>53</sup> Although there are some English authorities which favour a similar approach in the English Courts the matter is by no means settled there.<sup>54</sup>

(c) Liability in Nuisance

28. Liability in Nuisance may arise if the landlord has created a condition or authorises a usage of the demised property which necessarily involves a wrongful interference with another occupier's enjoyment of his property,<sup>55</sup> or, where a public nuisance is involved, if

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<sup>51</sup> [1954] I.R. 191.

<sup>52</sup> Id., at 198.

<sup>53</sup> Reported [1962] I.R. 58.

<sup>54</sup> See Salmond on Torts, 16th ed., 299 and authorities cited therein.

<sup>55</sup> Goldfarb v. Williams & Co. [1945] I.R. 433.

injury over and above that caused to the public generally is suffered by the complainant. Moreover, the landlord will be liable in Nuisance where he lets premises with a nuisance on them even if, at the time of the letting, he had no actual knowledge of the facts constituting the Nuisance, provided the Court is satisfied that he ought to have known such facts.<sup>56</sup> The landlord's liability under the heading of Nuisance has been extended in recent years in England, and it may now be said, as a starting point, that where injury is caused to a person not on the premises let, in England the landlord will be liable if he had a repairing obligation to the tenant and the defect in question arose from a breach of this obligation.<sup>57</sup> This has been extended to cases where the landlord has no obligation to repair but has a right to do so in respect of the relevant defects and where he knew of the defect;<sup>58</sup> and in Wringe v. Cohen<sup>59</sup> the principle was extended further when it was held that the landlord was liable in a similar situation even though he had no knowledge of the defect and was not negligent in not knowing it. In Mint v. Good<sup>60</sup> a landlord of property let on a weekly tenancy was held liable to a person on a public footpath who was injured when a wall collapsed, even though there was neither an obligation on him to repair nor any express right to enter and do repairs. The Court implied a right for the landlord to

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<sup>56</sup> St. Anne's Well Brewery Co. v. Roberts (1928) 140 L.T. 1; Salmond on Torts, 16th ed., 70.

<sup>57</sup> Payne v. Rogers (1794) 2 H.Bl. 350; Nelson v. Liverpool Brewery (1877) 2 C.P.D. 311.

<sup>58</sup> Wilchick v. Marks and Silverstone [1934] 2 K.B. 56.

<sup>59</sup> [1940] 1 K.B. 229 (C.A.).

<sup>60</sup> [1951] 1 K.B. 517 (C.A.).

enter in such a short tenancy and since a proper examination of the wall would have revealed the defect, the landlord was held liable. Moreover, the liability, it seems, continues even if the tenant has covenanted to repair in the lease.<sup>61</sup>

29. The liability of landlords in Nuisance for injuries caused by defective premises to persons off the premises is a personal one and seemingly is now less determined by the contract between the landlord and the tenant than was formerly the case. The modern criterion of liability as stated by Sachs L.J. in Brew Bros. Ltd. v. Snax (Ross) Ltd.<sup>62</sup> seems to be as follows:

"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."<sup>63</sup>

30. By way of summary, therefore, the tortious liability of the landlord at common law may be said to be as follows: the basic rule is that a landlord is not liable in Negligence for letting a tumbledown house. There has been criticism of this immunity in recent years and it has been suggested that the immunity might not withstand a

<sup>61</sup> Brew Bros. Ltd. v. Snax (Ross) Ltd., [1970] 1 Q.B. 612.

<sup>62</sup> [1970] 1 Q.B. 612. See also Farrell v. Burk and Cuffe (Cir. Ct.) 87 I.L.T.R. 70.

<sup>63</sup> Id., at p. 638-639. See also Grey v. Siev and O'Sullivan (Cir. Ct.) 83 I.L.T.R. 67.

challenge in the Supreme Court. Apart from this possibility, however, the landlord might become liable in tort (i) in Negligence for current operations or dangers created by him after the demise, (ii) as occupier, by virtue of his control over the premises or (iii) under the general heading of Nuisance.

#### C. The Builder

##### (i) Contract

31. When a builder sells or leases a building he becomes a vendor or a lessor and his liability in contract is that of a vendor or lessor (supra A(i) and B(i)). Briefly, this means that apart from express provisions he makes no warranty as to the quality or the fitness for purpose of the building. Apart from those cases where the Court will sometimes imply a term that the premises are fit for human habitation in the case of certain leases (supra B(i)), there is only one exception to this rule: where the builder sells or contracts to lease an uncompleted house in the course of completion. In this case the Court will imply terms in relation to the quality of the work and materials, the quality of workmanship and, when completed, the reasonable fitness for immediate occupation as a residence. The relevant passage has been quoted fully above at A(i) and need not be repeated here.<sup>64</sup>

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<sup>64</sup> [1954] I.R. 34 at 56.

(ii) Tort

32. The immunity from tortious liability conferred by the law on vendors and lessors does not extend to builders as such. If a builder negligently constructs a building which causes damage to another person he will be liable for that injury on ordinary Donoghue v. Stevenson principles.<sup>65</sup> It is only if he sells or leases the building that he inherits the immunity which the common law bestows on vendors and lessors in this matter. This immunity conferred on vendors and lessors has been criticised in the English Court of Appeal recently, however, and it might be said that even this immunity may not now be safe from the "devouring cormorant" of Negligence (see supra B(ii)). If the immunity of the vendor and lessor falls in this regard, the immunity of the builder/vendor and builder/lessor will also be lost.

33. The impression that these immunities are coming under pressure is now confirmed by a willingness in a recent English decision<sup>66</sup> to render a building inspector employed by a local authority liable for negligently certifying that a building complied with local bye-laws. It is interesting to note that in this case the action against the builder was settled for £625 in spite of the fact that existing authorities held that builder/vendors were immune in such cases (see supra A(ii)). Certainly both

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<sup>65</sup> Gallagher v. N. McDowell Ltd., [1961] N.I. 26; Sharpe v. E.T. Sweeting & Sons Ltd., [1963] 1 W.L.R. 665. Cf. Lock and Lock v. Stibor (1962) 32 D.L.R. (2d) 704. Billings (A.C.) & Sons Ltd., v. Liden [1958] A.C. 240. Sutherland v. C.R. Maton & Sons Ltd., (1976) 240 E.G. 135.

<sup>66</sup> Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373.



Denning M.R. and Sachs L.J. were prepared in that case to declare that the immunity of a builder/vendor for negligence no longer existed.<sup>67</sup> More recently still the English Court of Appeal in Sparham-Souter and Another v. Town and Country Developments (Essex) Ltd. and Benfleet Urban District Council<sup>68</sup> upheld this aspect of the Dutton decision when they confirmed the developer's liability and the liability of the local authority in similar circumstances. The Sparham-Souter case further held that the time within which the action must be brought did not begin to run until the plaintiff discovered, or ought to have discovered, the damage, thereby holding that Dutton was wrongly decided on this point.

34. More recently still some of the doubts caused by the Dutton and Sparham-Souter cases were dispelled by the House of Lords in a unanimous decision in Anns and Others v. Merton London Borough Council (London Times, Friday 13 May 1977, p. 19). On the liability of the local authority which negligently exercises its statutory functions to control buildings it held that Dutton was correctly decided. It further held that Sparham-Souter was correctly decided in holding that the period of limitation began to run only when the state of the building was such that there was present danger to the health or safety of persons occupying it. It did not

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<sup>67</sup> Id., at p. 394 and p. 401-402. Spencer in /1975/ C.L.J. 48 suggests that the ratio decidendi of Dutton is "that it merely curtails the general immunity of the landlord or vendor by making him liable when he creates the danger by his positive acts - rather than where, as in Cavalier v. Pope, he merely fails to avert a danger arising from elsewhere. In other words, Dutton's case simply overrules the line of decisions in which the lower courts extended Cavalier v. Pope from negligent non-feasance to negligent misfeasance". At p. 52.

<sup>68</sup> /1976/ Q.B. 858, /1976/ 2 W.L.R. 493. Dutton's case was also followed recently in New Zealand: Gabolinsky v. Hamilton City Corporation /1975/ 1 N.Z.L.R. 150. See infra Chap. V(d).

begin to run immediately on delivery as had been initially thought in Dutton. With regard to the liability of the builder, which was not directly at issue, the Times said that Lord Wilberforce, delivering the principal judgment of the court had this to say:

"As to the builder, his Lordship agreed with the majority of the Court of Appeal that it would be unreasonable to impose liability for defective foundations on the Council if the builder, whose primary fault it was, should be immune from liability. There was no doubt under modern authority that a builder of defective premises might be liable in negligence to persons who thereby suffered injury. Since it was the builder's duty to comply with the bye-laws an action could be brought against him for breach of statutory duty by any person for whose benefit or protection the bye-law was made. So there was no basis here for arguing from a supposed immunity of the builder to immunity of the Council."

In the case the builder, who undertook some remedial work and did not appear in the proceedings, was the builder/lessor of the buildings in question.

35. Since both Dutton and Anns & Others v. Merton London Borough Council were decided on common law principles rather than on the English Defective Premises Act, 1972, their relevance for Irish Courts is considerable. Once more, if a trend is to be extracted from recent Irish decisions (e.g. Purtill v. Athlone U.D.C.<sup>69</sup> and McNamara v. E.S.B.<sup>70</sup>) it would seem that it is towards contracting such immunities rather than allowing such immunities to continue unaffected by the general flood of Negligence.

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<sup>69</sup> [1968] I.R. 205.

<sup>70</sup> [1975] I.R. 1.

CHAPTER II    OTHER WAYS IN WHICH THE QUALITY OF THE HOUSING  
STOCK IN IRELAND HAS BEEN IMPROVED IN RECENT  
YEARS

36.    While the principal purpose of this paper is to examine the civil liability of vendors, lessors and builders for injuries caused by defective buildings, and while it is acknowledged that any increase in the civil liability of these parties should improve the quality of housing and building in general in the country, it should also be realised that there are other ways in which the quality of housing, etc., has been improved in recent years in Ireland. In practice, it should be noted that these other ways do provide the purchaser/tenant with certain quality guarantees which, because of the common law immunities conferred by the civil law on vendors and lessors of real property, assume considerable significance in providing a regime of protection for the purchaser/tenant. So that the total picture may be appreciated a brief description of these various regulatory measures will now be given. Some of these measures are criminal in nature (local bye-laws, Planning Acts, etc.,) others are administrative (building conditions attaching to housing grants and licences, etc.,) while still others are purely internal trade association regulations of a voluntary nature, backed up by the normal sanctions of trade associations such as fines or expulsion.

(1) Bye-Laws of Local and Other Authorities

37.    Local authorities (and planning authorities, sanitary authorities, health authorities, etc.) are empowered (and in some instances obliged) by various Acts to regulate matters within their competencies. Such authorities generally find their powers limited functionally - to the subject matter

referred to in the Act, e.g., planning, sanitary, health matters, etc. - and geographically, to a particular specified area. Thus, planning authorities are obliged to make development plans for their areas, to review the plan from time to time, and "generally to take such steps as may be necessary for securing the objectives which are contained in the provisions of the development plan."<sup>71</sup> Sanitary authorities, under the Public Health (Ireland) Acts, 1878 to 1890, and the Local Government (Sanitary Services) Acts, 1948 to 1962, have in addition to normal powers relating to sewerage and drainage, power to make bye-laws "to secure stability, prevent fires and for the purposes of health, circulation of air and with respect to ventilation of buildings."<sup>72</sup> Bye-laws do exist on these matters but powers in relation to further regulation of these matters have now been transferred to the Minister for Local Government by Section 86 of the Local Government (Planning and Development) Act, 1963. Like functions are discharged by the health authorities in relation to health matters under the Health Acts, 1947 to 1970, and by the harbour authorities in relation to the proper management of harbours (The Harbour Acts, 1946 and 1947).

