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LAW COMMISSION

ITEM VII – CIVIL LIABILITY OF VENDORS AND LESSORS FOR DEFECTIVE PREMISES

SECOND PAPER

Part I – Context and Scope of this Paper

1. The initial examination of the above First Programme item was directed to the law governing vendors' and lessors' liability for defects in dwelling houses. The study was divided into four parts :-

A.	Vendors' Liability	(i) in contract
		(ii) in tort
B.	Lessors' Liability	(i) in contract
		(ii) in tort

It was decided that the liability of lessors in contract could most conveniently be dealt with in the context of Item VIII of the First Programme (Landlord and Tenant).

2. In dealing with the subject of Vendors' liability in contract, it was found necessary to embark on a substantial measure of consultation with lay organisations concerned with the problem of the terms to be applied to trade sales of new houses i.e. sales by builders, property companies and estate developers to private purchasers. This section of the examination was dealt with in the Commission's earlier Paper on Item VII dated 21st September 1966. The present paper is limited to

A. Vendors' liability

(i) in contract (a) trade sales of old houses

(b) private sales

(ii) in tort

B. Lessors' liability in tort.

PART II – Present Law

Section A – Vendors' liability

CONTRACT.

3. In the absence of express provision, on the sale of any premises other than a building to be erected or in the course of erection, the principle of caveat emptor applies with full force. No term is implied that the premises sold are fit for any purpose or are free from physical defect of any kind and, fraud apart, the vendor is under no duty to disclose defects even though they be hidden and he may know of their existence.[1]

TORT.

Nuisance

4. A vendor the sells property in such a state as then to constitute a nuisance is liable to occupiers of other property affected by the nuisance, or to members of the public on highways affected by the nuisance for injury or damage arising there from if he has created or authorised the creation of the nuisance. There is no liability under this head to anyone who does not come within the above two categories whether he be the purchaser, a member of his family, his visitor or any one else.

Negligence

5. The vendor of a house is not liable in negligence to the purchaser or any third party (including members of the purchaser's family or his visitors) in respect of defects in the premises existing at the time of the sale or thereafter arising, making them dangerous.

6. In one recent case it has been held that builders or architects, not themselves being vendors, are liable to third parties including purchasers, their

[1] It is possible that the new remedies proposed in the Misrepresentation Bill will apply to the sale of land or buildings.

families and their visitors who sustain injury or damage as a result of defects arising from breach of the duty of care to prevent foreseeable risk of harm to persons likely to be affected. It is clear upon authority, however, that there is no such liability if the builder or architect be the vendor of the house.

7. Upon the basis of Donoghue v. Stevenson [1932] A.C. 562 in principle any person in breach of 'the general duty of care' (Cp. Commissioner for Railways v. McDermott [1966] 3 W.L.R. 267 at p. 270) is liable if, in consequence of such breach foreseeable harm befalls another person within the ambit of the protection provided by the duty. Although the potentiality for development of this concept is far from spent, a vendor of premises who by acting or omission has created a danger on the premises sold which a reasonable man would have foreseen as likely to cause harm to third parties would escape liability. So far as purchasers, their families and visitors are concerned, the vendor would escape because the exception from liability mentioned in Para. 5 above in such cases is so well established; so far as other third parties are concerned he would escape because the interposition of the purchaser as a person having occupation and control of the premises concerned would, upon the state of the authorities, in most cases break the link of responsibility between the vendor and the injured party.

8. It is possible that by application of the principles of Hedley Byrne v. Heller [1964] A.C. 465 vendors and others concerned with the sale of houses may incur liability for negligent misstatement to purchasers in the event of damage arising therefrom.

Section B – Lessor's Liability

TORT.

Nuisance

9. In respect of injuries and damages sustained otherwise than upon the premises let, a lessor is liable to members of the public (in respect of premises adjoining the highway) and to occupiers of other property affected by a nuisance in the following circumstances:-

(a) where he has personally or by his servants or agents created the nuisance by a positive act;

(b) where he has expressly or impliedly authorised the tenant to create or continue the nuisance, but not where it arises solely from the manner in which the tenant has chosen to conduct such authorised activities if they could have been conducted without creating a nuisance. Liability upon this basis has been held to exist when a landlord has let premises in such a condition as to constitute a nuisance of which he knew or ought to have known. It is doubtful whether such liability can be avoided by his imposing an obligation on the tenant to remedy or prevent the nuisance.

