

## 18. The Duty of Care

Injury can be caused by defective premises, dangerous works, hazardous materials, and so on. This chapter looks at some of the common situations giving rise to a duty of care.

### 1. Liability For Premises

Humans are notoriously clumsy, forgetful, unobservant, inconsiderate, wilful, and bad at reading warning signs. For their part, galleries and studios make ideal sites for accidents.

Whenever a person visits the studio of an artist or enters a gallery, there is a chance that that person may be injured. The studio, like many other workplaces, is not designed or operated with the visitor in mind. The gallery should be, but the large numbers of visitors, in combination with the presence of works such as installations and sculptures that often act as irresistible attractions for the bodies of distracted patrons, means that mishaps are common.

It is a difficult task to balance the safety of the public against accessibility to the works. After all, the gallery or the studio that poses the least threat to the public is the one that is locked and barred. To allow the public to enter 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 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.

(a) Categories of visitor

Visitors are categorised as follows:

- contractual;
- invitees;
- licensees;
- entrants as of right;
- trespassers.

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

(i) Contractual entrants

These are generally 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 them. 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.

(ii) 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 potential purchasers who come to a studio, 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.

Invitees have an obligation to look out for their own safety but 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 hands-on installation 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.

### (iii) Licensees

A licensee who enters 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 licensees is to protect them from concealed dangers that are known to the occupier. This is a more limited duty than that owed to invitees.

### (iv) Entrants as of right

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

### (b) The trend of change

The distinctions between the above categories are slowly eroding. As a generalisation it may be observed that the lower standard of care offered to licensees is slowly being raised toward that given to invitees. Similarly, the required standard of care to be taken of invitees is now much closer to that awarded to contractual visitors. For too long, many

worthy plaintiffs have lost their cases because of some formulary distinction that has its roots in legal history rather than the requirements of justice in contemporary society.

In some cases, and this is particularly so of those involving public places, the special rules of occupiers' liability are being circumvented by superimposing the laws of negligence: see *Hackinshaw v. Shaw* (1984) 56 A.L.R. 417; *Papantonakis v. Australian Telecommunications Commission* (1985) 156 C.L.R. 7. In other words, in addition to the old restrictive rules of occupiers' liability, the courts are increasingly prepared to impose a duty on occupiers to take reasonable care that their premises are reasonably safe for those who enter them. In doing so they are applying the familiar words of Lord Atkin:

“You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be, persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected”: *Donoghue v. Stevenson* [1932] A.C. 562 at 580.

By this approach it is more likely that the facts of each individual case will determine the result rather than the application of the old and often exclusionary formulae of occupiers' liability that have so often operated to separate justice from law.

This trend has been taken to its logical legislative conclusion in many overseas jurisdictions including England and New Zealand. In Australia however, only Victoria has enacted this important reform: see Wrongs Act 1958, s. 14B, amended by the Occupiers' Liability Act 1983:

“(3) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises

- (4). . . in determining whether the duty of care . . . has been discharged consideration will be given to --
- (a) the gravity and likelihood of the probable injury;
  - (b) the circumstances of the entry onto the premises;
  - (c) the nature of the premises;
  - (d) the knowledge which the occupier has or ought to have of the likelihood of persons or property being on the premises;
  - (e) the age of the person entering the premises;
  - (f) the ability of the person entering the premises to appreciate the danger;
  - (g) the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person.”

It is a formulation that is simple in its expression and useful in its application.

### (c) Trespassers

A trespasser 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 modern 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 studio with the intent to burgle and in the process falls into a hole that is improperly fenced and lit, the courts may well say that the artist had no duty of care to that person. However if that intruder were a child and there was some history of children scaling the wall at night, the courts may well say that the occupier owed a duty of care to that child. After all, because of the previous incidents, the likelihood of the present incident is more foreseeable.

“Common humanity” is a very variable guideline, but the courts are very willing to find that the 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. Each case has to be taken on its individual facts.