38. Most important, however, under this heading are the powers that local authorities have under various legislation<sup>73</sup> to make bye-laws for the "good government and management" of their own locality. In this connection it is worth noting,

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<sup>71</sup> Section 22 of Local Government (Planning and Development) Act, 1963.

<sup>72</sup> Section 41 of the Public Health (Ireland) Act, 1878; see also Section 23 of the Public Health Acts Amendment Act, 1890.

<sup>73</sup> Public Health (Ireland) Act, 1878; Towns Improvement (Ireland) Act, 1854, etc.

at this juncture, that the three major cities in Ireland (Dublin, Cork and Limerick) have, as part of their "good government and management", issued building bye-laws for their own particular areas. These bye-laws deal, inter alia, with the following matters: structure and quality of substances used in new buildings, structure of hearths, ventilation, spacing to ensure free circulation of air, drainage, waterclosets, etc., - matters primarily concerned with fire safety and health.

39. Housing authorities can also make bye-laws in relation to rented housing under statutory authority contained in Section 70 of the Housing Act, 1966. These bye-laws may seek:

- "(a) to ensure the provision as respects the house of proper drainage, ventilation and lighting;
- (b) to ensure the execution of any repairs necessary to maintain the structure of the house;
- (c) to ensure provision in the house of such closet accommodation, water supplies, washing accommodation and accommodation for the storage, preparation and cooking of food, as shall be adequate for the use of and shall be readily accessible to each family occupying the house;
- (d) to ensure that there is maintained as respects the house an adequate standard of cleanliness."

Only Dublin has made such bye-laws so far. Cork is in the process of doing so. When passed, these bye-laws will replace the old existing bye-laws on common lettings.

40. No general building regulations applicable throughout the State exist as yet in Ireland. It is worth noting, however, that a comprehensive draft of proposed Building Regulations has been recently published by the Department of Local Government. These proposed regulations, which insist

on minimum standards of construction, are issued under authority contained in Section 86 of the Local Government (Planning and Development) Act, 1963, and are significant for three reasons. First, when in force they will represent the first general Building Regulations which are to have nation-wide application. Second, when in force these Building Regulations will supersede local building regulations. Regulations on these matters will, therefore, be centralised and unified. Third, the new Building Regulations reflect the more modern technical building knowledge and are much more comprehensive than the many bye-laws, etc., that exist at present. They represent a definite improvement in content.

41. Normally, a breach of these bye-laws and regulations constitutes a criminal offence for which a penalty (usually a fine) is provided. The Draft Building Regulations, however, do not, and indeed cannot, specify what penalties, civil or criminal, are to be provided for a breach of the Regulations. Such a task is reserved for the Oireachtas.

## (2) Planning Controls

42. Planning authorities and members of the Planning Board are empowered<sup>74</sup> to supervise and inspect buildings subject to planning control during construction. Such investigations are not usually concerned with structural safety, etc., however, and in any event most planning authorities have not the resources to carry out such examinations except in the most unusual or suspicious circumstances.

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<sup>74</sup> Local Government (Planning and Development) Act, 1963, Sections 6 and 83, as amended by Section 42 of the Local Government (Planning and Development) Act, 1976.

(3) Grant-aided housing

43. In Ireland, various forms of assistance are offered both by the central Government and by local authorities in furtherance of general housing policy objectives. This assistance can take the form of cash grants, local tax remissions, subsidies, etc. Generally speaking, such assistance is subject to the observance of certain conditions, and failure to observe these conditions usually means forfeiture of the grant, etc. A builder, therefore, who wishes to benefit from these grants must observe the conditions attached thereto, and in this sense such conditions may be viewed as restrictions. A comprehensive system of supervision and inspection is administered by the Department of Local Government. All houses in respect of which the Department has received an application for a grant and/or ancillary benefits (e.g. rates remission) are inspected at various stages of construction by Local Government inspectors or by local authority inspectors on their behalf. This was particularly so until 1 January 1976, when most house purchasers satisfied the conditions for State grants. Since then, State grants are only payable to those in the lower income groups, but ancillary benefits continue to be available irrespective of the applicant's income. The position now is that houses eligible for State grants are inspected at various stages of construction, but those eligible solely for ancillary benefits are inspected only on completion, as a certificate that the house is complete, satisfactory and fit for habitation must be signed by the Local Government inspector before either the grant or ancillary benefits become operative. Local Government inspectors ensure that buildings comply with the conditions under which the grant and ancillary benefits are payable. The only sanction, however, for failure to comply with

Government standards in this matter is the withholding of the appropriate grant or ancillary benefit. However, if the decision in the English case of Dutton v. Bognor Regis U.D.C.,<sup>75</sup> were to be followed in Ireland the Government might be liable for injuries suffered by the purchaser of such property if the Government's inspector negligently certified such property. It is probably for this reason that the practice has grown up for the Department of Local Government to specify that certification by its inspectors for grant purposes is not to be taken as a warranty as to the works carried out or the structural soundness of the house.

(4) Certificates of Reasonable Value

44. In an effort to control the prices of new houses, a scheme was introduced by the Minister for Local Government in 1973. The basis of the scheme is to ensure that a house purchaser obtains reasonable value when he purchases a new house for which a State grant is paid. The controls apply to new houses in schemes of four or more houses which are being provided for sale and for which grants are sought. Before securing a grant, a certificate that the house is reasonable value for money must issue from the Department. Moreover, a refusal of such a certificate renders such houses ineligible for all other kinds of housing aids, for example, remission of rates, local authority grants, etc.

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<sup>75</sup> [1972] 1 Q.B. 373, approved in Anns and Others v. Merton London Borough Council (London Times, 13 May 1977, p. 19).



(5) Licensing Conditions

45. Analogous to conditions attaching to grants are the conditions which licensing authorities may attach to a licence for premises in which licensed activities are held. In these cases, the licence will normally issue only when the licensing authority is satisfied that the premises in question are safe and suitable for the activity in question. This is especially true where the activity contemplates crowds of people on the premises (cinemas - Cinematograph Act, 1909; amusement halls and funfairs - Gaming and Lotteries Act, 1956; premises for sale of intoxicating liquor - Intoxicating Liquor Acts, 1924-1962). Local authorities are frequently the licensing authorities in these cases, although the Revenue Commissioners (in conjunction with the courts) are the licensing authority in the case of liquor licences. In the larger urban areas - Dublin, Cork and Limerick - some of these premises may be also subject to local bye-laws. A bye-law exists in Cork, for example, for the licensing and regulation of theatres and other places of public amusement, which sets out the requirements for doors, exits, gangways, chairs, gas, etc., and other safety measures.

(6) Local Authority Housing

46. Standards in local authority housing are maintained in the following way. Under the Housing Authorities (Loan Charges Contributions and Management) Regulations, 1967, as amended,<sup>76</sup> the payment by the Minister for Local Government of contributions towards the annual loan charges incurred by a housing authority in respect of the provision of houses

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<sup>76</sup> S.I. Nos. 71 of 1967, 109 of 1969 and 42 of 1970.

and building sites is conditional on the observance by the authority of certain conditions, including a condition that "the dwellings or building sites be approved in accordance with proposals approved by the Minister." Plans for local authority housing are drawn up by the appropriate technical officers in the authority with or without, as the circumstances warrant, the technical cooperation and guidance of the Department of Local Government, the National Building Agency, An Foras Forbhartha and the Institute for Industrial Research and Standards. The Department of Local Government has itself made available fifty-nine model plans for various types of houses suitable for local authority housing. A housing authority is not required to obtain Departmental approval if it uses these plans.<sup>77</sup>

(7) Control by Finance Companies

47. Building Societies, and other institutions, which provide finance to house purchasers on a mortgage basis will normally only sanction such advances when the property has been inspected and approved by their surveyors. Such institutions, however, are not primarily concerned with the structure of the building in question, but rather with its adequacy as security for the loan.

(8) Regulations of the Construction Industry Federation

48. Finally, the efforts of the Construction Industry Federation to regulate the conduct of builders registered with it are worthy of note. It is estimated that approximately 30% of builders in Ireland are registered with the federation, and the federation in its efforts to raise

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<sup>77</sup> Circular N8/73 of the Department of Local Government.

building standards and protect purchasers insists that its members must (i) give a two-year structural guarantee on all new houses and (ii) ensure that a contract for the construction of a new house or a contract for the sale of a new house by a member shall not include any provisions which will diminish or delete a purchaser's rights at common law, and that in the case of a sale of a completed house the purchaser shall have the benefit of the warranties implied at common law in the case of a sale of a house in the course of erection.

49. The C.I.F., however, does not operate a comprehensive scheme whereby it stands behind or guarantees the work of its members, as exists in England.<sup>78</sup> It has, however, reached agreement in principle with the Department of Local Government to operate a limited scheme whereby it will guarantee major structural defects of member builders for a period of six years. Details of the scheme will be worked out in the coming months and the parties (the Department and the C.I.F.) hope that the scheme will be operational by January 1978.

50. From the point of view of the purchaser, however, such efforts by the C.I.F. have no consequence in civil law. The rules of the federation are merely trade regulations for a breach of which the builder member may be fined or expelled. He does not, by failing to comply with them, expose himself to any greater liability to the purchaser than he already has at common law.

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<sup>78</sup> For a description of English Scheme see, Marten and Luff, Guarantees for New Homes. See also Law Com. No. 40 pp. 6-8.

## CHAPTER III CRITICISMS OF PRESENT LAW IN IRELAND

51. Criticisms of the law relating to the liability of vendors, lessors and builders can be summarised briefly. First, from the point of view of the contractual protection offered to the purchaser/lessee the law is distinctly unsatisfactory. Not only are the parties in an unequal bargaining position at the outset and throughout the negotiations, but no terms are normally implied by the law with regard to the quality or fitness for purpose of the property in question. Second, the common law immunity conferred on vendors and lessors means that the purchaser/lessee (or anyone else) cannot normally sue in tort for personal injuries caused by defects in the property due to the negligence of the vendor or lessor. Third, a builder, although normally liable for negligent building, can immunise himself from legal liability by selling or leasing the property; in this case he is no longer considered as a builder but is considered to have donned the protective mantle of the vendor and lessor.

52. Generally speaking, one can say by way of criticism of this branch of law that the factual assumptions on which the present law is based are no longer valid, that the present law displays an inordinate amount of anomalies, inconsistencies and injustices, and finally, that the law is not in harmony with either present trends in the law of torts or perceptible future developments.

53. When the rules relating to this branch of law were being formulated in the early nineteenth century the purchaser or tenant was primarily concerned with the land. Accordingly, his interest in the house or buildings that might have been on the property were incidental to the main concern of the transaction. Moreover, the purchaser or tenant, in the

agricultural context of the time, had sufficient skill to execute the relatively simple maintenance needs of his house. He was also less mobile, and when he was a tenant this continuity of residence provided him with the incentive to repair. The modern purchaser/tenant, however, is more properly characterised as a highly mobile unit living in an urban environment, who possesses "a single specialized skill unrelated to maintenance work", who lives in a complex building unit, lacks the finance to make more than minor repairs, and whose primary concern is not addressed to the land as such, but to securing for himself and his family a place to live. Rules which were developed and articulated in the former factual situation must now be reassessed in the light of these new social facts.

