

## THE DUTY OF CARE TO THE PUBLIC

### 1. Liability For Physical Safety

Humans are notoriously clumsy, forgetful, unobservant, inconsiderate, wilful, and bad at reading warning signs. For their part, museums make ideal sites for accidents. For the museum administrator, it is a difficult task to balance the safety of the public against the accessibility of the collection. After all, the museum that poses the least threat to the public is the one that is locked and barred. To allow the public to enter a premises is to accept that a certain degree of risk will be involved. The law accepts this, and does not impose absolute liability on those who control public premises. Rather, the extent of that liability differs with the degree of protection that the law considers appropriate for each class of visitor.

It should be noted that the duty towards visitors is owed by the occupier of the premises and rarely the owner.

### 2. Categories of Visitor

Visitors are categorised as follows:

- (i) Contractual
- (ii) Invitees
- (iii) Licensees
- (iv) Entrants as of right
- (v) Trespassers

The occupier of the premises owes each of these persons a duty of care. That duty differs in each case:

#### (a) Contractual Entrants

These are people who pay to enter. In such cases the court will look to the purpose for which the person has entered the premises and will infer on the occupier a duty to make the premises as safe as reasonable care and skill can make it. Certainly, the occupier will be expected to use reasonable care to prevent any unusual danger of which it knows or ought to know. For example, if construction work is being carried out or a broken pipe has caused the floor to become wet and slippery, it is reasonable to expect that the occupier will fence off the dangerous area and provide warnings of the danger to the public.

#### (b) Invitees

This is another example of how the law distorts the English language. An invitee is not a person who is invited onto the premises. Rather, an invitee is one whose visit will bring an economic benefit to the occupier. For example, invitees would include persons approaching the ticket counter (or turnstile), the person wandering in the museum bookshop, diners in the museum restaurant, or the exhibition design consultant that has been retained for a special show.

The occupier has a duty to use reasonable care to prevent injury or damage from **unusual dangers of which the occupier knows or ought to know.**

It is difficult to define "unusual dangers" because these vary with each situation. The loose carpet, the open trap door, the extension flex that lies across the corridor, the mechanical exhibit which may injure a member of the public who handles it in the wrong way, are all examples. Furthermore, what may be obvious to an adult may be an unusual danger to a child.

(c) **Licensees**

A licensee who enters a premises is one whose presence does not confer upon the occupier an economic advantage. The most common example is that of a guest in one's home or a viewer who attends a performance on a complimentary ticket. The duty of the occupier to a licensee is to **protect them from concealed dangers that are known to the occupier**. This is a more limited duty than that owed to invitees. However, the trend of the cases has been to raise the standard of care owed to licensees so that it is akin to that owed to invitees.

(d) **Entrant as of Right**

These are lawful users of facilities that are open to the public. Most visitors to museums and Galleries fall into this classification. They are entitled to the same protection as invitees; that is, the higher standard of care.

(e) **Trespassers**

A trespassers is a person who comes onto property without permission, or stays on the property when requested by the occupier to leave. Occupiers owe a duty of care to trespassers but, as may be expected, that duty is not as high as with other categories of visitor. The usual guideline is that of "common humanity". This is always a question of fact which will vary in each case. It is clear that the curator who protects the premises with a blunderbuss connected to a trip wire is exceeding the duty of common humanity but less extreme examples are often difficult to judge. For example, if a person scales the wall of the museum with the intent to burgle, and in the process, falls into an improperly fenced and lit manhole, the courts may well say that the museum had no duty of care to that person. However if that person was a child, and there was some history of children scaling the wall at night, the courts may well say that the museum owed a duty of care to that child.

"Common humanity" is a very variable guideline, but the courts are very willing to find that that duty of care exists when children are involved. In the case of children, the courts do not find in their favour merely because of sentimentality. The fact is that many things that act as warnings for adults act as a lure for children.

(f) **Children**

Because the law in this area tends to favour children who have been injured, it is essential that museum administrators take them into account when designing and implementing warnings and other preventive measures. Barricades which may impede the progress of the car, merely act as monkey bars for children. Large dark holes are things to be explored and large signs, things to be ignored. In museums in which the collection is designed to be "hands on", the administration must be sure that such exhibits are suitably supervised. Furthermore, on/off switches should be well out of the reach of children (and preferably disguised as well). Where possible, there should also be safety mechanisms installed so that in the event of an accident the machinery or other display, can be immediately shut down so as to prevent further injury.

As for signs, these should be large enough to attract the attention of both adults and children. They should also take into account their differing readerships and use symbols, where appropriate, so that people who cannot read English (whether children or foreigners) can appreciate their important message.

### 3. Liability For Advice And Services

From time to time, members of the public seek the advice of museum staff on a range of subjects including the identification of an object, whether it is genuine or fake, how best it should be restored and so on. This advice can have serious legal consequences and it is important that every museum have a clear set of procedures for such occasions so that both the museum and the staff are protected.

#### (i) The Legal Principles Relating To Advice

In 1963 the English case of *Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.*, (1964) A.C. 465 held that " a negligent, though honest , misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby...". The law imposes "...a duty of care when a person seeking information from a party possessed of special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgement."

Lawyer readers will be familiar with the development of this proposition through the Australian cases of *Mutual Life and Citizens' Assurance Co. Limited v. Evatt* (1970) 122 C.L.R. 628 and *L. Shaddock and Assoc. v. Parramatta City Council* (1979) 1 N.S.W.L.R. 556 and many others. This is not the place to provide a detailed analysis of these cases for their ramifications for the museum and its staff are clear: errors made in the furnishing of their opinion and advice can be very expensive indeed. (It should go without saying that museum personnel must not give any valuations or estimates of value, nor opinions as to the reputations or relative merits of various private dealers, for these are outside their role and may prove costly for both the individual and the museum. If in doubt as to whether or not to give an opinion, the museum employee should not hesitate to decline. No reasons need be given.

#### (ii) Disclaimers

One may contract out of any liability for losses resulting from these sorts of mistakes and every museum that allows its staff to give any advice to the public should have very clear guidelines for the giving of such advice, including the use of a disclaimer which should be obtained in every case.

Whilst it is understood that no reputable museum professional would fail to take all reasonable steps to ensure that the information conveyed is correct, and that no such person would give negligent advice merely because of the protection afforded by the disclaimer, it is important to protect both the museum and the staff.

The disclaimer might take the following form:

The museum and such of its officers, employees, agents or other persons who have been involved in providing the information and advice furnished to you do not accept any responsibility for any inaccuracies which may be contained in that information and advice.

Such a clause is the minimum. Most lawyers would like to add more.

As the service offered to the public by the museum will probably include being responsible for material belonging to members of the public (albeit only temporarily) it is sensible to also include a disclaimer relating to the safety of that material:

Whilst all possible care is taken of material submitted, neither the museum nor its officers, employees or agents shall be liable for any damage to or loss of such items whilst they are in the possession of the museum.