(c) where the nuisance is due to the failure of the landlord to carry out repairs for which he is liable under the terms of the lease or by statute;

(d) in the case of premises adjoining the highway, in addition to his liability under the foregoing heads the cases appear to establish that a landlord will be liable to members of the public injured in the highway by the nuisance:-

  (i) if he has reserved a right to enter to inspect the state of the premises let and do repairs thereon; or

  (ii) if he has, in practice, undertaken the obligation to effect repairs covering the relevant defect.

  (It is uncertain whether these last grounds of liability are applicable in respect of nuisance affecting adjoining premises).

10. Whether or not the landlord's liability in nuisance is dependent upon prior notice of the relevant defect is unclear but the trend of authority is that notice is relevant in cases (c) and (d) above.

Negligence – liability to tenants.

11. A landlord is not liable to his tenant in negligence for any injury or damage caused to the tenant himself through the dangerous or defective condition

of the premises let. It is possible that a landlord would be held liable for negligent misstatement as to the condition of the premises let, by a development of Hedley Byrne v. Heller [1964] A.C. 465.[2]

12. Where a landlord retains in his control parts of a building the remainder of which is let, he is liable in negligence to the tenants of the parts for injury or damage caused to them by accidents on the retained parts, caused by the landlord's breach of the common duty of care as defined in and limited by the Occupiers' Liability Act 1957. This common duty can be restricted or qualified by contract.

Negligence – liability to third parties.

13. By virtue of section 4 of the Occupiers' Liability Act 1957 a landlord is liable in negligence to third parties (including members of the tenant's family) who, or whose goods, are lawfully on a tenant's premises, for injury or damage arising from breach of the common duty of care as defined and limited by that Act when the defect causing the accident was one which would have been prevented had the landlord fulfilled any express or statutory obligation of repair or maintenance resting upon him in relation to those premises. Liability here is dependent upon notice of the want of repair and cannot be otherwise excluded. The third party cannot, however, succeed unless the tenant himself, had he been injured, would have succeeded in a claim and the conditions for success of a tenant's claim depend upon his establishing a contractual basis of liability against his landlord. This he can do by showing that the landlord is in breach of an express or implied term of the tenancy. Implied terms of this nature normally arise only in the case of furnished lettings or where the obligations affecting landlords laid down by the Housing Act 1957 sections 6 and 7 and the Housing Act 1961 section 32 are imported into the tenancy. Speaking generally notice of the relevant defect is a pre-condition to such liability.

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2 The new remedies proposed in the Misrepresentation Bill might only be available in the case of tenancies covered by section 54(2) of the Law of Property Act 1925 (i.e. those taking effect in possession for not more than 3 years at a rack rent.)

14. By section 2 of the Occupiers' Liability Act 1957 a landlord who has retained control of parts of a building, other parts of which are let, is under the "common duty of care" to third parties lawfully upon the retained part of the premises (including tenants' families and visitors). This duty cannot be qualified or restricted (cf. Paragraph 12).

15. So far as liability in negligence to third parties other than lessees, their families and visitors for accidents on the premises let or retained parts of the building in which the premises let are situated, a lessor would normally be able to escape from the impact of the neighbour principle, for the same reasons as those discussed in Paragraph 7 above. If, however, the lessor in such case were under a legal liability for repair in relation to the defect giving rise to the third party's injury one of the routes of escape (the interposition of a duty to repair on the lessee) would in part be closed to him.

PART III – Factors for Consideration

Vendors liability in contract

Trade Sales

16. It is felt that many of the same considerations apply to persons who deal in houses for sale as to traders in goods. The lay public, in fact, transacts its business with traders upon the assumption that they are honest, desire to establish or preserve their goodwill, and will use their trading skills for the benefit of their customers. If this be right it is considered appropriate that trade sales of dwelling houses should in principle attract statutory obligations. For the reasons explained in paragraph 2 we do not in this paper deal with trade sales of new houses. In the case of old houses, it would be wrong to impose on the business vendor obligations in respect of matters such as materials, workmanship and methods of construction which affected the original construction of the house, possibly years before and normally outside the vendor's knowledge or control. Nevertheless, it is felt that a private purchaser should be entitled to rely to a certain extent, on the special skill and knowledge of a business vendor and there seems no reason why a trade sale of an old house should not carry with it an implied obligation of fitness for the purpose, known to the vendor, for which the purchaser is buying.