54. As has been seen above (Chap. I) whether a purchaser or lessee of real property or any other injured person can recover in Irish law for injuries arising out of quality defects or dangerous conditions of premises is a complex and complicated matter frequently depending on very fine distinctions. For example, whether one proceeds in contract or in tort, whether the injury occurred before or after the sale or lease, whether the house was completed or not at the time of the transaction, whether the injury was to the immediate transferee or to subsequent transferees, whether the vendor/lessor has or has not created the defect, whether the defendant is the builder or simply the vendor/lessor of the property, whether the injury occurred on or off the premises, whether the defect was known or not to the vendor/lessor, whether the plaintiff complains of physical or purely economic loss, and, in the case of a lease, whether or not the lessor had the right or obligation to repair - are all distinctions which may be crucial for the outcome of an action in this branch of the law as it now stands. As a

means of distributing social loss in these type of accidents some of these distinctions may be helpful and fair; others are of more doubtful value. A realistic reassessment in the light of modern values and developments will now show that many of these distinctions unnecessarily complicate the law and sometimes obstruct the attainment of justice.

55. The privileged immunity which the law of torts accords to vendors and lessors nowadays is an immunity which is difficult to justify in logic or in law. Since Lord Atkin in Donoghue v. Stevenson<sup>79</sup> postulated reasonable care as the general norm of conduct by which man's actions in society should be judged - as far as tortious liability is concerned at least - successful assaults have been successively made on the privileged positions held by various persons in the law. Little by little, it seems that the bastions are succumbing to the incessant pressure of the negligence flood. Accordingly, the person who makes negligent statements<sup>80</sup>, the occupier of premises<sup>81</sup> and probably the gratuitous bailor of goods<sup>82</sup> have all seen their privileged positions gradually eroded by negligence principles. As a result, the immunity of vendors and lessors is becoming more and more of an anomaly in our law. This immunity is rendered more curious by the development in Dutton v. Bognor Regis U.D.C.<sup>83</sup> in

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<sup>79</sup> [1932] A.C. 562.

<sup>80</sup> Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd. [1964] A.C. 465, approved in Securities Trust Ltd. v. Moore and Alexander Ltd. [1964] I.R. 417. See also Bank of Ireland v. Smith [1966] I.R. 646. See also Esso Petroleum v. Mardon [1976] 2 W.L.R. 583.

<sup>81</sup> McNamara v. E.S.B. (S. Ct.) [1975] I.R. 1.

<sup>82</sup> Campbell v. O'Donnell, (S. Ct.) [1967] I.R. 226.

<sup>83</sup> [1972] 1 Q.B. 373, approved in Anns and Others v. Merton London Borough Council, London Times, 13 May 1977, p. 19. In view of the House of Lords decision in this case it may be that the immunity of the builder/vendor or builder/lessor no longer exists in England.

which the English Court of Appeal rendered a local authority liable for the negligence of its inspector when he carelessly certified that premises conformed with local building bye-laws. To make the local authority liable in such circumstances when the builder/vendor or builder/lessor would be immune is curious to say the least.

56. The immunity of vendors and lessors of real property is most marked, however, when their position is contrasted with manufacturers' liability for defective products. Since Donoghue v. Stevenson<sup>84</sup> manufacturers are liable to ultimate consumers for negligence in the putting up of their products. Moreover, in recent years the trend is to impose even more strict liability on manufacturers because of their ability to handle, by price mechanism or by insurance, the loss distributing function now being cast upon them.<sup>85</sup> Many of the general consumer concepts which are making such an impact in the area of products' liability have equal validity for the present discussion relating to vendors and lessors: the parties are not in an equal bargaining position; the recent shortage of housing accommodation puts increased pressure on purchasers and tenants to make improvident arrangements; the landlord and the vendor (at least before the sale) are in the best position to control and supervise the premises and to know of defects in the premises; the landlord who makes a business out of leasing property is in the best position to handle and distribute the loss; liability insurance is readily available, etc. All of these argue that the lot of the purchaser and the tenant of real

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<sup>84</sup> Supra

<sup>85</sup> See McMahon, Liability for Defective Products: The Draft European Convention on Products' Liability. VIII Ir. Jurist 1973, 227-251. For EEC draft directive on Product Liability see Bulletin of European Communities Supp. 11/76.

property should be improved in relation to injuries incurred because of defects in the premises. It is not suggested that strict liability should at this stage be imposed on vendors, lessors and builders, but it is felt that they should give certain warranties with regard to the state of the premises and that, with regard to injuries to the person and to property, they should be liable at least for negligence.

57. Because the contract in practice offers the only real protection to purchasers and lessees of real property a further word should be said about the position of the purchaser and lessee in the contractual process that accompanies a sale or lease of house property. Briefly, and for reasons outlined hereafter, the position of the purchaser/lessee is extremely weak. In the pre-contract stage the purchaser/lessee is probably buying for the first time whereas the vendor/lessor, especially in the case of speculatively-built houses, has usually prepared the contract on the basis of several years' experience in the market. In recent years because the demand for new houses and rented accommodation has tended to exceed the supply, vendor/lessors are frequently able to adopt a "take it or leave it" attitude. The purchaser/lessee, on the other hand, may have various domestic and family pressures urging him to secure a home at any cost. Moreover, many builders provide the potential purchaser of a new house with little or no information regarding the standard of finish, specifications, proper site maps, etc., but merely give oral guarantees that the completed house will be similar to the show house. Finally, sales promotion literature is frequently inadequate or misleading in the description of the house and site.



58. Nor is the position of the purchaser/lessee any better at the contract stage. It is true, in relation to second-hand houses, that the standard form of contract recommended by the Incorporated Law Society is widely used and does attempt to balance the interests of the vendor and purchaser. No such standard contract exists for speculatively-built houses, however. A joint working party on Housing Standards, representing the Royal Institution of Chartered Surveyors, the Incorporated Law Society and the Royal Institute of Architects of Ireland, recently examined this position and came to the following conclusion:

"The Working Party examined a number of agreements currently being used by speculative house builders and found that these contracts omitted many of the following items which would normally be included in the Incorporated Law Society's standard form of contract for the sale of secondhand houses and these are as follows:

1. The contract normally does not specify a completion date nor does it contain a penalty clause for any delay in completing the house. In some cases a completion date is mentioned but the contract specifies that the builder shall "use his best endeavours to complete the house" by that date.
2. There is usually no detailed plans or specifications attached to the contract.
3. Some contracts provide that the builder shall be responsible for any "structural defects" which appear in the premises within a specified time of the date of the closing provided notice is given to the builder. However, in such cases it is usual for the contract to also state that the builder shall not be liable for certain other defects which may arise within that time period.
4. Should the builder go bankrupt the purchaser usually has no charge on the site and consequently ranks as an unsecured creditor in respect of any sums paid by him.

5. In most cases it is usual for the builder to undertake to pave and construct the footpath and kerb adjoining the purchaser's site but the clause usually provides that the purchaser shall not be entitled to delay completion of the sale on the ground that the builder has not constructed the footpath. Consequently there can often be considerable delays in getting the builder to complete the site development works and the purchaser is not usually entitled under the agreement to retain any of the contract price until such works are completed by the builder.

6. In several cases the title is not adequately detailed in the contract.

7. Some contracts provide for the builder to increase the contract price in the event of materials and labour increases. However, it is difficult for the purchaser to monitor these charges.

8. Some contracts provide for the builder to substitute alternative materials or methods of construction for either those described in the showhouse or the drawings and specifications.

9. Contracts which contain provisions for the appointment of an Arbitrator in the event of disagreement were examined. In some cases the Arbitrator is appointed by the Solicitors for the builder and in other cases the builder's Architect is nominated. It was felt that the Arbitrator should in fact be appointed by the President of the Law Society or the President of some other professional institution.

10. Contracts can also provide for the builder to annul the agreement should the purchaser raise any objection or requisition in respect of the title or specification to which the lessor is unwilling to comply with. (sic) It is felt that conditions of this sort should not be incorporated in the contract since it gave far too much latitude to the vendor to terminate the agreement at any time."

59. Likewise the purchaser's position at the post-contract stage in those speculatively-built houses is inadequately protected. For example, the structural guarantee given in some contracts usually does not cover a period of more than 18 months or 2 years. This contrasts badly with current

practice in the U.K. where such guarantees are usually given for a period of 10 years. Finally, when a builder fails to complete estate roads and open spaces, although he may be liable to certain legal proceedings under the Local Government (Planning and Development) Acts 1963 and 1976, the individual purchaser has normally no direct legal action against the builder.

60. It seems fair to conclude therefore that although the contract represents the only real method by which the purchaser/lessee can protect himself in our law, the unequal bargaining position of the parties, the shortage of an adequate supply of suitable housing property and the practices of the professions do not ensure the proper recognition of the legitimate interests of the average home purchaser/lessee. Commercial purchasers and lessees may, it is true, wield enough economic power to ensure that the contract adequately protects their interests, but private purchasers or lessees rarely, if ever, enjoy this kind of power.

61. Two other problems must be referred to. First, in recent years the number of builders who have gone into liquidation is disturbingly high<sup>86</sup> and it has been suggested

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<sup>86</sup> In the five year period up to 30/9/1976, builders (and allied trades) accounted for the following % of all bankruptcies and arrangements: 1971/72 - 19%; 1972/73 - 16%; 1973/74 - 15%; 1974/75 - 22%; 1975/76 - 22%. The total number of builders or firms who went into bankruptcy or made arrangements during this period was 29 out of a total of 152 i.e. 19%. (Source: Figures supplied by the Official Assignee in Bankruptcy, May 1977.)

In relation to building companies which have gone into liquidation, figures are only readily available from the beginning of 1975. The following figures show how many building companies have gone into liquidation during the

that a reforming measure which merely gives the purchaser, etc., better civil remedies without addressing the problem of the insolvent builder, or the builder who has disappeared, is useless reform. Second, a practice is becoming common whereby developers and builders are using the corporate vehicle, or multiple companies, to evade possible civil liability in relation to defective construction. One way a builder can use the company structure to achieve this end is as follows: he forms a company with little or no assets to build a number of houses; when the houses are completed he liquidates the company or merely abandons it, and forms a new company to build his next lot of houses. In this situation the purchaser might have an action against an assetless shell or, if the company has been liquidated, might have no potential defendant at all against whom he might initiate proceedings.

62. There are two separate, though not wholly unrelated, problems here: the first concerns the solvency of the builder, etc.; the second concerns the continuing existence of a legal person.

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86 Cont'd  
 period commencing January 1975:  
 1975 - 49 (approx. 16% of total); 1976 - 90 (approx. 13% of total); 1977 (Jan. - May) - 33 (approx. 13% of total).  
 In addition to this, the following number of what are called "estate companies" went into liquidation in these years: 1975 - 20; 1976 - 120; 1977 (Jan. - May) - 40. Many of these "estate companies", it is understood, would be companies which dealt in the development and management of property and if they were to be included in calculating the % of "building companies" which went into liquidation, the % for the period in question would be much higher: 1975 - 22%; 1976 - 29%; 1977 (Jan. - May) - 28%. (Figures supplied by the Companies Office.) Because of the difficulty of determining, from the Companies' Register, the actual activities in which "estate companies" engage, however, these figures must be taken as approximations only. "Building companies" include companies not only engaged in building houses but also companies engaged in land development, central heating installation, etc.