## 2. Liability for Injuries Caused by Works

Severe injury may be caused by works of art and craft. It is not common but it does occasionally happen and most commonly such incidents concern public art and domestic craft.

With art, most physical dangers involve sculptures or installations situated in public places. After all, two-dimensional works are only likely to be a danger if the means by which they are suspended have been negligently attached. Three-dimensional works, particularly those situated in public places, may cause injury because of features of their design, manufacture, materials, method of presentation or simply position.

With craftworks, the range of dangers is far greater because the objects are more commonly designed for use. Earthenware cooking vessels, wooden furniture and stained glass windows can all cause considerable damage and injury if they are negligently designed or made.

Sometimes the problem lies not with the object itself but with the way that it is used. For example if the object is low-fired there should be explanation provided to users that it will not hold water. If poisonous dyes and glazes have been used it is essential that the craftsperson warn likely users of the danger. The craftsperson knows better than the purchaser or user what the dangers are in their work and should provide appropriate warnings. This need not be done in a manner which will scare off buyers. It is often best done by describing the uses for the object and providing instructions for care. In other

words, instead of being threatening, the relevant information is incorporated in the marketing of the product.

### 3. Children

Because the law in this area tends to favour children who have been injured, it is essential that those who are responsible for the display of works take children into account when organising supervision of an exhibition or 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.

Signs 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.

### 4. Liability for Artists' Health Hazards

The health hazards of art practice are becoming well known: the poisonous chemicals used in certain photographic processes, paints and glazes; corrosive thinners used in printmaking and painting; injurious noise levels endured by some sculptors; fungal infections which commonly affect potters; repetitive strain injuries and sciatica which often affect potters, printmakers and weavers; muscular-skeletal injuries suffered by those artists whose work involves the lifting of heavy loads; the dusts which cause silicosis and which eventually destroy the lungs; extremes of heat that can result in burn injuries and various forms of degeneration suffered by organs such as the lungs and eyes; certain polyurethane resins which can cause allergic reactions (including severe asthma); manganese dust to which potters, electric arc welders, glassblowers and those who do

metal casting are so commonly exposed and which has been shown to reduce male fertility. The list goes on and on.

It is only in recent years that artists have started to pay serious attention to the health hazards that affect their professional lives. Increasingly precautions are being taken to minimise the risks, but all too often no regard is had to the listed contents of products, labelling is inadequate or misleading; work procedures are continued without regard to their potential for causing long-term injury. Almost everybody, including the manufacturers, artist employers, practitioners and even some art schools, seem to be in a sado-masochistic conspiracy to ignore the proven hazards of art and craft practice.

### Legal remedies

It is not intended to give a detailed description of the legal remedies available to those who suffer such diseases or injuries. The important lesson is to strive to avoid such personal damage but if that does not work, to see a lawyer who is expert in product liability and personal injury work.

In brief, some of the remedies available to the artist are little different to those available against the artist (and described above).

1. The manufacturers owe artists who use their products a duty of care. This includes a duty to either not use ingredients in their products that are hazardous or to clearly label those ingredients (and perhaps even their dangers). An action against a manufacturer will usually involve various heads of tort, contract and both State and federal statute.
2. Employers owe their artist employees a wide range of both statutory and common law duties. These would include the duty to provide safe materials and/or a safe system of work. Besides the large artist employers such as art schools there are hundreds of small arts employers (who perhaps employ an assistant, even on a part-time basis),

who are automatically covered by the duties imposed by the extensive factories and workers' compensation legislation of their State. There may be minimal union representation in the visual arts but the legislation introduced to protect the health and working environment of workers in other industries, nevertheless applies to art workers as well.

The ignorant, the exploitative and the lazy should beware: minimisation of health hazards and the legal actions brought on behalf of practitioners who suffer injury or disease as a result of hazardous materials or procedures, will be a focus of artlaw practice during the next decade.