

OCCUPIERS' LIABILITY BILL

EXPLANATORY NOTE

THE purpose of this Bill is to alter and simplify the common law relating to the liability of occupiers of premises for injury or damage resulting to persons or goods lawfully on their premises from dangers due to the state of the premises. The Bill does not alter the law so far as trespassers are concerned.

The Bill is based on and substantially follows the wording of the Occupiers' Liability Act 1957 of the United Kingdom. That Bill was passed as a result of a report of the United Kingdom Law Reform Committee presented in November 1954 (Cmd. 9305).

The Present Law

The following summary of the present law is based on the report of the United Kingdom Law Reform Committee.

The common law recognises that the occupier of premises owes some duty of care, in regard to the safety of the premises, to persons lawfully coming upon them. But in assessing the standard of care required of the occupier in relation to his visitors, the Courts have divided them into categories, fixed by reference to the nature of the right to enter, or justification for entering, the premises, and have imposed on the occupier a standard of care varying with the category to which the particular visitor is held to belong. The categories of lawful visitors are as follows:

(a) *Contractual visitors.* These are persons who enter premises under a contract entitling them to use the premises for some purpose. There is no difficulty where the contract expressly fixes the obligations of the occupier in relation to the safety of the premises. But in most cases it does not, and the responsibility of the occupier is left to be determined by such terms as the law implies in contracts of the particular kind. Generally speaking, where the contract is for the use of premises (such as a contract for accommodation) the implied term amounts to a warranty that the premises are as safe for the purposes contemplated by the contract as reasonable care and skill on the part of anyone can make them; and this includes responsibility for defects due to the negligence of an independent contractor employed by the occupier to construct or repair the premises. But where the use of the premises is incidental to the main purpose of the contract (as in the case of a contract for work or services), the duty of the occupier appears to be limited to a warranty that he has taken reasonable care to see that the premises are reasonably safe for the purpose. As there is an endless variety in the kinds of contracts involving the use of premises, and in the attendant circumstances,

it is often difficult to know what kind of term is to be implied, and what standard of care is required. Moreover, there are qualifications to the implied term in certain cases. Also, the duty owed by the occupier to third persons entering the premises under the contract is that which he owes to the other party to the contract (the terms of which the third persons do not know).

(b) *Invitees*. This term is misleading. An "invitee" is a person who enters premises for a purpose in which the occupier has a material interest (for example, a customer who enters an office or a shop to do business or offer to do business with the occupier). He is not necessarily invited (in the ordinary sense of the term) to enter by the occupier. The law is that such a visitor, using reasonable care for his own safety, is entitled to expect that the occupier will use reasonable care to prevent damage from unusual danger which he knows or ought to know. Where the invitee knows of and appreciates the danger the occupier is exonerated from liability. A warning of the danger is therefore usually sufficient to relieve the occupier from liability. As a general rule the occupier's liability includes responsibility for defects due to the negligence of an independent contractor employed by the occupier.

(c) *Licensees*. A "licensee" is a person who enters premises for a purpose in which the occupier has no material interest (for example, a person allowed by an occupier to take a short cut through his premises, or a guest invited to dinner or to stay with the occupier of premises). The standard of care owed to a mere licensee is limited to warning the licensee of any concealed danger (or trap) of which the occupier actually knows.

Many difficulties have arisen in the field of liability to "invitees" and "licensees". In the first place, it must be decided whether, in the circumstances of a particular case, there is a "material interest". Secondly, the distinction between an "unusual danger" on the one hand and a "concealed danger or trap" on the other is a narrow one. Thirdly, the distinction between a danger of which the occupier "knows or ought to know" and one of which he "actually knows" is not very wide, as there have been cases where "actual" knowledge has been imputed to occupiers. It is often difficult to decide whether a visitor is an "invitee" or a "licensee".

It appears that persons lawfully using premises provided for the use of the public are mere licensees.