63. Consideration of the matter has led to the conclusion that the first problem could be partly solved by the introduction of a Register or a licensing system for builders. Without getting involved in the details of such a system it is felt that a registration or licence would involve an initial examination of the builder's technical ability and his financial stability. Registration or licencing might be made to depend on the builder's ability to provide a bond. The registration or licensing body might be enabled to re-inforce the builder's position by running a guarantee scheme (funded by way of levy from the participants) which would back the financial stability of the builder and guarantee his work. The system would ensure that builders would not only have minimum competence in construction, but would also have some financial stability first, in the form of the bond and second, in the form of the registration (licensing) authority's guarantee fund. Precedents for such schemes can be found in England, Northern Ireland, Canada, Australia.<sup>87</sup>

64. The second problem, however, that of ensuring the continuing existence of a corporate builder, vendor, etc., is more difficult to solve in theory. It is felt, however, that the problem would be less acute if a bond system, backed by a guarantee fund as suggested in the last paragraph, were adopted. Insurance companies issuing bonds would be likely to insist that corporate builders would provide some assets as security. Moreover, the registering authority or the trade association (the C.I.F., for example) in operating a guarantee fund could, and probably would, insist, that "the corporate veil should be pierced" where a shell company is being used, and that the holding company or

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<sup>87</sup> See Appendix for a brief description of such schemes in general and the English scheme in particular.

the individuals behind the company would have to make themselves personally liable for the shell company's responsibilities. It is understood that the Housing Development Security Scheme, a similar type scheme operated at present by the C.I.F. in respect of builders' obligations under the Local Government (Planning and Development) Acts, 1963 and 1976, does in fact insist on such conditions. This scheme guarantees that member builders will comply with planning conditions in respect of layout of the estate, completion of roads, etc. It does not extend to building defects.

65. Having referred to the problems of the builder's financial stability and his continued existence, we are, however, of the opinion that the two aspects of reform, that is, the civil liability of vendors, lessors and builders on the one hand, and the continued financial stability of the builder on the other, should be kept separate. A reform measure in one should not be linked with the other. We came to this conclusion for several reasons. First, it seems that the rules of civil liability imposed on builders, vendors and lessors should be mandatory, whereas the concept of registering, bonding and guaranteeing builders could well (but need not) be a voluntary scheme. Second, the proposals for reform in substantive rules are likely to receive a good deal of agreement, whereas the registration, etc., of builders is likely to be contentious. Moreover, the satisfactory operation of a registration scheme would depend on the co-operation of various other interests such as the Construction Industry Federation, the Department of Local Government, the insurance companies, the building societies and other bodies. Securing the agreement of all of these would inevitably involve delay. Third, the two issues - the legal liability of vendors, lessors and builders and the financial stability of builders - are not dependent on each other. The issues can logically and legally be

dealt with separately. Fourth, there might be a tendency, if a voluntary scheme for registering, bonding and guaranteeing builders were evolved, to hold fire on the substantive reforms. This would be unfortunate, because even with such a scheme there would still be gaps in the law. For example, schemes of this nature that exist in other countries confine their operation to new dwelling houses; they do not extend to other premises. Moreover, such schemes when they exist, only apply to registered builders. They do not extend to unregistered builders; they do not extend to the liability of vendors or lessors; and they do not normally extend to non-structural defects. For these reasons we are of the opinion that a reform measure which clarifies and sets out the principles of civil liability which should bind vendors, lessors and builders should not be delayed until a registration, bonding and guaranteeing scheme is evolved. Such a scheme should be encouraged and promoted, but it should not delay desirable reforms in substantive matters.

## CHAPTER IV COMPARATIVE EXCURSUS

66. In this chapter a brief examination of the law on this topic in other common law countries is undertaken. The survey does not attempt to be comprehensive and attention is given only to jurisdictions where recent developments were considered to be instructive either because they indicated comparative attitudes to the problem or they were capable of yielding a pointer as to the direction which a reform measure in Ireland might ultimately take. The jurisdictions covered are: England, Northern Ireland, United States of America, New Zealand, Canada, Australia and Scotland.

(a) England

67. The principal statutory reform in this area is to be found in the English Defective Premises Act, 1972. Before one attempts to comment on this legislation, however, and before one tries to assess the suitability of the English solution for the Irish context some background information relating to the English statute should be borne in mind. First, the position of vendors, lessors and builders in so far as they were occupiers of premises was dealt with in England in the Occupiers' Liability Act, 1957. Second, an extensive guarantee scheme operated by the National House Building Council in relation to new houses built by registered builders represents a very real attempt voluntarily to improve building standards and to protect purchasers in England. Under the scheme registered builders are obliged to give certain warranties and undertakings with their work and the Council guarantees to honour judgments against such registered builders within certain time limits. The purchaser's legal position at common law is not, however, improved by this scheme; but he is likely to get better



contractual concessions from registered builders and he also benefits from the Council's guarantee, subject to a maximum of £20,000 in respect of one dwelling. A registered builder who does not observe the rules is liable to the Council's internal disciplinary procedure of a fine or expulsion.<sup>88</sup> No such scheme is in existence in Ireland,<sup>89</sup> although the Construction Industry Federation does insist that its members give a two year structural guarantee with new houses and shall not exclude any of the purchasers' common law rights, etc. Third, in England, Section 72 of the Health and Safety at Work Act, 1974, provides an action for breach of statutory duty where any Building Regulation made under the Public Health Acts is broken. Because these regulations constitute a comprehensive code of rules relating to almost every aspect of building construction and design, and because the action seems to lie irrespective of negligence and even where no privity of contract exists, the liability of builders is greatly widened.<sup>90</sup> No such general Building Regulations exist in Ireland, and the Draft Regulations that do exist do not, and indeed could not, provide for such a civil remedy, although it is possible to imagine that such an action might lie at common law for breach of statutory duty in the appropriate circumstances if such regulations came into force. Fourth, the Defective Premises Act, 1972, as finally enacted, did not adopt all of the suggestions recommended by the Law Commission in England and, in our opinion, the piecemeal changes brought about by the 1972 Act in England are not entirely satisfactory as a piece of overall reform.

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<sup>88</sup> See Law Com. No. 40, pp. 6-8. See also, Marten and Luff, Guarantees for New Homes, 1974.

<sup>89</sup> But see para. 49 supra and accompanying text.

<sup>90</sup> See Spencer, The Defective Premises Act, 1972 - Defective Law and Defective Law Reform, 34 C.L.J. 48.

68. The 1972 Act in England attempts to improve the law in four ways. First, it imposes a statutory duty on persons who "take on" work to build the dwellings in a proper and workmanlike fashion and with proper materials, etc. Second, it abolishes the immunity conferred by common law on vendors and lessors in respect of negligent work done before the sale or lease of the property. Third, it imposes on a landlord who has a duty or a right to repair in respect of demised premises a further duty to take reasonable care for the safety of all who might reasonably be expected to be affected by defects in the state of the premises. Finally, the act declares that these statutory duties cannot be excluded or restricted by contract.

69. The Defective Premises Act, 1972, is set out hereunder for comparative purposes, and some more specific criticisms of the legislative provisions follows. (Sub-Sections 2(3) - 2(6), being of limited interest, are omitted.)

#### The Defective Premises Act 1972

##### 1. Duty to build dwellings properly.

(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 properly 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) 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.

(5) 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 at the time when the dwelling was completed, but if after that time a person who has done work for or in connection with the provision of the dwelling does further work to rectify the work he has already done, 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.

## 2. Cases excluded from the remedy under section 1.

(1) Where -

- (a) in connection with the provision of a dwelling or its first sale or letting for habitation any rights in respect of defects in the state of the dwelling are conferred by an approved scheme to which this section applies on a person having or acquiring an interest in the dwelling; and

- (b) it is stated in a document of a type approved for the purposes of this section that the requirements as to design or construction imposed by or under the scheme have, or appear to have, been substantially complied with in relation to the dwelling;

no action shall be brought by any person having or acquiring an interest in the dwelling for breach of the duty imposed by section 1 above in relation to the dwelling.

(2) A scheme to which this section applies -

- (a) may consist of any number of documents and any number of agreements or other transactions between any number of persons; but
- (b) must confer, by virtue of agreements entered into with persons having or acquiring an interest in the dwellings to which the scheme applies, rights on such persons in respect of defects in the state of the dwellings....

(7) Where an interest in a dwelling is compulsorily acquired -

- (a) no action shall be brought by the acquiring authority for breach of the duty imposed by section 1 above in respect of the dwelling; and
- (b) if any work for or in connection with the provision of the dwelling was done otherwise than in the course of a business by the person in occupation of the dwelling at the time of the compulsory acquisition, the acquiring authority and not that person shall be treated as the person who took on the work and accordingly as owing that duty.

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

(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 /1 January , 1974;
- (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.

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

(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 material time and arising from, or continuing because of, an act or omission by the landlord which constitutes or would if he had had notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises; and for the purposes of the foregoing provision "the material time" means -

- (a) where the tenancy commenced before this Act, the commencement of this Act; and

(b) in all other cases, the earliest of the following times, that is to say -

- (i) the time when the tenancy commences;
- (ii) the time when the tenancy agreement is entered into;
- (iii) the time when possession is taken of the premises in contemplation of the letting.

(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 he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he shall be treated for the purposes of subsection (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 a right of occupation given by contract or any enactment and not amounting to a tenancy as if the right were a tenancy, and "tenancy" and cognate expressions shall be construed accordingly.

#### 5. Application to Crown.

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.

#### 6. Supplemental.

(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 or enforceable by virtue of any provisions of this Act is in addition to any duty a person may owe apart from that provision.

(3) Any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of this Act, or any liability arising by virtue of any such provision, shall be void.

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

70. As already mentioned, the English Act does not satisfactorily tackle all the problems of the area. The Law Commission in its suggested draft did at least try to effect an overall reform of the position, but in adopting little over half only of the Commission's proposals, we are of the opinion that Parliament merely tinkered with existing rules instead of scrapping the whole lot and starting again. The result is a truncated effort at law reform.<sup>91</sup>

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<sup>91</sup> These criticisms of the 1972 Act are based on the critical analysis of the Act made by J.R. Spencer. See The Defective Premises Act, 1972 - Defective Law and Defective Law Reform, 33 C.L.J. 307-323 and 34 C.L.J. 48-78. For a different and less critical view see North, 36 M.L. Rev. 628-638.

71. Section 1 of the English Act is a good attempt to give the purchaser, and other deserving parties, rights against builders, etc., in respect of quality defects occurring in new dwellings. Section 2, however, deprives it of much of its teeth by excluding its application to approved schemes, one of which is the scheme operated by the National House-Building Council referred to above. Since no similar scheme operates in Ireland Section 2 has no relevance in the Irish context. Other problems concerning Section 1 are the following: it is specifically limited to dwellings; the exact meaning of "takes on", and the legal or equitable interests covered by the section, are not clear; finally, the general question of remoteness of damage and in particular the problem of purely economic loss.

