OCCUPIERS' LIABILITY

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SIR PETER NORTH
CBE, QC, DCL, FBA

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INTRODUCTION

1. The Background

The scope of this book is the examination of liability for dangers caused by the state of land and buildings. It focuses on three major areas all of which have the characteristics that the rules were developed by the common law but in such a way that, in the twentieth century, there was growing dissatisfaction with the state of the law. In some areas it had become over complex; other areas were considered to be inadequate in providing remedies to injured claimants, not least because of the inability of the courts, under the then applicable doctrine of precedent, to amend rules established by the House of Lords in the nineteenth century. However, the establishment of law reform bodies in the middle part of the twentieth century provided opportunities for the problems to be addressed, first by the Law Reform Committee which examined the problems of the liability of an occupier to his lawful visitors and the liability of a landlord for injuries suffered on his premises. Their proposals led to the Occupiers' Liability Act 1957. **1.01**

However, two areas of difficulty remained, both of which were addressed by the then newly established Law Commission. The first was that the provisions of the Occupiers' Liability Act 1957 relating to the liability of landlords were found to be too limited and, furthermore, decisions of the appellate courts had re-emphasized how limited were the rights of those who had acquired properties which were **1.02**

defective because of the failings of builders or landlords. This led the Law Commission to make proposals for reform which were embodied in the Defective Premises Act 1972, repealing in the process the provisions in the 1957 Act dealing with the liability of landlords.

1.03 The second area of difficulty concerned, primarily, the liability of an occupier to trespassers on his land. It had been established by the House of Lords in the nineteenth century that the duty of care owed by an occupier to a trespasser was extremely limited. Despite continued criticisms of the situation, it was not until the House of Lords accepted in 1966[1] that it could, in certain circumstances, revisit earlier decisions of the court that an opportunity arose for the court to create new rules establishing a broader duty of care owed to trespassers. Unfortunately, the decision of the House of Lords[2] establishing the new rules provided a classic example of that court speaking with five different and, at times, inconsistent and conflicting voices. The unsatisfactory state in which the law was then left led to an immediate reference of the matter to the Law Commission; though it took nearly a decade for its recommendations to lead to the passage of the Occupiers' Liability Act 1984.

1.04 It is with the liability of occupiers, landlords, and builders under these three statutes that this book is predominantly concerned. The rest of this chapter will examine the genesis of this legislation a little more fully.

2. Occupiers' Liability Act 1957

1.05 The rules of occupiers' liability are those rules of law which govern the liability of an occupier of premises for injuries to persons who come on to those premises. It has been said that 'occupation of premises is a ground of liability and is not a ground of exemption from liability'.[3] At common law the obligations of the occupier depended on the class of visitor into which the claimant fell. He could be a visitor exercising a right of entry conferred by a contract; he could be invited by the occupier to visit the premises; he could merely be permitted by the occupier to be there; and, finally, he could be there without any permission at all, ie a trespasser.

1.06 Because an occupier's obligations varied from class to class, a detailed and complex body of law came into being to differentiate between the various classes. It might be asked, at the outset, why there were any special rules relating to occupiers'

[1] *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.
[2] *British Railways Board v Herrington* [1972] AC 877.
[3] *Commissioner for Railways v McDermott* [1967] 1 AC 169, at p 186; cf *Wheat v E Lacon & Co Ltd* [1966] AC 552, at p 578.

liability at all and why this whole area of liability could not be regarded as merely one aspect of the obligation of a person to take reasonable care not to cause injury to his neighbour founded on Lord Atkin's famous dictum in *Donoghue v Stevenson*.[4] The answer is historical. The basic pattern of the law relating to occupiers' liability was laid down in a number of important decisions[5] at a time when general broad principles of negligence liability were not fully developed. One may speculate that had negligence principles developed earlier, there might have been no separate rules as to occupiers' liability and this 'pigeon-hole approach'[6] might have been avoided; but the fact remains that the existence of such rules as a highly specialized sub-category of negligence liability was never doubted. In the very same year as *Donoghue v Stevenson*, Dixon J had this to say of the specialized rules, in the High Court of Australia in *Lipman v Clendinnen*:[7]

> The circumstances in which one man may lawfully come upon premises in the occupation of another are infinitely various and as his lawful presence there must raise some duty of diligence, however slight, for his safety, it might be considered consonant with general principle to measure the standard of care required by determining as matter of fact what amount of care in all the actual circumstances of each particular case the reasonable man would exercise. But English law has adopted a fixed classification of the capacities or characters in which persons enter upon premises occupied by others, and a special standard of duty has been established in reference to each class. Many of the circumstances which might have been considered in reference to the precautions required go now only to the question in what character did the sufferer come upon the premises.

