COLLECTIONSLAW
LEGAL ISSUES FOR AUSTRALIAN ARCHIVES, GALLERIES, LIBRARIES, AND MUSEUMS BY SHANE SIMPSON

CHAPTER 35. DUTY OF CARE TO THE PUBLIC

INTRODUCTION

Collecting institutions are natural repositories of traps, dangers and hazards and every organisation that opens it doors to the public has a duty to take reasonable steps to ensure that those premises are safe for its visitors. The institution is at risk from the time that a visitor enters the grounds of the institution to the time that he or she leaves.

Humans are notoriously clumsy, forgetful, unobservant, inconsiderate, wilful, and bad at reading warning signs. For their part, museums, galleries and libraries make ideal sites for accidents and it is a difficult task to balance the safety of the public against the accessibility of the collection.[1] After all, the institution that poses the least threat to the public is the one that is locked and barred. To allow the public to enter any 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 tests of liability focus on "reasonableness" and "foreseeability". Some of these risks are the usual and general risks borne by all occupiers – not just collecting institutions. For example:

Safety of access to and use of the facility: From the time that a member of the public enters the grounds, to the time he or she leaves, the institution has a duty of care for that person.[2] This duty is owed to persons whether they are using the

[1] Some collecting institutions have greater problems than others in this regard. For example, a maritime museum faces considerable difficulties in ensuring that the public is safe when accessing wharves, gangways and vessels.

[2] As discussed later in this chapter, a collecting institution will also owe duties of care to its employees and staff, and may also owe a duty of

paths, gardens, stairs, corridors or lavatories, wandering in the bookshop, dining in the restaurant, or looking at an exhibition. To all of these people, the occupier has a duty to use reasonable care to prevent injury or damage from unusual dangers of which it knows or ought to know: the loose carpet, the open trap door, or the extension flex that lies across the corridor. The odds are always against the popular venue: the greater the volume of visitors, the greater the risk of accident. Other risks are more peculiar to collecting institutions. For example:

Nature of the exhibit: A history museum that exhibits a collection of swords, spears or other sharp objects knows that it must do so in a way that will not endanger either its staff or its public. Similarly, a maritime museum knows that pontoons and gangplanks are inherently unstable and that visitors may injure themselves if they stumble or fall.

Access to the exhibit: Some exhibits can cause severe injuries. Most commonly such incidents concern sculpture, installations and other accessible objects situated in public spaces. (After all, two-dimensional works are only likely to be a danger if the means by which they are suspended have been negligently attached.) Exhibition material may cause injury by its design, manufacture, constituent material, method of presentation, or simply position.

Characteristics of the visitor: When the institution opens its doors to the public, it must anticipate that its visitors will have all of the characteristics of the community that it services. What may be obvious to an adult may be an unusual danger to a child. What might be obvious to a normally sighted person may be a hazard to the visually impaired.

Interaction with the exhibit: Where the exhibition contains elements that encourage physical interaction (including interactive displays), the range of potential dangers is far greater. Many of these can cause considerable damage and injury if they are negligently supervised, designed, manufactured or maintained.

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care to a trespasser (whether he or she is "innocent" – such as a straying or lost child – or someone with malevolent intent).

Fitness of merchandising for purpose: In merchandising, sometimes the problem lies not with the object itself but with the way that it might be used. For example if a ceramic vase is low-fired there should be explanation provided to users that it is not designed to hold water. If poisonous dyes and glazes have been used on a plate it is essential that the museum's shop warn likely users of the danger. The museum, gallery or library shop has a duty of care to its customers and, accordingly, must inform itself of any dangers inherent in its stock and should provide appropriate warnings to it customers. This need not be done in a manner that 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.

Hazards associated with public programs: Some public programs introduce the public to the back rooms of the institution. From time to time this may expose them to dangerous goods, hazardous chemical and biological materials, mechanical dangers, weapons and ammunition. The duty owed to these people is high because they are not expert: a comparison with the liability of teachers to schoolchildren is apposite.

Occupier v. Owner

It is important to note that it is usually the occupier of the premises, and rarely the owner, that owes the duty towards visitors. The law generally takes the approach that the owner has little day-to-day control over or knowledge of the condition of the building.