72. Section 3 purports to remove the immunity conferred on vendors and lessors of real property, and thereby makes them amenable to the general principles of common law on the matter. This, of course, means that the law relating to vendors and lessors will, after the Act, be found in the common law and earlier statutory material. This approach can be criticised in that it does not indicate in a positive fashion what the vendor's or lessor's responsibilities are; it merely states, in a negative fashion, that his immunities are gone and the common law and other statutory material now governs his position. The lawyer or layman who wishes to know the positive rules must travel beyond the Act. Moreover, such an approach would have something to recommend it if it were shown that the common law rules on the matter were clear. As we have already seen, however, such an approach in the Irish context would be unsatisfactory in that the common law position is anything but clear (*supra* Chap. I). Finally, this approach might have some justification in England where, especially in relation to landlords, some settled principles had been statutorily established by the Occupiers' Liability



Act, 1957. No such legislation exists in Ireland, however, and the welcome judicial developments of McNamara v. ESB<sup>92</sup> may not have created sufficient certainty to justify abstaining from a positive formulation of the vendor's and lessor's duty. A more serious criticism of Section 3 is that it imposes no liability for omissions or for negligent non-feasance.

73. Under Section 4 of the 1972 Act the landlord's liability to persons injured on the demised premises depends on whether the landlord has an obligation or a right to repair under the tenancy. It seems wrong in principle that a landlord's liability for injuries to third parties should depend on a contractual arrangement between the landlord and tenant. This is especially true when one remembers that, apart from express contractual provisions, the Courts themselves have great difficulty in deciding whether the landlord has an obligation or a right to make repairs under certain tenancies. The base to which the landlord's liability is attached, therefore, is itself moveable, and no certainty in the law results. It is felt that if Section 3 extended to landlords and covered non-feasance also, then Section 4 would not be needed.

74. While the English Defective Premises Act, 1972, therefore, is instructive, it cannot be used blindly as a model for an Irish reforming measure. It contains some provisions which have no relevance for the Irish context (Section 2); other provisions display shortcomings which should, it is suggested, be eliminated in any Irish legislative proposal. The suggested draft Bill attached to this report (Chap. V) purports to take cognisance of these criticisms.

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<sup>92</sup> [1975] I.R. 1.

(b) Northern Ireland

75. The position in Northern Ireland is sufficiently similar to the English position to merit little elaboration.

76. The Defective Premises (Northern Ireland) Order 1975 (S.I. 1975 No. 1039 (N.I. 9)) brings into operation by order the major provisions of the English Defective Premises Act, 1972. Under Article 4 of this order another order - The House Building Standards Order (Northern Ireland) 1975 (S.R.&O. (N.I. 1975 No. 301) - was made. This approves a scheme to be operated by the National House-Builders Council (Northern Ireland Committee) identical to the scheme operated by the National House-Building Council in England. Houses built within the approved scheme in Northern Ireland are not subject to any of the legal provisions of the Defective Premises (Northern Ireland) Order 1975. This is equivalent to Section 2 of the Defective Premises Act, 1972 in England.

(c) The United States of America<sup>93</sup>

77. The law on this topic in the U.S.A. is largely grounded on the common law position. Vendors and lessors have certain immunities in relation to injuries caused by the defects in the premises sold or let. That is the starting point. Dissatisfaction with this position has been manifest for some decades for policy reasons similar to those outlined above at Chapter III. This dissatisfaction, however, has not generally manifest itself in any legislative reform, but rather asserted itself in a more insidiously

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<sup>93</sup> See generally Prosser, Law of Torts, 4th ed. 399-415, 639-640; Love, Landlords Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability 1975 Wis. L. Rev. 19-160.

piece-meal fashion through the decisions of the courts. Note is here taken of these judicial developments. By way of warning, however, it should be mentioned that what follows is merely an attempt to extract judicial trends from the jurisprudence of the American courts and to state what the law is in the majority of the states. Sometimes the articulated rule will also have been adopted by the American Law Institute in its Restatement, but one must remember that what follows may not be the law for any given state.

78. As already mentioned the general rule is that of the common law: no liability rests on the vendor or landlord of premises for injuries arising from a defective condition existing at the time of the sale or lease. Although various exceptions have been carved out of the rule they merely attest to the continued vigor of the rule itself rather than to its demise. A brief word should be said about these judicial exceptions first, in the case of vendors and then, in relation to lessors.

79. In spite of the general immunity conferred on the vendor the courts in the U.S. have seen fit to restrict the vendor's immunity in the following cases:

- (i) They impose a duty on the vendor to disclose to the purchaser any concealed conditions known to him which involve an unreasonable danger to the health or safety of those upon the premises, and which he should expect will not be discovered by the purchaser.<sup>94</sup>

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<sup>94</sup> Second Restatement of Torts, §353. Belote v. Memphis Development Co., 1961- 208 Tenn. 434, 346 S.W. 2d 441; Bray v. Cross, 1958, 98 Ga. App. 612, 106 S.E. 2d 315; Derby v. Public Service Co., 1955, N.H. 53, 119 A. 2d 335. Prosser, Law of Torts, 4th ed., 412-413.

- (ii) They show a willingness to impose liability on the vendor where the land is in such a condition that it involves an unreasonable risk of harm to those outside the premises. Most of the reported cases on this relate to nuisances (public or private), but the exception it seems is not, in theory, limited to the nuisance situation.<sup>95</sup>
- (ii) The builder-vendor of a house, it now seems, impliedly warrants that the dwelling conforms to statutory requirements, was built in a workmanlike manner and is fit for habitation. This it should be noted imposes liability even if the vendor was not negligent.<sup>96</sup> Completed houses are now equated to unfurnished houses in this regard.

80. The general position of lessors has developed in a similar fashion.<sup>97</sup> From the common law immunity conferred on lessors the courts have been willing to carve out various exceptions. In addition to the exceptions familiar to Irish lawyers, the lessor's liability for current operations, the lessor's liability as occupier of the buildings and the lessor's liability in nuisance, the U.S. Courts have indicated a willingness to impose liability in two further cases:  
 (a) in the case of dangerous conditions known to the lessor

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<sup>95</sup> Second Restatement of Torts, §373. Wilkes v. New York Tel. Co., 1926, 243 N.Y. 351, 153 N.E. 444; Keely v. Manor Park Apartments, Del. Ch. 1953, 99 A. 2d 248. Prosser, Law of Torts, 4th ed., 413.

<sup>96</sup> Carpenter v. Donohoe, 1964, 154 Colo. 78, 388 P. 2d 399; Rothberg v. Olenik, 1970, 262 A. 2d 461; Crawley v. Terhune Ky. 1969, 437 S.W. 2d 743. Prosser, Law of Torts 4th ed., 639. Tavares v. Horstman, 542 P. 2d 1275 (Wyo. 1975). On warranties for unfinished houses, see Vanderschrier v. Arron (1957) 103 Ohio Appeals 340.

<sup>97</sup> See article by Love cited in fn. 93 supra.

and unknown to the lessee a duty to disclose is imposed on the lessor<sup>98</sup> and (b) where land is leased for a purpose involving the admission of the public an affirmative duty is imposed to exercise reasonable care to inspect and repair the premises before possession is transferred to prevent any unreasonable risk to the public.<sup>99</sup>

81. In addition to these exceptions, however, two more recent developments in the U.S. courts deserve our attention. First, it seems that there is a distinct recent trend in the U.S. courts which characterises a lease as a contract containing an implied warranty of habitability (or fitness) which is interdependent with the covenant to pay rent and enforceable by contract remedies.<sup>100</sup> Second, although only a few courts have, to date, abolished the landlord's immunity from tort liability,<sup>101</sup> such a course of action is being canvassed in some states.<sup>102</sup>

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<sup>98</sup> Faber v. Creswick, 1959, 31 N.J. 234, 156 A 2d 252; Knox v. Sands, Mo. 1967, 421 S.W. 2d 498. See also Prosser, Law of Torts 4th ed., 401.

<sup>99</sup> Prosser, Wade and Schwartz, Cases and Materials on Torts, 6th ed., 520, citing and quoting from Borders v. Roseberry, 1975, 216 Kan. 486, 532 P. 2d 1366.

<sup>100</sup> See Love, op. cit. fn. 93 supra, at 97.

<sup>101</sup> The first example occurred in Sargent v. Ross, 1973, 13 N.H. 388, 308 A. 2d 528.

<sup>102</sup> See for example, Love, op. cit. fn. 93, supra. For law review comments on Sargent v. Ross fn. 101 see (1974) 43 U. Cin. L. Rev. 218; (1974) 5 Tex. Tech. L. Rev. 887; (1974) 8 Suffolk L. Rev. 1305.

(d) New Zealand

82. The legal position of vendors, lessors and builders in New Zealand for damage caused by defects in the premises sold, let or built can be best discussed in the context of a recent Supreme Court decision: Gabolinscy and Another v. Hamilton City Corporation.<sup>103</sup>

83. Before this case the law of New Zealand corresponded to the orthodox common law position: neither the vendor nor lessor of realty gave any implied contractual warranties. The purchaser or lessor had to look out for himself. Neither was the vendor or lessor liable in Negligence, since the general view before Gabolinscy was that Donoghue v. Stevenson principles did not extend to the vendors or lessors of real property. Moreover, builders who became vendors or lessors took the immunities which the common law bestowed on these privileged classes.

84. In Gabolinscy, however, the Supreme Court in New Zealand was prepared to hold (i) that there are some circumstances where the court will imply warranties as to the quality of the land sold and (ii) that the principles of Donoghue v. Stevenson apply to realty and that the owner-subdivider-lessor of realty will be liable in Negligence if he has not taken care in the preparation of the land for sub-division.

85. The facts of the case were as follows. The defendant corporation owned a piece of land which it had used as a gravel pit for some years. In 1946, when the pit was exhausted the corporation developed the area for transit housing and in 1957 when the need for transit housing disappeared the corporation decided to develop the

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<sup>103</sup> [1975] 1 N.Z.L.R. 150.

land and make it suitable for more permanent dwelling houses. To this end it sub-divided the land into 14 lots and offered them for lease for a period of 21 years with a perpetual right of renewal. It was a condition of the lease that the lessee would within 2 years of the date of the lease erect a dwelling-house on the lot to a value of not less than £2,500. In July 1959 the plaintiffs leased one of the lots and obtained a building permit for the erection of a brick veneer house in November of the same year. This house was completed in July 1960. In 1970 settlement cracks appeared in the house due to the subsidence of the supporting land on which the house was built. The cost of repairs to the house was \$3,615 and the plaintiffs sued the defendant corporation for this amount. They also claimed the sum of \$1,000 as general damages for inconvenience and worry.

86. The plaintiffs claimed, in tort, that the defendant corporation were, as owner-subdivider-lessor, liable for Negligence. Alternatively, the plaintiffs claimed that there was an express or implied warranty that the land was suitable for the erection of a dwelling-house and an undertaking that it had been properly and adequately prepared and developed for that purpose.

87. With regard to the contractual claim the court held that while there was no evidence to support the claim that an express warranty had been given, the circumstances of the present case did permit the court to imply a warranty in the instant case. At p. 163 of the report the court makes the following statement:

"From this I take it to be the case that, although warranties as to the quality of any land which is the subject of a contract of sale or lease are not in general to be implied, the totality of the circumstances of any particular case may lead the Court to a decision that such a warranty should

be implied. I think that this is such a case. Not only was it clearly known to the council that the plaintiffs were purchasing the land for housing purposes, but also the council, both by the contents of the "particulars and conditions of lease by public application" and by cl 4 of the lease itself, specifically required the plaintiffs to use it for that purpose and to build upon it a house of a certain standard within a specified time. Consequently I hold that a warranty of the type pleaded is to be implied in the present case and that there was a breach of it. The defect was of a nature which the plaintiffs could not have been expected to discover by reasonable examination."