Where a landlord remains in occupation of the means of access to leased premises, persons using such means of access for the purpose of visiting the tenants are mere licensees in relation to the landlord.

Further difficulties arise where a landlord is liable, under the terms of a lease or tenancy, to keep tenanted premises in repair. If any person other than the tenant is injured as a result of the landlord's breach of his obligations, that person has no remedy against the landlord; although an injured visitor can sue the tenant, who in his turn can sue the landlord.

The Bill

The main purpose of this Bill is to abolish the distinction between invitees and licensees, and to fix and define a "common duty of care" owed by an occupier (as such) to all his lawful visitors. The following notes explain briefly the effect of the clauses.

Clause 1 relates to the Short Title and commencement of the Bill. The Bill will come into force on 1 January 1963.

Clause 2 is an interpretation clause.

Clause 3: Subclauses (1) and (2) provide that the rules set out in *clauses 4 and 5* are to have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in his capacity as an occupier in respect of dangers due to the state of the premises or to things done or omitted there. For the purposes of the new rules, persons who at common law would be either “invitees” or “licensees” are “visitors”, and the one set of rules will apply to them. In *subclause (1)* the words “in his capacity as an occupier” (which do not appear in the United Kingdom Act) have been inserted to make it clear that the Bill applies only to “occupancy duty” (i.e., a duty of care in respect of the state of the premises). It is not intended that the Bill should apply to the duty of care owed in respect of activities being carried out on the premises, as that is covered by the general law of negligence.

Subclause (3) provides that the new rules are also to regulate (a) the obligations of a person occupying or having control over any fixed or movable structure; and (b) the obligations of a person occupying or having control of any premises or structure, in respect of damage to property.

Clause 4: Subclause (1) provides that an occupier owes the “common duty of care” to all his visitors, except so far as he is free to and does alter or exclude the duty by agreement or otherwise.

Subclause (2) defines the common duty of care as a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

Subclause (3) provides that the circumstances relevant for the present purpose include the degree of care that would ordinarily be looked for in such a visitor. The subclause gives examples.

Subclause (4) provides that, in determining whether the occupier has discharged the common duty of care, regard is to be had to all the circumstances. The examples given in *paragraphs (a) and (b)* deal with a warning given by the occupier and with damage caused by a danger due to faulty work done by an independent contractor employed by the occupier.

Subclause (5) provides, in effect, that the occupier is not liable to a visitor in respect of risks willingly accepted by the visitor.

Subclause (6) provides that persons entering premises in the exercise of a right conferred by law (for example, police with search warrants or inspectors with a statutory right of entry) are to be treated for the purposes of the clause as permitted by the occupier to be there.

Clause 5: The effect of this clause is that where an occupier is bound by contract to permit third persons to enter or use his premises he may not by that contract restrict or exclude the duty of care he owes to them as his visitors (even if he restricts this duty towards the other party to the contract); but in the absence of express provision to the contrary the third persons may invoke any higher duty he undertakes towards the other party.

Under *subclause (2)* the occupier who has taken all reasonable care is not to be liable to third persons for dangers due to faulty work done by independent contractors.

Subclause (4) provides that where under a tenancy (including a statutory tenancy) the landlord or tenant is bound (though not by contract) to permit third persons to enter or use the premises, this clause is to apply as if the tenancy were a contract between the landlord and the tenant.

Subclause (5) provides that this clause, so far as it prevents the restriction or exclusion of the common duty of care, applies to contracts and tenancies entered into before or after the commencement of the Act; but so far as it enlarges the duty of the occupier it applies only to obligations undertaken after such commencement.

Clause 6: The effect of *subclause (1)* is that where persons or goods are on premises under a right conferred by a contract with the occupier, the occupier's duty is to be the common duty of care, except so far as a contrary intention is expressed in the contract.

Subclause (2) provides that in determining whether in any such case the occupier has discharged the common duty of care the existence and nature of the contract are to be included in the circumstances that must be taken into account under *clause 4*.