17. It is however appreciated that an old house might not be fit for the purchaser's purpose on account of its age or for other reasons, and yet the purchaser wishes to bargain for it in its present condition. He will take its condition into account in fixing the price. It is therefore suggested that the vendor should be able to modify the above obligation in so far as he expressly states the extent to which it is qualified by reason of specified defects.

18. There is a further case in which trade vendors should be relieved of the burden of an implied obligation of fitness of an old house. That is when a house is bought by an occupying tenant who is likely to have a far greater knowledge of its qualities than his landlord – vendor and he will also take condition into account in determining the price. The relief for vendors discussed here would clearly have to be confined to cases in which the occupying tenant purchasing has had a reasonable opportunity to acquire knowledge of the qualities of the house in question. This object could be achieved by limiting the relief to cases in which the tenant purchasing has occupied the house in question as his home for a minimum period of, say, 12 months.

Private Sales.

19. Private sales on the other hand are affected by different considerations, since it would not seem right to put on the private vendor obligations as onerous as those proposed in the case of the business vendor. Yet there are practices adopt by some private vendors, such as camouflaging known and serious defects, which call for legislative treatment. House purchase is probably the most important business transaction into which the ordinary layman is likely to enter and it is felt to be wrong that caveat emptor should apply even in respect of serious defects of a latent character which are known to the vendor. The appropriate means for dealing with this problem is to treat a private vendor's contract to sell a house as uberrimae fidei in the sense of imposing upon such a vendor a duty to disclose to the purchaser material defects affecting the fitness of the house for the purchaser's purposes, so far as such matters are within the knowledge of the vendor. If this obligation is imposed as a duty created by a proposed contract, it ought not to be evaded by a contractual term to the contrary

effect. It is considered that there is a growing tendency to accept good faith as a basic element in contractual relationships, and the proposed duty of disclosure accords with this trend.

Vendors' liability in Tort

Negligence.

20. In considering the liability of vendors in tort in respect of dangers in the premises sold, the main problem is created by the refusal of the Courts to apply the "neighbour principle" as between vendors, on the one hand, and purchasers, members of their households and their visitors, on the other. It is considered that here again a distinction needs to be drawn between vendors in the course of business and private vendors. Assuming the latter not to have been the builders of the house sold, and accepting the duty of disclosure of known defects, it would not be right to expose them to liability in respect of defects arising from circumstances outside their control. Trade vendors are, however, in a different position and no reason of principle can be seen which justifies their escaping liability to persons injured, whether they be purchasers or third parties, in consequence of breach of a duty to take reasonable care that premises sold are not affected with dangers likely to cause injury. As authority has recently developed, the Courts are prepared to apply the neighbour principle to persons concerned with the design or building of a house other than the vendor himself.

21. In the context of an extended liability in negligence to be imposed upon trade vendors of houses, it is necessary to deal with the question of vicarious liability for independent contractors. On this point it seems that the proper analogy is to be found in s. 2(4) of the Occupiers' Liability Act 1957, i.e. that the vendor should not be liable for an independent contractor's faulty work if he (the vendor) acted reasonably in entrusting the work in question to a contractor of whose competence he was satisfied, provided that reasonable steps were taken to see that the contractor's work was properly done. An alternative would be to apply the different principle which governs the responsibility of highway authorities under s. 1(3) of the Highways (Miscellaneous Provisions) Act 1961. But it is considered that the factors affecting the latter case are basically different from those relating to

the general duty of care when its application to vendors is under consideration. On the other hand it is important not to lose sight of the rapidly growing practice of the employment of "labour only" contractors in house construction. Whilst it would not be unreasonable for the vendor to be free of liability for the negligence of a competent specialist trade sub-contractor on the terms of s. 2(4) of the 1957 Act, to allow a similar freedom in respect of the negligence of general sub-contractors, particularly of the "labour only" type, would in many cases deprive an injured party of an effective remedy.