88. With regard to the tortious action the court was also prepared to find for the plaintiffs. Referring to the majority opinion in the English case of Dutton v. Bognor Regis Urban District Council<sup>104</sup> - that is the judgments of Lord Denning MR and Sachs L.J. - the court said:

"Stamp LJ was somewhat more cautious in his approach but, although he still appeared to be of the view that a builder-owner who subsequently sells the house that he has built cannot be liable to his purchaser for damage caused through negligent construction, I prefer, with respect, the views of the majority of the Court, and, consequently, if the builder-owner must now answer to his purchaser on the basis of Donoghue v. Stevenson for his negligent work in connexion with realty, it appears to me that the owner-subdivider who offers the land to the public for building purposes must be similarly liable if he has been negligent in the preparation of the area for subdivision."<sup>105</sup>

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<sup>104</sup> [1972] 1 Q.B. 373.

<sup>105</sup> [1975] 1 N.Z.L.R. 150, at 156. It should be noted that Dutton's case has not received universal approval. In McCrea et al v. City of White Rock et al. 56 D.L.R. 3d 525 (B.C.C.A. 1974) reversing 34 D.L.R. 3d 227 (Sup. Ct., Berger, J. 1972) the court refused to find a building inspector liable for not inspecting a building, which subsequently collapsed, at a particularly important stage of the construction. The most recent statement of the law on the liability of builders in New Zealand is to be found in Bowen v. Paramount Builders Limited (C.A. 69/84, decided 22 December 1976, not yet reported). All of this must now be considered in view of the House of Lords' decision in Anns and Others v. Merton London Borough Council, London Times, 13 May 1977, p. 19, supra C(ii), para. 34.



89. What then is the effect of this decision? For our purposes we can be brief in our assessment. First, it is clear that the Supreme Court in New Zealand was not content to let the old common law rules prevail in the matter. It recognised the legitimate interest of the plaintiff and showed itself willing to inject, at least in the circumstances of this case, into the leasing contract a "fitness for purpose" warranty. Furthermore, it declared that Donoghue v. Stevenson principles apply to realty and that the owner-subdivider-lessor who offers land for building purposes is liable in Negligence if he has been negligent in the preparation of the area for subdivision. It should be noted that statements made in the statement of claim and evidence called on were not sufficient to support a finding of negligence against the defendant in its role as a local authority. The decision, therefore, is not limited to local authorities, but has a much wider sphere of application.

90. On the legislative side, note should be taken of the Property Law Amendment Act, 1975 (No. 36) which increases the liability of lessors, and The Building Performance Guarantee Corporation Bill at present before a Parliamentary Select Committee. The Corporation, to be established by this Bill, will issue indemnities protecting and indemnifying the owners of residential buildings against loss or damage that may arise because of defective construction. The indemnity is to attach to, and run with, the land for the benefit of future owners of the dwelling.

(e) Canada

91. The basic common law rules which give immunities to the lessors and vendors of real property still dominate this branch of the law in Canada. Generally speaking, apart from contract, there is no duty upon the owner of an unfurnished house or apartment to see that the house or

apartment let is in a safe condition at the commencement of the term, and if a tenant or a guest or employee of the tenant suffers injury for the unsafe state of the rented premises no action for negligence will lie against the owner for such injury.<sup>106</sup> In the case of the sale of real property caveat emptor is also the dominant rule applicable.

92. Builders or contractors, who are not also vendors or lessors of the property in question, are, however, liable under ordinary negligence principles. They are not immune unless they have sold or leased the property in which event they are classified as vendors or lessors and as such inherit the immunities accorded to these persons at common law. As Jessop J.A. says in a recent case:

"In any event, I think that a contractor or builder who is negligent in the performance of a contract to build is liable in tort, under the principle of *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562, to any person suffering resultant injury to person or property...."<sup>107</sup>

93. The principle established in the English case of *Dutton v. Bognor Regis Urban District Council*<sup>108</sup>, rendering liable a local authority for the negligent inspection by its officer of buildings under construction, also seems to have found favour with the Canadian courts, although in a most recent case a British Columbian court refused to apply it to the facts before it. The facts of this case are worth discussing.

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<sup>106</sup> *Albert v. Pelletier* 66 D.L.R. (3d) 536 N.B. S.Ct.

<sup>107</sup> *Dominion Chain Co. v. Eastern Construction Co.* 68 D.L.R. (3d) 385, at 395. Authorities cited with approval in this connection included *Gallagher v. N McDowell Ltd.*, [1961] N.I.L.R. 26; *Lock and Lock v. Stibor et al.*, [1962] O.R. 963, 32 D.L.R. (2d) 273; *Sharpe v. E.T. Sweeting & Son, Ltd.*, [1963] 2 All E.R. 455; *Dutton v. Bognor Regis United Building Co. Ltd. et al.* [1972] 1 All E.R. 462.

94. Under the Municipal Act, R.S.B.C. 1960, c 255 (s. 714) a municipality is empowered, for the health, safety, and protection of persons and property, to enact a bye-law regulating the construction, alteration, repair or demolition of buildings and structures. The defendant municipality had done so and had provided that builders had to notify inspectors and obtain approval at various stages of construction. In the present case the plaintiff suffered damage when part of the premises in which he was a tenant collapsed. It appeared that, although some inspections had been carried out on the premises during their construction, the inspector had not been notified of the construction operations which eventually caused the damage and these had been carried out without inspection. In an action against the inspector and the municipality it was held, on the construction of the bye-laws that there was no duty on the inspector to inspect in the absence of a notice from the owner of the premises. The plaintiff's action, therefore, failed. Dutton's case (which could find support in Canadian precedents<sup>109</sup>) was distinguished in that first, the inspector had notice of the repairs in Dutton and had carried out the inspection and second, Dutton was a clear case of mis-feasance whereas the present case was a case of non-feasance. The wording of the bye-laws in the two cases was also very different.<sup>110</sup>

95. As in other countries, however, dissatisfaction with the unwarranted immunities conferred on landlords and vendors has led to some moves for reforms. In recent

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<sup>108</sup> [1972] 1 Q.B. 373.

<sup>109</sup> See 56 D.L.R. (3d) 525, at 546.

<sup>110</sup> McCrea et al. v. City of White Rock et al. 56 D.L.R. (3d) 525.

years, for example, some provinces have in the leasing situation passed legislation which places an obligation on the landlord to maintain rented premises in a good state of repair and fit for habitation.<sup>111</sup>

96. Apart from these statutory warranties in relation to repair and fitness for habitation, recent reforms in this area of the law are principally concerned with providing protection for purchasers of new homes. The method of protection which seems to be finding favour in the Canadian provinces is similar to the scheme which is operated in England by the National House-Building Council. This involves operating a register of builders, inspection during construction, implied warranties and a guarantee fund. To date, several provinces including Alberta, Manitoba and Ontario operate such schemes. The schemes as operated in these provinces are so similar to the English model that one does not have to engage in a detailed description of their provisions. One difference, however, in the various approaches deserves to be mentioned: the scheme as operated in Ontario, for example, is a statutory one whereas the Alberta and Manitoba New Home Certification Plans are not matters of law at all but are self-imposed schemes which operate in a manner similar to the English scheme. The basic functions of the Alberta and Manitoba programmes are:

- "1. to register qualified builders.
2. to issue certificates on all homes built for sale by registered builders under the provisions of the Program.

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<sup>111</sup> See for example, Landlord and Tenant Act, R.S.O. 1970 c 236, s. 96 (Ontario), Landlord and Tenant Act, R.S.P.E.I. 1974 Cap L-7, s. 102 (Prince Edward Island), and Landlord and Tenant Act S.B.C. 1974, c 45 (British Columbia). It is understood that Alberta has plans to introduce a similar statute in the near future.

3. to provide protection for the consumer to a maximum of \$20,000 per home against the loss of his deposit and down payment owing to bankruptcy or fraud of the builder.
4. to provide a five (5) year warranty up to \$20,000 maximum for the new home which,
  - a. guarantees the builders warranty for the first year, and
  - b. guarantees the owner against loss from major structural defects during the ensuing 4 years.
5. to conciliate home owner/builder grievances and ensure that valid complaints by either party are resolved."

97. The Ontario plan, being statutory deserves a further word. The New Homes Warranties Plan Act, 1976, provides for the establishment of an independent non-profit making corporation whose primary function is to run the plan set up by the Act. Section 6 provides

"No person shall act as a vendor or a builder unless he is registered by the Registrar (appointed by the Corporation) under the Act."

The Act sets out several provisions relating to the registration process including provisions relating to the following: conditions of registration, refusal to register, revocation, hearings, appeals tribunal, etc.

98. The plan established by the Act comprises certain warranties to be given with a new home and a guarantee fund which provides compensation in circumstances provided for in the Act (Sec. 11). The vendor (including a builder/vendor) is obliged by the Act to provide the purchaser with certain documentation and notices respecting the plan and no builder is to commence building a home until he has notified the corporation and has got its permission.

99. Under Section 13 of the Act every vendor of a home warrants to the owner

- "(a) that the home,
  - (i) is constructed in a workmanlike manner and is free from defects in material,
  - (ii) is fit for habitation, and
  - (iii) is constructed in accordance with the Ontario Building Code;
- (b) that the home is free of major structural defects as defined by the Regulations; and
- (c) such other warranties as are prescribed by the Regulations."

100. Although the term of the warranty is relatively short - one year - it is enforceable notwithstanding the absence of privity of contract between the parties and cannot be contracted away.

101. Section 14 sets out the circumstances which will bring the compensation provisions into play:

- "14. - (1) Where,
  - (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
  - (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
  - (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed.

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations."

102. In this fashion, therefore, by a combination of a system of registration, implied statutory warranties and the availability of a guarantee fund the legal position of a purchaser of a new home has been greatly improved in Ontario.

(f) Australia

103. The unsatisfactory protection afforded to purchasers and lessees by the common law has been recognised in several of the states in Australia. Legislation recently adopted in these states rely on a variety of techniques to assist the purchaser and lessee of new homes, including the following: compulsory registration of builders, compulsory insurance on new buildings, implied warranties, etc. A brief description of the principal Acts in force in the various states of Australia follows.

New South Wales:

Builders Licencing Act, 1971, as amended by Builders Licencing (Amendment) Acts, 1975 and 1976.

104. The scheme of these Acts obliges all builders to take out a licence with the Builders Licencing Board established by the Act. Unlicenced builders are prohibited from carrying out any building work. Certain warranties in relation to the quality of the building, the materials used, etc., are implied into building contracts irrespective of any attempt to exclude them in the contract. The Builders Licencing Board effects insurance (financed by levy from the builders) to cover such risks as the insolvency of the builder, structural defects in the buildings, failure by the builder, after arbitration, to honour his warranties, etc. The Board transfers the benefit of the insurance contract to the purchaser by way of contract. Under the Acts the Board is deemed to have entered into an agreement

with every purchaser of a building to which the Act applies - called a house purchasers agreement - wherein the Board in effect assigns to the purchaser the benefit of the insurance cover already taken out by it.

South Australia:

Defective Houses Act, 1976.

105. Under this Act certain statutory warranties are imposed in any contract for the construction of a new house. The warranties cover workmanship and the quality of materials used and a warranty when the house is completed that it will be fit for habitation. Such warranties cannot normally be excluded by the parties and the Act in no way limits the liability to which the builder or vendor may be subject otherwise than under the Act.