1.07 The specialization and technicality of the common law rules as to occupiers' liability proved to be their downfall. The distinctions drawn between the different categories of visitors were applied with great firmness. There can be no clearer statement of this firmness than that made by Viscount Dunedin:[8]

> Now the line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories. When I say rigid, I mean rigid in law. When you come to the facts it may well be that there is great difficulty—such difficulty as may give rise to difference of judicial opinion—in deciding into which category a particular case falls, but a judge must decide and, having decided, then the law of that category will rule and there must be no looking to the law of the adjoining category.

1.08 Such an analysis into black and white, with a denial of the existence of grey areas between the categories, is likely to lead either to hard cases or bad law. This is

[4] [1932] AC 562, at p 580.

[5] *Indermaur v Dames* (1866) LR 1 CP 274; *Francis v Cockrell* (1870) LR 5 QB 501; *Cavalier v Pope* [1906] AC 428; *Lowery v Walker* [1911] AC 10; *Maclenan v Segar* [1917] 2 KB 325; *Mersey Docks and Harbour Board v Proctor* [1923] AC 253; *R Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358.

[6] MA Millner, *Negligence in Modern Law* (1967), p 11.

[7] (1932) 46 CLR 550, at pp 554–555.

[8] *R Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358, at pp 371–372.

exactly what happened. Decisions were made on the basis of these distinctions and of distinctive duties owed to visitors in each category which were the subject of strong criticism; and other unpalatable conclusions were evaded by the drawing of over-subtle distinctions or by fictitious characterizations. As one writer has put it, 'the facts are made to fit the conception, instead of having the conception fit the facts. By this Procrustean method, the three categories are preserved intact even though reason and experience be sacrificed in the process'.[9]

1.09 Whilst one cannot deny that the different duties owed to different classes of visitor 'correspond to real differences in the nature of the user of property and in the reasonable claims to protection of those who are permitted such use',[10] what was criticized was the need for rigid classification to take account of these factors. Decisions of the House of Lords were far from immune from this criticism. Twentieth-century House of Lords judgments[11] in the field of occupiers' liability were described as 'remarkable for their enthusiasm in reaching results that were far from inevitable, were indeed opposed to common sense, and could only be supported by a literal interpretation of isolated words in early decisions'.[12]

1.10 The general feeling of unrest[13] with regard to the law of occupiers' liability[14] led the Lord Chancellor to invite the Law Reform Committee, in 1952, to consider:

(1) Whether any, and if so what, improvement, elucidation or simplification is needed in the law relating to the liability of occupiers of land or other property to invitees, licensees and trespassers.
(2) Whether any amendment should be made in the law relating to a lessor's obligations towards his tenant's invitees and licensees.

The Law Reform Committee reported in 1954.[15] Its report both highlighted the defects of the common law and made recommendations for improvement.[16] The defects and their suggested remedies might be summarized as follows.

[9] MacDonald (1929) 7 Can Bar Rev 665, 668.
[10] Atkin LJ in *Coleshill v Manchester Corpn* [1928] 1 KB 776, at p 791; and see the Third Report of the Law Reform Committee: Occupiers' Liability to Invitees, Licensees and Trespassers, Cmnd 9305 (1954): Minority Report, para 4.
[11] *Jacobs v LCC* [1950] AC 361; *London Graving Dock Co Ltd v Horton* [1951] AC 737.
[12] Wright (1961) 6 JSPTL 2, 13.
[13] This area of the law was described by Denning LJ in *Dunster v Abbott* [1954] 1 WLR 58, at p 62, as a 'morass'.
[14] For a helpful description of the problems in this area, see SJ Bailey, 'Occupiers' Liability: the Enactment of "Common Law" Principles', in Arvind and Steele (eds), *Tort Law and the Legislature* (2013), pp 188–191.
[15] Cmnd 9305 (1954). For comments thereon, see Heuston (1955) 18 MLR 271; Odgers [1955] CLJ 1; Bowett (1956) 19 MLR 172. The work of the Committee is critically discussed by Bailey at, pp 191–195.
[16] There was a brief minority report by Lord Diplock, then Mr Kenneth Diplock QC.