This clause differs from the equivalent provision in the United Kingdom Act, which merely provides that the duty of the occupier under such a contract, so far as it depends on a term to be implied in the contract, is to be the common duty of care.

Clause 7: The effect of this clause is that where premises are occupied under a tenancy which puts on the landlord an obligation to maintain or repair the premises the landlord owes the same duty to all persons lawfully on the premises in respect of dangers arising from a breach of that obligation as if he were the occupier.

The effect of *subclause (4)* is that a visitor has no right of action unless the landlord's default is actionable at the suit of the occupier.

Under *subclause (8)*, this clause applies to tenancies created before or after the commencement of the Act.

Clause 8 provides that the Act is not to apply to obligations under or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft, or other means of transport, or under or by virtue of a contract of bailment.

Clause 9 provides that the Act is to bind the Crown.

Hon. Mr Hanan

OCCUPIERS' LIABILITY

ANALYSIS

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A BILL INTITULED

An Act to amend the law relating to the liability of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or other property from dangers due to the state of the property or to things done or omitted to be done there

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

- 10 **1. Short Title and commencement**—(1) This Act may be cited as the Occupiers' Liability Act 1962.
(2) This Act shall come into force on the first day of January, nineteen hundred and sixty-three.

2. Interpretation—In this Act, unless the context otherwise requires,—

“Premises” includes land:

“Structure” includes any vessel, vehicle, or aircraft.

Cf. Occupiers' Liability Act 1957, s. 1 (3) (a) (U.K.) 5

3. Application of next two succeeding sections—(1) The rules enacted by sections 4 and 5 of this Act shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in his capacity as an occupier in respect of dangers due to the state of the premises or to things done or omitted to be done on them. 10

(2) The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives, or is to be treated as giving, to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier and as his visitors are the same as the persons who would at common law be treated as an occupier and as his invitees or licensees. 15 20

(3) Subject to the provisions of section 8 of this Act, the rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate— 25

(a) The obligations of a person occupying or having control over any fixed or movable structure; and 30

(b) The obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors. 35

Cf. Occupiers' Liability Act 1957, s. 1 (U.K.)

4. Extent of occupier's ordinary duty—(1) An occupier of premises owes the same duty (in this Act referred to as the common duty of care) to all his visitors, except so far as he is free to and does extend, restrict, modify, or exclude his duty to any visitor or visitors by agreement or otherwise. 40

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the
5 occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—

10 (a) An occupier must be prepared for children to be less careful than adults; and

(b) An occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the
15 occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

20 (a) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

25 (b) Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, reconstruction, demolition, maintenance, repair, or other like operation, by an independent contractor employed by the occupier, the occupier is not to be
30 treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor
35 was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor. The question whether a risk
40 was so accepted shall be decided on the same principles as in other cases in which one person owes a duty of care to another.

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

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Cf. Occupiers' Liability Act 1957, s. 2 (U.K.)

5. Effect of contract on occupier's liability to third party—

(1) Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the common duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, so far as those obligations go beyond the obligations otherwise involved in the common duty of care.

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(2) A contract shall not by virtue of this section have the effect, unless it expressly so provides, of making an occupier who has taken all reasonable care answerable to strangers to the contract for dangers due to the faulty execution of any work of construction, reconstruction, demolition, maintenance, repair, or other like operation by persons other than himself, his servants, and persons acting under his direction and control.

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(3) In this section the expression "stranger to the contract" means a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it, and accordingly includes a party to the contract who has ceased to be so entitled.

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(4) Where by the terms or conditions governing any tenancy (including a statutory tenancy which does not in law amount to a tenancy) either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this section shall apply as if the tenancy were a contract between the landlord and the tenant.