Victoria:

Local Government (House Builders' Liability) Act, 1973, as amended by the Local Government (House Builders' Liability Amendment) Act, 1974.

106. This legislation provides that a builder shall not enter into a contract to construct a dwelling-house or to sell a completed dwelling-house unless an approved indemnity or contract of insurance is in force in respect of that dwelling-house. The cover may be provided either by an approved guarantor or pursuant to an approved policy of insurance. The extent of the cover is \$2,000 or 10 per cent of the contract price, whichever is the greater in respect of financial failure, \$10,000 or 50 per cent of the contract price where the builder fails to complete the dwelling, \$12,000 or 60 per cent in respect of defects appearing in the first year, and \$5,000 or 25 per cent, whichever is the greater in each case, in respect of major



defects appearing between the end of the first and sixth years after completion of the dwelling. In order to keep the insurance premium down small claims (less than \$100) are excluded from the ambit of the scheme. Moreover, if the builder disappears the purchaser has a right to claim directly against the fund. Like other legislation in this area contractual attempts to negate the provisions of the Act are void and the rights given to the purchaser by the Act are in addition to any Common Law remedies he may have apart from the Act.

Queensland:

Builders' Registration Act, 1971, as amended by the Builders' Registration Act Amendment Act, 1973.

107. This legislation requires every person who wishes to operate as a builder to be registered with the Builders' Registration Board of Queensland. In deciding who shall be registered emphasis is placed on technical ability, or experience as well as on maturity (over 21 years) and "good fame and character". Persons who are not registered as builders are prohibited from advertising that they are registered and are also prohibited from carrying out works of building constructions. Where the Registration Board is of the opinion that work carried out by a registered builder has not been carried out in a proper and workmanlike manner, the Board may order him to remedy the faulty or unsatisfactory building work within a reasonable time. Failure to observe this order constitutes an offence under the Act, and empowers the Registration Board to cancel the builder's registration.

Western Australia:

Builders' Registration Act, 1939-1970.

108. This legislation establishes a registration system for builders which is very similar to that which prevails in Queensland and which has been sufficiently described in the preceding paragraph.

Tasmania:

109. Legislation for the compulsory registration of builders is to be considered by the Legislative Council at the next parliamentary session. The Bill has already been passed by the House of Assembly.

110. Apart from the legislation mentioned above which attempts to assist the purchaser of a new home by regulating builders and by imposing statutory warranties, etc., other legislative developments in Australia attempt to assist the tenant in his dealings with his landlord. For example, in Queensland the Property Law Act, 1974 (Section 106) declares that in every lease for 3 years or less there is an obligation on the part of the lessor to maintain the premises during the lease in a good state of repair and where the premises are let for human habitation to provide and maintain the premises in a condition reasonably fit for human habitation. Similar legislation is to be found in other states.

(g) Scotland

110A. Scotland has few reported cases on this topic and apart from the Occupiers' Liability (Scotland) Act, 1960, no legislation. The immunities which vendors and lessors have at common law do not apply, however, in Scotland and judging from the absence of decisions the ordinary principles of delict (failure to take reasonable care) cope adequately with the problem.

## CHAPTER V SUGGESTED REFORMS

### General Approach

111. Defects in this branch of the law in Ireland may be said to relate to two problems. First, the substantive principles governing the liability of vendors, lessors and builders are defective in that they confer immunities which these persons, on modern concepts of liability, ought not to have. Second, there is the problem of ensuring the financial stability and the continued existence of vendors, lessors and builders in view of recent experience in the house building market.

112. For reasons already given (supra Chap. III) it is felt that these problems should be dealt with separately. Treatment of the second problem may well be appropriately dealt with in a voluntary way through a scheme which contemplates the registration, bonding and guaranteeing of builders. It would involve consultation with various interested parties and would undoubtedly involve delay. Such measures should be actively promoted and encouraged, but they should not be linked with the substantive reforms recommended in this report. Worthwhile substantive reforms, it is felt, can be achieved without undue delay.

113. In substantive matters it is felt that the thrust of reform measures should be to increase the liability of vendors, lessors and builders and render them more amenable to current notions of civil liability. It is proposed that reasonable terms should be implied for the benefit of purchasers or lessees relating to the quality of all premises sold or leased. Moreover, it is proposed that the immunity which vendors and lessors have in tort for injuries caused by dangerous defects in the property should

be abolished. More specifically these reforms should try to achieve four objectives:

1. Any person who undertakes building work should owe a duty to see that the work is executed in a good and workmanlike or professional manner and with suitable 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.

It is intended that such a provision should not only impose a duty on builders, subcontractors, architects, engineers, etc., but also on banks and financial institutions which participate in the management, control or conduct of the work in question.

2. Any person who sells, leases or licences premises should owe a duty to take reasonable care in respect of all persons who might reasonably be expected to be affected by defects in the premises provided that such defects existed at the time of the disposal of the property and were known or ought to have been known to the vendor, lessor or licensor.
3. Where any person sells, or leases or grants a licence of premises in the course of business, or where the premises are less than 12 years old otherwise than in the course of business, and the purchaser, lessee or licensor expressly or by implication makes known the particular

purpose for which the premises are being taken there shall normally be implied a condition in the contract lease, or licence, that the premises should be reasonably fit for that purpose.

4. The obligations imposed by the suggested legislation should be in addition to any duty a person may owe independently of the Act and should not be capable of being excluded or limited by contractual provisions.

The proposed headings for a draft Bill set out hereunder (infra p. 82) attempt to achieve these objectives.

114. The present study suggests that various methods can be used to improve the lot of the purchaser or lessee of a house. These methods are as follows:

1. Warranties Implied by Law.
2. Obligations Imposed by Statute.
3. Registration of Builders.
4. Insurance.
5. Inspection during Construction.
6. Quality Control by Mortgagees or Guarantors.

While it is true that each and every one of these methods can be used to improve the quality of housing in the State, the various methods approach the problem in different ways. In approaches No. 1 and 2, for example, the remedy is given to the purchaser or lessee himself, and it is left to himself to pursue it; the purchaser/lessee becomes his own enforcement agency. In approaches Nos. 3 to 6, however, an outside agency or third party is contemplated. No. 3 involves a Registrar of Builders, No. 4 involves Insurance Companies, No. 5 involves Inspectors (possibly, but not necessarily Government appointed) and No. 6 involves finance houses.

115. Another difference between approaches 1 and 2 and approaches 3 to 6 is that the solutions offered in 1 and 2 presuppose, and depend for their efficacy on the continued solvency of the builder, etc., whereas approaches numbered 3 to 6 are more designed to ensure the quality, the continued existence and the financial stability of the builder. In a way, therefore, approaches 3 to 6 complement measures which might be adopted at 1 or 2.

116. It should also be noted that suggestions for reform of substantive matters at 1 or 2, suggestions which might mitigate the harshness of caveat emptor, can be considered as alternatives to each other. Reform here could be either by way of implied warranties or obligations imposed by statute: either 1 or 2. Both approaches would not be necessary. Approaches mentioned at 3 to 6, however, tend to complement each other and should probably be viewed as a package. A registration system for builders inevitably involves continuous inspection to ensure quality standards, and an insurance or bond system where it is considered necessary to guarantee the builders' financial stability.

117. The ideal solution it would seem, therefore, would be to adopt measures suggested at 1 or 2, and to re-inforce these rights by a scheme comprising some or all measures mentioned in 3 to 6, which would guarantee the quality and the financial stability of the builder. Such a two phased approach seems to offer the best comprehensive solution to the vexed problems that arise in this area.

118. It should be stated, however, that the two charges of the double-barelled reforming measure need not necessarily be discharged simultaneously. Because the package mentioned in measures numbered 3 to 6 involves third parties and a good deal of administrative structures, some delay might be expected in implementing it. On the other hand, reform

measures under 1 or 2, once agreed, can be converted into legislation fairly quickly. Moreover, obligations imposed by statute would apply to vendors and lessors as well as to builders, whereas the package mentioned in measures 3 to 6 normally aims at builders only. Desirable reforms relating to vendors and lessors (including builder/vendors and builder/lessors) should not be postponed until an acceptable Builders Registration scheme is evolved.

119. A registration scheme, which involves some of the methods mentioned in 3 to 6 above, has been the subject of discussions between the Department of Local Government and the Construction Industry Federation in Ireland for some years and recently the Government has given approval to the C.I.F. proposal.

120. Details of the scheme have not yet been worked out but its main features have been described by a statement from the Government Information Services in the following language:

"Broadly, the agreed scheme provides for the establishment of a body by the Construction Industry Federation for a registration of house builders who are competent, technically and financially, to undertake house building. The purchaser of a house built by a registered house builder will receive a six year guarantee from the builder, which will be backed by the registering body. Every guaranteed house will be inspected by technical officers of the Department of Local Government (or, where appropriate, of Roinn na Gaeltachta) on at least three occasions (foundation, roofing and completion stages) and registered builders will be required to remedy any structural defects then observed. If a builder fails to remedy the defects, his name may be removed from the register and the purchaser will be compensated. A system of conciliation and arbitration will be established to resolve any disputes arising under the scheme. Two observers from the Department of Local Government will attend meetings of the guaranteeing body and the expenses of that body will be met by a small levy (about 1% of the purchase price of the guaranteed house). It is intended to enable builders who are not members of the Federation to be associated with the guarantee scheme."

121. As has been already suggested earlier in this paper the development of a registration scheme which guarantees the work of builders is to be encouraged. The present proposal would seem to suffer from some serious defects, however, the most important of which are the following:

- (1) The proposed scheme, it seems, is intended to cover "spec. houses" only. Contract houses or incomplete houses are not to benefit from the protection of the proposed scheme.
- (2) The registration body will guarantee major structural defects only, it does not propose to guarantee minor structural defects or non-structural defects.
- (3) The guarantee, it seems, will be for a period of 6 years only, whereas similar schemes in Northern Ireland and England, give a ten year structural guarantee.
- (4) It is proposed that the registration body will be run by the C.I.F. It will be a builders' body exclusively and will have no outside representation. It is true that two Government "observers" will be permitted to attend, but no other interests will be represented e.g. consumers, finance houses, trade unions, etc. Since at present the C.I.F. only represents 30% (approx.) of all builders in Ireland, the composition of the registration body may not be sufficiently representative to inspire the public confidence necessary for the success of such a scheme.
- (5) The guarantee offered by the registering body, it appears, will only arise if the purchaser fails to get satisfaction from the builder. Primary liability will lie at all times with the builder and the purchaser must show that he has exhausted his remedy against the



builder before he can claim against the registering body. In the English scheme, the Council's liability is independent of the builder's liability.

- (6) The proposed scheme does not, it seems, guarantee the solvency of the builder. It will not help the purchaser who loses his deposit or his interim payments, when the builder becomes bankrupt or goes into liquidation.

122. Whatever the success prospects are for this scheme, however, the substantive reforms suggested in this paper should not be delayed because of its establishment.

GENERAL SCHEME OF A BILL TO AMEND THE LAW RELATING TO THE  
LIABILITY OF BUILDERS, VENDORS AND LESSORS FOR THE QUALITY  
AND FITNESS OF PREMISES.