(1) Contractual visitors

1.11 Where an occupier's obligation to his contractual visitor depended on an implied term in the contract there was uncertainty as to the appropriate standard of care expected of the occupier, particularly as to whether the occupier should be regarded as an insurer of the premises, or whether the obligation should be lower and depend on use of reasonable care. The Committee rejected any idea of differing standards of care. They recommended that, where there is no contractual provision governing the duty owed by the occupier to his contractual visitor in relation to the safety of the premises, the duty shall be the same duty of care as is owed to all lawful visitors. No special regard was to be had to the fact that the claimant was a contractual visitor other than to that fact being a relevant circumstance in determining whether the duty of care had been discharged.[17]

(2) Entry pursuant to another's contract

1.12 There was some authority[18] at common law for the view that an occupier who contracted with a person to allow third parties to visit the premises could limit his obligation to those third parties by the terms of the contract to which they were not parties. The Committee's recommendation to clarify this situation was that such a third party should be owed the same general duty of care as was owed to all lawful visitors, unless the contract made the duty on the occupier more onerous.[19]

(3) The distinction between invitees and licensees

1.13 Whilst in many cases it was difficult to say whether a particular visitor was an invitee or licensee, it was harder still to define the basis on which that distinction was to be made. Traditionally an invitee was said to be a person who entered the premises in circumstances where the occupier had a material interest in the purpose of that person's visit,[20] such as a customer in a shop. Some decisions had suggested that this should be qualified by indicating that the interest should be a 'common interest' between occupier and visitor.[21] A licensee was a visitor in whose entry on to the premises the occupier had no material interest. A common example was that of a gratuitous grant of permission to walk across the occupier's land. The distinction between the categories of invitee and licensee was criticized as one which could not rationally be maintained as a universal distinction; it was not relevant to the degree of care expected of an occupier; it was incapable of sensible application in practice; and it was productive of capricious or unreasonable results.

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17 Law Reform Committee Report, para 95A(1). See paras 10.02–10.27.
18 *Fosbrooke-Hobbes v Airwork Ltd* [1937] 1 All ER 108, at p 112.
19 Law Reform Committee Report, para 95A(1)(ii). See paras 10.30–10.34.
20 Law Reform Committee Report, paras 7–8.
21 Eg *Mersey Docks and Harbour Board v Proctor* [1923] AC 253; *Jacobs v LCC* [1950] AC 361; cf *Haseldine v CA Daw & Son Ltd* [1941] 2 KB 343, at p 352.

1.14 The drastic solution recommended by the Committee was that: 'The distinction between invitees and licensees should be abolished'.[22] Two subsidiary recommendations were made. Persons who enter premises in pursuance of some legal right or authority should be deemed to have the implied permission of the occupier to be there; and persons who use premises open to the members of the general public should be deemed to have the permission of the authority charged with the management of the premises for public use, that authority being regarded as the occupier.[23]

(4) The duty of care owed to non-contractual visitors

1.15 A corollary of the common law distinction between invitees, and licensees, and indeed between them and contractual visitors, was that the duty of care owed by the occupier depended on the category into which the entrant fell. If the visitor was an invitee the occupier had to use reasonable care to prevent damage to the visitor from 'unusual danger',[24] but the occupier was relieved from his obligations by the invitee's knowledge of that danger.[25] There was much debate at common law as to what dangers constituted 'unusual dangers'.[26] If the visitor was a licensee then the obligation of the occupier was the more limited one of warning the visitor of 'concealed dangers' or 'traps' which were actually known to the occupier and were unknown to the licensee.[27]

1.16 Amongst the difficulties with these two tests as to the occupier's duty were the problem of drawing any real distinction between 'unusual dangers' on the one hand and 'concealed dangers or traps' on the other; the injustice of the rule that an invitee's knowledge of the unusual danger relieved the occupier from liability; the amount of knowledge really required of an occupier before he would be liable to a licensee; and whether 'actual knowledge' of the concealed danger could include cases where he had knowledge of a potential danger.[28] The Committee was quite scathing about a requirement of 'actual knowledge', saying: 'It is, indeed, really impossible without lapsing into absurdities to adhere strictly to the criterion of actual knowledge; nor in our view is it a desirable test. It seems to us to put a premium on negligence.'[29]

1.17 Although this state of the law was that which the Law Reform Committee wished to achieve, they did not think that it had already been achieved.[30] The solution