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(5) This section, so far as it prevents the common duty of care from being restricted or excluded, applies to contracts entered into and tenancies created before the date of the commencement of this Act, as well as to those entered into or created on or after that date; but, so far as it enlarges the duty

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owed by an occupier beyond the common duty of care, it shall have effect only in relation to obligations which are undertaken on or after that date or which are renewed by agreement (whether expressed or implied) on or after that
5 date.

Cf. Occupiers' Liability Act 1957, s. 3 (U.K.)

6. Occupier's duty to contractual visitors—(1) Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred on them by contract with a
10 person occupying or having control of the premises, the duty he owes them, in his capacity as occupier, in respect of dangers due to the state of the premises or to things done or omitted to be done on them shall be the common duty of care, except so far as a contrary intention is expressed in the contract; and
15 the provisions of subsections (2) to (5) of section 4 of this Act shall apply accordingly.

(2) In determining whether in any such case the occupier has discharged the common duty of care, so far as it is applicable, the existence and nature of the contract shall be
20 included in the circumstances to which regard is to be had under section 4 of this Act.

(3) Subject to the provisions of section 8 of this Act, this section shall apply to fixed and movable structures as it applies to premises.

25 (4) This section does not apply to contracts entered into before the commencement of this Act.

Cf. Occupiers' Liability Act 1957, s. 5 (1), (2), (4)
(U.K.)

7. Landlord's liability in virtue of obligation to repair—
30 (1) Where premises are occupied by any person under a tenancy which puts on the landlord an obligation to that person for the maintenance or repair of the premises, the landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same duty,
35 in respect of dangers arising from any default by him in carrying out that obligation, as if he were an occupier of the premises and those persons or their goods were there by his invitation or permission but without any contract.

(2) Where premises are occupied under a sub-tenancy, subsection (1) of this section shall apply to any landlord of the premises (whether the immediate or a superior landlord) on whom an obligation to the occupier for the maintenance or repair of the premises is put by the sub-tenancy, and for that purpose any obligation to the occupier which the sub-tenancy puts on a mesne landlord of the premises, or is treated by virtue of this provision as putting on a mesne landlord, shall be treated as put by it also on any landlord on whom the mesne landlord's tenancy puts the like obligation towards the mesne landlord. 5 10

(3) For the purposes of this section, where premises comprised in a tenancy (whether occupied under that tenancy or under a sub-tenancy) are put to a use not permitted by the tenancy, and the landlord of whom they are held under the tenancy is not debarred by his acquiescence or otherwise from objecting or from enforcing his objection, then no persons or goods whose presence on the premises is due solely to that use of the premises shall be deemed to be lawfully on the premises as regards that landlord or any superior landlord of the premises, whether or not they are lawfully there as regards an inferior landlord. 15 20

(4) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises unless his default is such as to be actionable at the suit of the occupier or, in the case of a superior landlord whose actual obligation is to an inferior landlord, his default in carrying out that obligation is actionable at the suit of the inferior landlord. 25

(5) This section shall not put a landlord of premises under a greater duty than the occupier to persons who or whose goods are lawfully on the premises by reason only of the exercise of a right of way. 30

(6) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section. 35

(7) For the purposes of this section, obligations imposed by any enactment in virtue of a tenancy shall be treated as imposed by the tenancy; and "tenancy" includes a statutory tenancy which does not in law amount to a tenancy, and includes also any contract conferring a right of occupation; and "landlord" shall be construed accordingly. 40

(8) This section applies to tenancies created before the commencement of this Act, as well as to those created after its commencement.

Cf. *Occupiers' Liability Act 1957, s. 4 (U.K.)*

8. Act not to apply to certain contracts of hire or carriage, etc.—This Act shall not apply to the obligations of any person under or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel,
5 aircraft, or other means of transport, or under or by virtue of any contract of bailment.

Cf. Occupiers' Liability Act 1957, s. 5 (3) (U.K.)

9. Act to bind the Crown—This Act shall bind the Crown.

Cf. Occupiers' Liability Act 1957, s. 6 (U.K.)