Lessors' Liability in Tort

Nuisance

22. We turn to the tortious liability of lessors. So far as nuisance is concerned, for such time as this head of liability is retained in the law of tort, we think that it would be useful to define by statute the conditions of a lessor's liability for nuisances caused by wants of repair on the premises let. It is proposed that the areas of doubt upon present authority (see Paragraphs 9 and 10) should be resolved by providing that:-

(i) when a landlord has let premises in such a state as to constitute a nuisance of which he knew or ought to have known, he will be liable to third parties notwithstanding that he has imposed an obligation upon the tenant to remedy or prevent such nuisance;

(ii) unless liability to repair is specifically imposed upon the tenant by the terms of the letting, a lessor should be liable to third parties;

(iii) a lessor's prior notice of the relevant defect should not be a condition of liability;

(iv) save in respect of liability for independent contractors, the conditions of a lessor's liability to occupiers of adjoining premises and to highway users should be the same.

Negligence

23. So far as lessors' liability to tenants for defects upon the premises let is concerned, the existing law (stated in Paragraph 11) is unsatisfactory. The

question of the contractual liability of lessors to tenants will be dealt with in the Commission's work under Item VIII of the First Programme. For the purposes of the present paper the vital question is whether or not notice to the lessor should be a precondition of liability, whether based on contract or in tort. To this we will return after considering the position of third parties suffering injury upon premises let vis-à-vis lessors.

24. Under the present law of England and Wales liability to third parties in such case is dependent upon notice because by s.4(4) of the Occupiers' Liability Act 1957 a landlord is not deemed in relation to third parties to have made default unless the consequence of such default would be actionable at the tenant's suit had he been injured. The law of Scotland is different (vide. s.3 Occupiers' Liability (Scotland) Act 1960), in the respect that there liability to a tenant or a third party in respect of injury suffered on the premises let depends upon whether or not the lessor had failed to discharge his responsibilities in respect of the maintenance or repair of the premises. Notice of defects is not a pre-condition of liability although it clearly may be a factor in determining whether or not the lessor's responsibilities have been discharged. Further, since the relevant provisions of the Law Reform (Contributory Negligence) Act 1945 apply to Scotland a tenant who knew of the relevant defect but failed to notify the lessor, would be at risk of extinguishing or diminishing any personal claim on account of his own default. Reverting to English law it is difficult to understand why a lessor's liability to a third party should depend upon whether or not the tenant of the promises where the accident occurred has given the lessor such notice. The concept of failure to discharge responsibilities, the basis of liability in Scotland, seems preferable.

25. If vis-à-vis third parties notice as a pre-condition of lessors' liability is abandoned, then there seems no justification for retaining it in relation to tenants' own claims. As indicated in Paragraph 23 above, a tenant who, knowing of a defect in the premises, fails to notify its existence to the landlord would face a defence under the 1945 Act to his own personal claim. The cases culminating in McCarrick v. Liverpool Corporation [1947] A.C. 219 which decided that notice

was a precondition to lessors' liability for breach of statutory terms as to fitness etc. under the old Housing Acts, did so on the basis that the implication of a term of "notice" was required to give business efficacy to the tenancy agreement including the statutory terms. But this reasoning ante-dates the development of the concept of "fault" in relation to the 1945 Act by such cases as Davies v. Swan Motor Co. [1949] 2 K.B. 291 and Jones v. Livox Quarries [1952] 2 Q.B. 608. These decisions have moved 'fault' away from the concept of a breach of duty of care owing to others towards failure to take care for one's own or anyone else's safety. In relation to tenants' claims, therefore, the Scottish basis of liability seems preferable.

26. We have conducted our examination of this Programme Item, as the pattern of authority and statute seemed to dictate, upon the basis that whether or not vendors or lessors are under liability in tort for defective premises and, if so, the nature and limits of such liability are dependent in the first place, upon concepts of control in relation to the premises and, in the second place upon the existence of a physical connection between the injured party and the defective premises the cause of his injury. Whilst it is, we think, impossible to eliminate the factor of control from consideration of the basis of this liability in tort, we see in principle no reason why an injured party's right to sue should depend upon his establishing a physical connection with the relevant defective premises. So far as liability in negligence is concerned it seems to us that as long as the injured third party falls amongst those whom the tortfeasor ought reasonably to have foreseen might sustain injury from a breach of this duty, that he was not at the time of the accident upon the premises seems to us to be merely fortuitous.