[22] Law Reform Committee Report, para 95A(2).
[23] Law Reform Committee Report, para 95A(2).
[24] *Indermaur v Dames* (1866) LR 1 CP 274, at p 288.
[25] *London Graving Dock Co Ltd v Horton* [1951] AC 737.
[26] Law Reform Committee Report, para 25.
[27] *Mersey Docks and Harbour Board v Proctor* [1923] AC 253, at p 274.
[28] Eg *Ellis v Fulham BC* [1938] 1 KB 212; *Pearson v Lambeth BC* [1950] 2 KB 353.
[29] Law Reform Committee Report, para 74.
[30] There had already been moves in this direction; see *Dunster v Abbott* [1953] 2 All ER 1572; *Slade v Battersea and Putney Hospital Management Committee* [1955] 1 WLR 207. This continued

envisaged by the Committee was the formal abolition of the categories of invitee and licensee and of the different duties owed to each.[31] In their place they recommended one uniform duty of care owed to all lawful visitors, being a duty to take such care as in all the circumstances of the case is reasonable to see that the premises are reasonably safe. This common duty of care should be capable of extension, restriction, modification, or exclusion; and in determining whether an occupier of premises has discharged the common duty of care in any particular instance, regard should be had to all the circumstances of the case.

1.18 The Committee recommended that there should be a number of limitations on the duty. An occupier should not be liable to a visitor, who enters the premises to conduct construction, maintenance, or repair work, for damage caused in the course of such work unless the danger was one the visitor would normally have encountered. The fact that the visitor had been warned of the danger, or knew of it, should be relevant factors in determining whether the duty of care had been discharged, whether the claimant had entered the premises on the basis that he had assumed the risks from the danger, and in deciding whether the damage suffered by the claimant was due in whole or in part to his own fault. In addition, the defences of assumption of risk and contributory negligence should be available to the occupier.[32]

(5) Liability for independent contractors

1.19 There had been doubt at common law whether an occupier was liable to an invitee for injuries caused by the negligence on the premises of the occupier's independent contractor. A decision of the Court of Appeal[33] indicated that the occupier was not liable if he had acted with care in his choice and supervision of the contractor. However, a House of Lords decision,[34] which did not consider the other case for both were decided at almost the same time, decided that the occupier's obligation was personal to him and was strict in the sense that it could not be discharged by delegation to a contractor.[35] The Committee resolved these doubts in favour of the occupier, ie supporting the Court of Appeal decision, by recommending that, where the occupier entrusts work to an independent contractor, the question of whether the occupier should be liable for damage caused by the independent

after the publication of the Law Reform Committee's Report; see *Slater v Clay Cross Co Ltd* [1956] 2 QB 264, at pp 269–270, 272; *Riden v AC Billings & Sons Ltd* [1957] 1 QB 46, at p 56; affirmed sub nom *AC Billings & Sons Ltd v Riden* [1958] AC 240. Indeed Lord Denning, in *Wheat v E Lacon & Co Ltd* [1966] AC 552, at pp 577–578, maintained that by 1956 the distinction had been reduced to vanishing point and all that the 1957 Act did was to confirm the process.

31 Law Reform Committee Report, para 67.

32 Law Reform Committee Report, para 95A(2).

33 *Haseldine v CA Daw & Son Ltd* [1941] 2 KB 343.

34 *Thomson v Cremin* (1941) [1953] 2 All ER 1185.

35 For a fuller discussion of the problems at common law, see paras 9.01–9.06.

contractor should depend on whether the occupier had acted reasonably in entrusting the work to an independent contractor and had taken reasonable steps to satisfy himself that the work was properly done.[36]

(6) Liability to trespassers

1.20 The basic common law rule considered by the Law Reform Committee was that an occupier owes no general duty of reasonable care towards a trespasser. His only obligation was not wilfully to injure a trespasser or to act in reckless disregard of his presence.[37] The Committee recommended no change in the law[38] and it later fell to the Law Commission to address this issue.[39]

(7) Landlords out of occupation

1.21 At common law the lessor of premises out of occupation was under no liability in tort to anyone injured on the premises demised as a result of their defective state, even though the landlord might be in breach of an express obligation to the tenant to repair the premises. The landlord was only liable to the tenant on the lease and not in tort. This had been established by the House of Lords in *Cavalier v Pope*.[40] The claimant, the wife of a tenant sued the defendant, the landlord, who had contracted to maintain the property, for injuries due to the defective state of the premises of which he had notice. The action failed because the claimant was not in privity of contract with the landlord. Although *Donoghue v Stevenson*[41] saw the end of privity of contract as a requirement for tortious liability for negligence, the decision in *Cavalier v Pope* was expressly upheld. This decision has always been cited as authority for the view that a landlord owes no duty in tort to his tenant,[42] despite the fact that it was a third party case, explicable in 1906 on grounds of privity of contract. The Law Reform Committee felt that it was unfair not to give the injured visitor a right of action against the landlord similar to that available to the tenant. Indeed they indicated that such a change would not only produce substantial justice but would also avoid the circuity of action involved in the visitor suing the tenant who would claim indemnity from the landlord. Accordingly, the Law Reform Committee recommended that:

> Where a lessor is bound by contract with his tenant or by statute to keep demised premises or any part thereof in repair, and in consequence of any breach by him of that obligation any member of the tenant's family, or person residing with or lawfully visiting the tenant, sustains injury, the person injured should have the same

[36] Law Reform Committee Report, para 94A(2)(v).
[37] *R Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358.
[38] Law Reform Committee Report, para 80.
[39] See paras 1.32–1.35.
[40] [1906] AC 428.
[41] [1932] AC 562.
[42] Eg *Bottomley v Bannister* [1932] 1 KB 458; *Davis v Foots* [1940] 1 KB 116.

> right of action against the landlord as he would have had if he himself had been the tenant, without prejudice to any other right of action he might have independently of this provision.[43]

As will be seen,[44] broader provisions in relation to the liability of landlords, and also provisions in relation to builders, were later thought by the Law Commission to be desirable.

(8) The 1957 Act

1.22 Virtually all these recommendations were implemented by the Occupiers' Liability Act 1957,[45] which came into effect on 1 January 1958.[46] The only reason for the mild qualification is that that Act does not specifically abolish the distinction between invitees and licensees as the Committee recommended,[47] though in substance the Act has this effect.[48] Again there is no specific reference in the Act to the fact that a visitor's knowledge of the danger does not, in itself, discharge the occupier from liability.[49] Nevertheless this last point is adequately dealt with in those subsections of the 1957 Act which consider the effect of warnings[50] and the defence of assumption of risk.[51] The Committee recommended, as has been seen, that the defence of contributory negligence, within the meaning of the Law Reform (Contributory Negligence) Act 1945, should be available to a claim under what is now the Occupiers' Liability Act 1957.[52] There is no express provision to this effect but decisions under the 1957 Act have allowed the defence to claims based on breach of the statutory duty.[53]

1.23 The hope of the draftsman was that:

> the Act would replace a principle of the common law with a new principle *of the common law;* instead of having the judgment of Willes J[54] construed as if it were a statute, one is to have a statute which can be construed as if it were a judgment of Willes J.[55]

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[43] Law Reform Committee Report, para 95B. See para 12.02.

[44] See Chapter 12.

[45] For commentaries on the legislation, see Odgers [1957] CLJ 39; Newark (1958) 12 NILQ 203; Payne (1958) 21 MLR 359; Hutton (1961) 24 MLR 18, 26–30. For a description of the legislative process, see Bailey (n 14), pp 195–196.

[46] Section 8(3).

[47] Paragraph 94A(2)(i).

[48] Paras 3.03, 5.03.

[49] Paragraph 95A(2)(vii).

[50] Section 2(4)(a).

[51] Section 2(5).

[52] Paragraph 95A(2)(ix).

[53] See paras 8.02–8.05.

[54] This alludes to the judgment of Willes J in *Indermaur v Dames* (1866) LR 1 CP 274, the leading decision on the liability of an occupier to an invitee.

[55] In fact, Sir Noël Hutton, whose words these are, considered that to set the draftsman such a task was coming 'near to asking for the impossible'. To do this is an 'exercise which depends essentially on not saying too much' (1961) 24 MLR 18, 28–29.

Indeed, the legislation was greeted with general approval as 'a conquest in legislative form for the principles of negligence'.[56] Nevertheless, two sour notes were struck as to the need for statutory reform and the problems it might bring in its wake. One dissentient voice was raised in the Law Reform Committee's Report, that of Lord Diplock, who felt that this branch of the law was unsuitable subject matter for a statutory code. Indeed he said that 'To attempt to codify the law can . . . only have the result of causing, for a considerable period of years until the new case law has been settled, uncertainty over a wide field of legal rights and obligations which affect every member of the public in his daily life'.[57] Similar gloomy prognostications were voiced by Newark in his comments on the new legislation, suggesting that 'the drafting of the Act has presented so many difficulties that we may well see a spate of litigation, and the condition of the last state may be worse than that in which the majority of the Law Reform Committee saw the first'.[58]

1.24 With the advantage of hindsight it can be said that such forecasts have been confounded. The experience of the English courts over the past half century or so is that the 1957 Act works fairly well. Despite his earlier doubts, Lord Diplock later said that 'my dissenting report—thank goodness—did not play any weight at all and they passed the Occupiers' Liability Act . . . and it has worked like a charm'.[59] The number of reported decisions on the Act which are of interest other than in a purely illustrative capacity is relatively small because the number of difficult issues arising from points of interpretation under the Act has been correspondingly small. As Carnwarth LJ has said:

> The Act has given rise to relatively little contentious case law, and, where problems have arisen, it has provided a clear and reliable framework for resolving them.[60]

1.25 Imitation is the sincerest form of flattery and legislation modelled, to varying degrees, on the English Occupiers' Liability Act 1957 has been introduced in Northern Ireland[61] and in Scotland.[62] The English Act has also formed the basis of reforming legislation, often after consideration by the relevant law reform agency,

[56] Millner (n 6), p 176.