1. (1) Provide that a person who undertakes or  
executes any work for or in connection with the provision  
of any premises (hereinafter referred to as 'building work')  
shall owe a duty

- (a) to the person who commissioned the work and
- (b) without prejudice to paragraph (a) above, to  
every person who acquires an interest (whether  
legal or equitable) in the premises

to see to it that the work which he undertakes or executes,  
is executed in a good and workmanlike or, as the case may be,  
professional manner and with suitable and proper materials,  
and so that, where the premises consist of a dwelling, they  
will be reasonably fit for occupation and habitation, and in  
the case of other premises, so that they will be reasonably  
fit for the purpose for which they were intended.

(2) Provide that, for the purposes of this section,  
a person who undertakes or executes any building work may  
include any bank, building society, financial institution or  
other person or body of persons who or which

- (a) participates in the management, control or  
conduct of the work in question or
- (b) in respect of the building work in question  
receives or is entitled to fees in addition  
to the normal interest or loan fees associated  
with its business.

(3) Provide that 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.

(4) Provide that a person shall not be treated for the purposes of subsection (3) 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.

(5) Provide that in subsection (3) and (4) "instructions" includes plans and specifications and references to the giving of instructions shall be construed accordingly.

(6) Provide that a person who -

- (a) in the course of a business that consists of or includes providing or arranging for the provision of dwellings or of 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 undertake 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 undertaken the work.

(7) Provide that where an interest in a dwelling is compulsorily acquired -

- (a) no action shall be brought by the acquiring authority for breach of the duty imposed by section 1 in respect of the dwelling; and
- (b) if any work for or in connection with the provision of the dwelling was executed otherwise than in the course of a business by the person in occupation of the dwelling 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.

(8) Provide that the Statute of Limitations 1957 is hereby amended by the addition of the following paragraph in subsection (5) of section 11:

"(d) an action under section 1 of the Defective Premises Act 1977."

(9) Provide that subject to subsection 10, any cause of action in respect of a breach of the duty imposed by this section shall 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 the first person 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.

(10) Provide that where, by virtue of subsection 9, the limitation period begins to run when possession is taken of the premises or the first time after completion of the premises when an interest in it is acquired by a person, and after that time a person undertaking work of any description in connection with the premises does further work in such connection any action in respect of that further work shall be deemed to have accrued at the time when the further work is finished.

(11) Provide that damages for breach of the duty created by this section includes damages for economic loss (if any).

2. (1) Provide that any person who sells or leases premises or grants a licence of premises shall owe a duty to all persons who might reasonably be expected to be affected by defects in the condition of the premises (whether or not these defects have been created by the acts or omissions of the vendor, lessor or licensor) 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 such defect, provided that such defects existed at the time of the sale, lease or licence and were known or ought to have been known to the vendor, lessor or licensor.

(2) Provide that in determining whether a person has discharged the duty placed on him by this section in respect of the condition of any premises regard shall be had to all the circumstances; and any warning given to the purchaser, tenant or licensee of the premises shall not be treated as absolving the vendor, lessor or licensor from

liability unless it was sufficient to enable the purchaser, tenant or licensee 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.

(3) Provide that in determining whether the lessor of the premises has discharged his duty under this section account should be taken, where premises are let under a tenancy, of the fact (if it is a fact) that the lessor was obliged or entitled to repair.

(4) Provide that where a person sells or leases premises or grants a licence of premises in the course of business, or sells, leases or grants a licence of premises that are less than 12 years old otherwise than in the course of business, and the purchaser, lessee or licensee expressly or by implication makes known to the vendor, lessor or licensor the particular purpose for which the premises are being taken, there shall be an implied condition in the contract of sale, in the lease or in the licence that the premises are reasonably fit for that purpose, except where the circumstances show that the buyer, lessee or licensee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the vendor, lessor or licensor.

(5) Provide that 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 sold or granted by licence, when the sale or grant of the premises was completed, or a contract for their sale or grant 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 agreement by which the consideration for the disposal was fixed before the commencement of this Act.

3. Provide that a breach of an obligation under section 1 or section 2 shall be a breach of a statutory duty and a wrong within the meaning of section 2 of the Civil Liability Act 1961, and that Act shall apply accordingly. A person who is in breach of an obligation under section 1 or section 2 of this Act shall be a wrongdoer within the meaning of and for the purposes of the Civil Liability Act, 1961.

4. (1) Provide that in this Act -

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

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

"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 by his attorning tenant to his mortgagee;
- (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) Provide that any duty imposed by any provision of this Act is in addition to any duty a person may owe independently of this Act.

(3) Provide that any provision contained in any contract for the disposal of premises shall be void in so far as it attempts to exclude or limit any duty or obligation imposed by this Act except where the person who undertakes or executes the work in question or the vendor, the lessor or the licensor sets out in clear and unambiguous language, in the contract, in the lease or in the licence, the defects in the premises and the purchaser, the lessee or the licensee is fully aware of them and accepts the premises subject to these defects.



## APPENDIX

### SCHEMES FOR REGISTRATION OF BUILDERS AND THE NATIONAL HOUSE-BUILDING COUNCIL IN ENGLAND.

1. As has been mentioned in the body of the Working Paper, one of the objects of any reforming measure in this area should be the establishment of some system which would ensure the quality and the financial stability of builders. Schemes to achieve this end have been adopted in various jurisdictions in the common law world. Although these schemes differ from each other in detail they broadly try to achieve their objectives in the following way.

2. First, a body (Council) is established to operate a Register of builders. Registration is not usually made mandatory, but certain advantages are attached to being on the register. Registration is usually dependent on proof by the builder of minimum standards of competence and some proof of financial stability. The schemes are usually confined to new homes.

3. Second, once registered the builder must comply with the rules of the registration authority. These normally oblige him to undertake to build to the authority's building standards and further obliges him to give the purchaser certain warranties about the premises. Under this the builder must normally give a warranty to remedy any defects in the dwelling for a period of 1 - 2 years.

4. Third, the registration authority itself guarantees to remedy major structural defects for a fixed period (5 - 10 years) and to stand behind the builders (1 - 2 years) warranty. It also protects the purchaser against losses sustained in the event of the builder becoming bankrupt. The back-up guarantee programmes are paid for by way of levy

collected from the builders. The authority also runs a conciliation scheme to assist in the solution of disputes between purchasers and registered builders.

5. For the purchaser of a new house the advantages of dealing with a registered builder are worth noting. By dealing with a registered builder the purchaser knows that he is dealing with a person who complies with the Council's minimum standards relating to technical competence and financial stability. He gets a form of contract which recognises his legitimate interests and which gives him certain warranties which he would not otherwise get, including a two year defects warranty from the builder. Furthermore, the Council guarantees (within certain limits) the builder's warranties, and provides a structural guarantee for a longer period (10 years in England). Moreover, in the event of the purchaser losing money (e.g. deposit) because the builder becomes bankrupt the Council undertakes to re-imburse the purchaser with the amount of his loss. Finally, the purchaser gets the benefit of a professional conciliation service in the event of a dispute.

6. Such schemes are frequently described as voluntary or self-regulatory but these terms tend to be misleading. Such schemes are only 'self-regulatory' in the sense that in some cases they require no legislation; the schemes are such that the Government decides to refrain from legislation. But even though no legislation is passed, the Government is very much concerned with the successful operation of the scheme and it usually has observers monitoring the progress of the scheme. Moreover, at all times there is the expressed or implied threat of the Government that if the scheme does not succeed legislation will then be introduced. With regard to the "voluntary" nature of the scheme the following comment on the National

House-Building Council of England is worth quoting:

"Thus, the mark of success of a 'voluntary' scheme is that it becomes 'virtually mandatory' as quickly as possible. The reason for this language, notably using the word 'voluntary' when 'independent' or 'non-statutory' is meant, lay in the political bargain which had been made. The housebuilders were to gain status by co-operating in a scheme which appeared not to be official, while the building societies were to gain similarly by agreeing to underpin the scheme and to help run it. The architects, surveyors and other monitors on N.H.B.R.C. were to continue in that prestigious role, while the Ministry avoided both the need for legislation and the heavy administrative burden of themselves inspecting and guaranteeing new houses."

(Barker, The National House Builders Registration Council, in Hague, Mackenzie, Barker, Public Policy and Private Interests: The Institutions of Compromise pp. 327-355, at 349. MacMillan Press Ltd. 1975. London and Basingstoke).

It is in the light of these comments that the recent guarantee scheme announced by the Department of Local Government and the Construction Industry Federation should be viewed (supra para. 119).

7. The National House-Building Council Scheme in England is probably the best known scheme of its kind and since it has served as a model for other countries a further word about it would not be inappropriate. An almost identical scheme operates in Northern Ireland.

#### National House-Building Council in England

8. The National House-Building Council was established, largely on the initiative of the building industry itself, to maintain building standards in the industry, to improve the purchasers rights at law and to provide a guarantee scheme for major structural defects in dwellings.

9. The Council maintains a Register of Builders and Developers. Before a person is placed on the register an examination of his technical ability and his financial stability is undertaken. This means that a purchaser who deals with a registered builder has certain assurances as to the builder's competence and financial security. Registration, however, is not compulsory.

10. In addition to this, however, the Council maintains standards in three additional ways.

- (a) The registered builder or developer undertakes to comply with the Council's construction standards. Failure to achieve these standards can involve the builder/developer in disciplinary action by the Council.
- (b) The registered builder or developer must use, when he sells the dwelling, the contract form approved by the Council. This standard form of contract provides the house-buyer with certain rights against the builder or developer and against the Council which would not otherwise be available to the purchaser.
- (c) The Council operates an insurance scheme under which a purchaser gets a ten-year structural guarantee from the Council in respect of dwellings to which the scheme applies. To get the benefit of the guarantee the dwelling must be a registered one, it must have been inspected from time to time during construction and a certificate of compliance must have been issued by the Council. The Council's liability, however, contemplates certain maximum limits.

11. The builder's or developer's obligations under the standard contract form (HB5 - current House Purchasers Agreement) are set out in clauses 2 and 3. Under these clauses the builder or developer warrants (1) that his name is entered on the Register maintained by the Council; (2) that he has undertaken to abide by the Rules of the Council and that he has submitted or will submit an application for periodic inspection of the dwelling by the Council during construction. Moreover, in respect of the dwelling he warrants that it has been built or that it will be built (1) in an efficient and workmanlike manner and of proper materials and so as to be fit for habitation and (2) so as to comply in all respects with the Council's Requirements and (3) so as to qualify for the Council's Full Certificate. Furthermore, and independent of the above obligations, the builder or developer gives an undertaking in clause 6 to make good for a period of two years any defects in the dwelling consequent on any breach by the builder or developer of the Council's construction requirements.

12. In addition to the 10 year structural guarantee which the Council gives in respect of registered dwellings the Council also undertakes to indemnify anyone who has lost money (including a deposit) as a result of the bankruptcy or liquidation of the registered builder or developer before the house is complete. It also undertakes to honour the builder's or developer's two year guarantee should the builder or developer fail to fulfil his obligations in this regard.

13. The overall scheme, therefore, provides the house purchaser with certain guarantees in relation to the construction techniques used in the erection of the dwelling as well as legal remedies against the builder or developer, and against the Council itself, in the event of failure by the builder or developer to achieve these standards, or in the event of the builder becoming bankrupt.



This Working Paper was completed for publication on  
11 November 1977.

It is circulated for comment and criticism and does not  
represent the final views of the Commission.

The Law Reform Commission will be grateful if observations  
on the Working Paper are made before 1 March 1978.

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