PROVISIONAL PROPOSALS

27. With these considerations in mind the Commission has formulated the following propositions for changes in the law. These should be read in

conjunction with the proposals contained in Paragraph 21 of the earlier paper (reference 93-126-01 dated 21st September 1966) relating to obligations on the sale of new houses.

[SEE NEXT PAGE]

VENDOR'S LIABILITY

Trade Sales: Old Houses (Paragraph 16-18)

1. A person who in the course of his business sells any completed dwelling house, other than a new house [1], to a purchaser not being a person who has occupied the house as his home for a period exceeding 12 months prior to the sale, shall be under an obligation that the house should be reasonably fit as a dwelling house for the purposes for which to the seller's knowledge the house is required.

2. Such a seller may not exclude modify or restrict the operation of the foregoing obligation except in respect of particular defects of which a list has been given to the buyer before the contract of sale has been entered into and where that list is subsequently incorporated into such contract.

3. A sale of a house shall include the grant of a lease thereof otherwise than at a rack rent and without payment of a premium; it shall also include the assignment of a lease other than one at a rack rent.

4. A person selling a house in the course of his business includes anyone who has bought such house for the purpose of selling it.

5. Subject to proposition 2 above, the seller's obligation under proposition 1 enures for the benefit of any purchaser of the relevant premises irrespective of the absence of any contractual relation between him and the original seller.

Private Sales (Paragraph 19)

6. On the sale of any house by a person other than a seller to whom propositions 1 and 4 apply the seller shall be under an obligation to disclose to the buyer any material defect rendering the house not reasonably fit as a dwelling

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[1] A new house means a house which has not previously been inhabited or which was substantially completed less than one year before the relevant sale.

house if such defect is known to the seller prior to the making of the contract of sale.

Duty of Care (Paragraphs 20-21; 26)

7. Where a person sells a house in the course of his business he shall be under the common duty of care in respect of the soundness of the premises to the buyer and to third parties on the premises with the buyer's consent. This duty will be in extension of the duty of care owing to third parties under the general law.

8. Where injury or damage is caused to a buyer or a third party owing to the faulty execution of any work or construction by an independent contractor other than a general contractor[2] employed by the seller, the seller will not be liable if, in all the circumstances he acted reasonably in entrusting that work to the contractor and took proper steps to satisfy himself that the contractor was competent and that the work had been properly done.

LESSOR'S LIABILITY IN TORT.

Nuisance (Paragraph 22)

9. Where a nuisance caused by want of repair exists upon premises the subject of a letting the landlord shall be liable to third parties:-

(a) where at the time of the letting the premises were in a state as in that respect to constitute a nuisance of which the lessor knew or ought to have known.

(b) unless a liability to repair comprising the relevant defect has been specifically imposed on the tenant by the terms of the letting.

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(2) See Paragraph 22. It is appreciated that the expression "general contractor" is too vague. It has however been used as a convenient means of distinguishing between "specialist sub-contractors" and "general sub-contractors" particularly for labour only.

These grounds shall be in extension of the present liability of lessors in nuisance. (see Paragraph 9).

10. Prior notice of the relevant defect shall not be a condition of the liability of a lessor in nuisance.

11. The conditions of a lessor's liability in nuisance to occupiers of adjoining premises and to highway users shall be the same, except that in the former case the liability of the lessor for the acts or omissions of independent contractors should remain qualified, as it is at present.

Duty of Care (Paragraphs 23 - 26)

12. A lessor's liability to a tenant or third party for injuries sustained on the premises let by reason of a defect shall depend upon whether or not the lessor is in breach of his repairing obligations. This liability shall not be dependent, in any case, upon whether or not notice of the defect had been given to the lessor; nor in the case of a third party shall liability dependent upon whether had the tenant himself been injured, the lessor would have been liable to him. This liability shall be in extension of the duty of care owing to third parties under the general law.

27th October 1966.