[57] Law Reform Committee Report, p 43.

[58] Newark (1958) 12 NILQ 203, 204; and see Odgers [1957] CLJ 39; Payne (1958) 21 MLR 359, 372–374.

[59] (1971) 45 Aus LJ 531, 569; and see his comments in *Savory v Holland and Hannen and Cubitts (Southern) Ltd* [1964] 1 WLR 1158, at p 1164.

[60] *Maguire v Sefton Metropolitan Borough Council* [2006] EWCA Civ 316; [2006] 1 WLR 2550, at para 33; and see *Roles v Nathan* [1963] 1 WLR 1117, at p 1122; *Videan v British Transport Commission* [1963] 2 QB 650, at p 677.

[61] Occupiers' Liability Act (Northern Ireland) 1957. This Act is cast in terms almost identical to the English Act, and decisions of the Northern Ireland courts are referred to throughout this book.

[62] Occupiers' Liability (Scotland) Act 1960. This Act differs in a number of respects from the English legislation, being based also on the First Report of the Law Reform Committee for Scotland, Cmnd 88 (1957). Unlike the English Act, it applies for example to harm or damage suffered by trespassers. References are made to decisions of the Scottish courts where appropriate.

in most Australian states[63] and Canadian provinces,[64] as well as in Ireland,[65] New Zealand,[66] and the West Indies.[67]

3. Defective Premises Act 1972

1.26 In their first Programme of Work, the Law Commission decided to address a number of problems relating to the Civil Liability of Vendors and Lessors for Defective Premises.[68] The four basic questions which they thought should be considered[69] were: the rights, if any, that a purchaser of property should have when later it turns out that defects in the property make it less suitable or valuable; the special consideration, if any, of which account should be taken if the property is newly built and bought or leased from the builder; the circumstances in which a person who sells or lets premises should be liable for injury or damage stemming from defects existing at the time of the sale or lease; and the circumstances in which a landlord should be liable for injury or damage arising after the commencement of the lease. The Law Commission addressed these issues by the publication of two Working Papers,[70] followed by the circulation of a draft Report for comment, culminating in the publication in 1970 of their Report on Civil Liability of Vendors and Lessors for Defective Premises.[71]

(1) Duty to build properly

1.27 Whilst the Law Commission accepted the general principle of caveat emptor in the case of sales and lettings of commercial and industrial property, and generally of private dwellings, it found serious concern in the case of newly built dwellings. Their conclusion was that the purchaser of such a dwelling was in need of greater protection, saying:

> There is no reason why a person who acquires a dwelling from a builder should have to examine it in detail to see whether it is in sound condition. He should be able to rely on the diligence and skill of those whose work has gone into the provision of the dwelling and he should have a remedy if the dwelling proves to be defective.[72]

[63] See K Barker, P Cane, M Lunney, and F Trindade, *The Law of Torts in Australia*, 5th edn (2012), paras 11.1–11.19.
[64] See AM Linden and B Feldthusen, *Canadian Tort Law*, 9th edn (2011), pp 719–744.
[65] Occupiers' Liability Act 1995; see E Quill, *Torts in Ireland*, 3rd edn (2009), pp 170–181.
[66] Occupiers' Liability Act 1962; on which see CR Pidgeon, *Occupiers' Liability* (1970); S Todd, *Law of Torts in New Zealand*, 5th edn (2009), pp 249–260.
[67] Eg Jamaica: Occupiers' Liability Act 1969.
[68] Item VII of the First Programme.
[69] Law Com No 40 (1970): Civil Liability of Vendors and Lessors for Defective Premises, para 9.
[70] Law Com Working Paper Nos 5 and 6 (1966).
[71] Law Com No 40 (1970).
[72] Law Com No 40 (1970), para 20.

This led to their Recommendation[73] that anyone who takes on work in connection with a new dwelling, or professionally arranges for such work to be undertaken, should owe a duty of care that the work would be properly done and that the dwelling, when completed, should be fit for habitation. This duty should be owed to anyone who acquires an interest in the dwelling and should apply whether or not the dwelling is built on the purchaser's own land. However, such duty would be discharged if the builder took on the work on the basis that he should follow instructions given by the purchaser.

1.28 Section 1 of the Defective Premises Act 1972, in implementing this recommendation, follows very closely Clause 1 of the Law Commission's draft Bill. However, the Act, in section 2, also provides that the duty of care under section 1 does not apply where the purchaser of a new dwelling has rights under an 'approved scheme', such as that under the National House Builders Registration Council (NHBC). The Law Commission had been opposed to exemption of purchases under such schemes from the effect of their Recommendation[74] but, in fact, such schemes are no longer approved.[75]

(2) Duty of care and disposal of the premises

1.29 It was clear, at common law, that if builders created a danger during the course of building work, they would be liable for injuries caused by their negligent conduct, whether the work was done on the builder's land or a third party's.[76] However, where property was sold or let, the vendor or lessor enjoyed an immunity from liability for his own acts of negligence before the sale[77] or letting.[78] In the view of the Law Commission, 'it is clear . . . that the immunity can cause great injustice and the law is applied by the courts of first instance with considerable regret'.[79] Their proposal was a simple one, namely that 'the vendor's and lessor's immunity from liability for the consequences of his own negligent acts should be removed',[80] a proposal which was carried into effect by section 3 of the 1972 Act.[81]

[73] Law Com No 40 (1970), para 32.
[74] See Law Com No 40 (1970), paras 22–25.
[75] See para 12.48.
[76] See eg *Clay v AJ Crump and Sons Ltd* [1964] 1 QB 533; *Sharpe v ET Sweeting and Son Ltd* [1963] 1 WLR 665.
[77] *Bottomley v Bannister* [1932] 1 KB 458; *Otto v Bolton and Norris* [1936] 2 KB 46.
[78] *Davis v Foots* [1940] 1 KB 116; *Travers v Gloucester Corpn* [1947] KB 71.
[79] Law Com No 40 (1970), para 45.
[80] Law Com No 40 (1970), para 47.
[81] A further recommendation by the Law Commission that a person who sells or lets premises should be under a general duty of care in respect of known defects (Law Com No 40 (1970), para 70(3)) was not accepted and finds no place in the 1972 Act.

(3) Liability of a landlord during the letting

1.30 The liability of a landlord for injury caused by defects in the premises leased was governed by section 4 of the Occupiers' Liability Act 1957. However, that provision was somewhat narrow in effect, as the statutory liability of the landlord did not apply to the tenant himself, and the landlord was only liable for harm caused to others on the premises, such as members of the tenant's family or other visitors, if he was in breach of his obligations to the tenant. Furthermore, the landlord's obligation under the 1957 Act was limited to circumstances where he was under a legal obligation to repair. To address these issues, the Law Commission recommended that a landlord who had a repairing obligation or who had a right to do repairs to the premises should be under a general duty of care in relation to the risk of harm or damage for his failure to repair or his failure to exercise his right to repair with due diligence. However, the Law Commission also recommended that the landlord should not be liable for injury to the tenant caused by the tenant's own default. As a result, the Law Commission's draft Bill broadened the liability of the landlord to include liability to the tenant himself, to cases where the landlord knew or ought to have known of the defect, and to cases where the landlord, though not under an obligation to repair, has a right to enter to repair. The Law Commission's view was that the obligation to be imposed on the landlord should be a duty of reasonable care to protect from personal injury and damage to property. The recommendations of the Law Commission have been given effect by section 4 of the Defective Premises Act 1972, which has replaced section 4 of the Occupiers' Liability Act 1957.

(4) The 1972 Act

1.31 The process of implementation of much of the Law Commission's draft Bill in the form of the Defective Premises Act 1972 was remarkably quick. It was just 18 months from publication of the Report to the granting of Royal Assent to the 1972 Act.[82] Indeed, the wording of the Act in major respects follows that of the draft Bill very closely.[83] The Act was followed by similar legislation in Northern Ireland[84] but, as the courts have remarked,[85] the Northern Ireland legislation is more limited in scope in that there is no equivalent of section 4 of the 1972 Act amending section 4 of the 1957 Act.[86]

[82] On the speedy passage of the Act, see North (1973) 36 MLR 628.

[83] The major difference is that a Recommendation by the Law Commission that a person who sells or lets premises should be under a general duty of care in respect of known defects (Law Com No 40 (1970), para 70(3)) was not accepted and finds no place in the 1972 Act.

[84] Defective Premises (Northern Ireland) Order 1975, SI 1975/1039 (NI 9).

[85] See *Brady v Northern Ireland Housing Executive* [1990] NI 200; *McDonagh v Northern Ireland Housing Executive* NI CA (1990), Unreported, 11 January; *Moreland v Northern Ireland Housing Executive* NI (1990), Unreported, 27 September.

[86] Ie no replacement of s 4 of the Occupiers' Liability Act (Northern Ireland) 1957.

4. Occupiers' Liability Act 1984

1.32 The Occupiers' Liability Act 1957 does not apply to those who visit premises other than with the agreement or licence of the occupier, ie trespassers and certain other categories of person exercising rights of entry. As has been indicated,[87] the House of Lords and other courts had established that only a very limited duty of care was owed to trespassers, essentially a duty not to injure them intentionally or by reckless conduct. Growing dissatisfaction with such a severe approach eventually led the House of Lords, once free to do so,[88] to reconsider the law.[89] Whilst there was no doubt that their decision ameliorated the position of the trespasser by imposing a heavier duty on the occupier, described as 'a duty of common humanity', the different approaches to be seen in the five separate speeches in the House of Lords left the law in such a state of uncertainty that the Law Commission was promptly asked to examine the issue of occupiers' liability to trespassers.[90]

1.33 Having published a Working Paper[91] on this topic, the Law Commission's final Report[92] concluded that statutory intervention was required. It was proposed that the new statutory regime should, in a sense, build on the Occupiers' Liability Act 1957, with the same reference to 'occupier', and claimants in effect to be defined by reference to those entrants not falling within the 1957 Act. Again, 'premises', and dangers due to their state, should follow the terminology of the 1957 Act. As for the duty of care, the Law Commission concluded that it was not right to apply to trespassers the same duty of care as under the 1957 Act, but that there should be a new statutory duty of care owed by an occupier to trespassers and other 'uninvited entrants' (though excluding users of the highway).[93] This duty should be owed in relation to such dangers on the premises as it is reasonable for the occupier to be expected to offer the entrant some protection. The duty should be one to take such care as is reasonable in all the circumstances to see that the entrant does not suffer injury from the danger. Consideration was given by the Law Commission to the issue of whether the duty of care should extend to a duty in relation to the property of a trespasser.[94] Consultees had been fairly evenly divided on this matter, and the Law Commission came down against recovery for such damage. Furthermore, they thought it would be 'arbitrary and illogical' simply to allow recovery for

[87] See para 1.03.
[88] *Practice Direction (Judicial Precedent)* [1966] 1 WLR 1234.
[89] *British Railways Board v Herrington* [1972] AC 877.
[90] For fuller discussion of the common law position, see paras 11.01–11.03.
[91] Law Commission Working Paper No 52 (1973): Liability for Damage or Injury to Trespassers and related questions of Occupiers' Liability.
[92] Law Com No 75 (1976): Report on Liability for Damage or Injury to Trespassers and related questions of Occupiers' Liability.
[93] Report, para 80(1), (2).
[94] Report, para 30.

damage to the clothes a trespasser was wearing. However, as will be seen,[95] their decision leaves an unfortunate uncertainty as to whether a trespasser can recover for damage to property and, if so, on what basis.

1.34 Consideration was also given to the effect of notices purporting to limit or exclude the liability of the occupier.[96] Given that an occupier can exclude his liability under the 1957 Act by an exempting notice, the Law Commission concluded that to prohibit exemption of liability to a trespasser would have the unfortunate effect of leading a claimant to argue that he was a trespasser, rather than a visitor under the 1957 Act, in order to avoid the effect of an exempting notice. However, it was thought that some control on exempting notices was needed, and it was proposed that any restriction or exclusion of the occupier's duty to a trespasser should only be effective if it was held to be fair and reasonable to allow reliance on it.[97]

1.35 Although the Law Commission's Report was published in 1976, it was not until 1984 that its Recommendations were substantially implemented in the Occupiers' Liability Act 1984.[98] The 1984 Act was followed in Northern Ireland by the Occupiers' Liability (Northern Ireland) Order 1987[99] which is cast in very similar terms.[100]

[95] See paras 11.50–11.52.
[96] Report, paras 60–79.
[97] Report, para 80(3).
[98] A full account of both the law reform process and its legislative implementation is to be found in Bailey (n 14), pp 199–207.
[99] SI 1987/1278 (NI 15).
[100] As a consequence, reference is made to decisions of the Northern Ireland courts under the 1987 Order as well as to decisions applying the 1984 Act. That is not the case with decisions under the Occupiers' Liability (Scotland) Act 1960 which imposes the same duty of care to both visitors and trespassers.