This can be particularly significant where the collection is owned and administered by a different legal entity from the owner of the premises. For example, a museum owned by a trust may be situated in premises owned by the local council. If a visitor were to fall down the steps or trip over a projector cord, one would ask: "Given the cause of the accident, who had a duty of care to the injured person? Who was negligent?" In this case it would be clear that the trust, not the local council, owed the duty of care. It may be otherwise if the injury was

caused by the dilapidated condition of the steps into the building. That may well be an owner liability.[3]

LIABILITY TO VISITORS

We can all agree that a collecting institution owes a 'duty of care' towards its public, but what does this mean in practice?

In the past, the law divided visitors into a number of categories and allocated a different standard of care to each category. So the occupier owed the highest duty to those who were classed as 'contractual entrants' and the lowest duty was owed to trespassers.[4] Now, while these categories continue to influence the development of the law, the distinctions have been eroded.[5] For too long, many worthy plaintiffs have lost their cases because of formulary distinctions with their roots in legal history rather than the requirements of justice in contemporary society.

For years, judges have laboured to articulate definitions and formulae to describe the concepts of 'fault', 'duty' and 'reasonable care'. Each new judicial attempt falls under the swords of the judges that follow.[6]

Generally, the special rules of occupiers' liability have been subsumed into the general law of negligence.[7] In other words, the courts are increasingly prepared to impose a duty on occupiers "to take reasonable care appropriate to the circumstances of the individual case.[8] In doing so they are applying the words of Lord Atkin:

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[3] In such a case, the plaintiff may well sue both the owner and the occupier so as to make sure that it succeeds against at least one of them.

[4] The five categories were: contractual; invitees; licensees; entrants as of right; and trespassers. These distinctions are now merely historical.

[5] There remains a distinction between contractual and non-contractual entrants: a visitor who enters premises under a contract, for example a paying visitor to an exhibition, may be owed an even higher duty of care by the occupier of the premises. See Fleming at 511.

[6] See Kirby J's judgment in *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540.

[7] The case that established that the class of entrant no longer determined the existence and extent of the duty of care was *Australian Safeways Stores Pty Ltd v Zaluzna* (1986-1987) 162 CLR 479, but see also *Hackinshaw v. Shaw* (1984) 56 A.L.R. 417; and *Papantonakis v. Australian Telecommunications Commission* (1985) 156 C.L.R. 7

[8] See Fleming at 503 and *Graham Barclay Oysters Pty Ltd v Ryan,* supra fn 6.

> ‘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.’[9]

Generally, the courts will look at a number of factors in deciding whether a duty is owed and whether that duty has been breached. In *Avenhouse v Hornsby Shire Council,* the Court of Appeal said that,

> ‘*the courts make decisions by first asking the question ‘is the relationship between the plaintiff and the defendant in the instant case so close that a duty arose?’ and then answering ‘yes’ or ‘no’ in light of the court’s own experience-based judgment*.’

In some jurisdictions[10], these factors have been summed up in legislation. One example is in Victoria where the *Wrongs Act* 1958, s. 14B (as amended by the *Occupiers' Liability Act* 1983) states:

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

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[9] *Donoghue v. Stevenson* [1932] A.C. 562 at 580.

[10] including England, New Zealand and several Australian states: *Occupiers' Liability Act 1985 (WA); Wrongs Act Amendment Act 1987 (SA).*

(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.[11]

Such statutes provide a useful risk management checklist. They provide factors that are relevant to working out whether you owe a duty of care to any person or class of persons and whether the institution fulfilled that duty of care. For example, assume that an art gallery wishes to install a kinetic sculpture and allow viewers to look closely at the work or even touch it. There is no doubt that the gallery owes a duty of care to those viewers. So what must it do to fulfil that duty of care? It could rope-off the exhibit but that would likely detract from the artistic or curatorial purpose. The gallery might chose to place warning signs stating that viewers who touch the artwork do so at their own risk. It might even order constant supervision of the artwork. Nevertheless, even if this were done, a court might still say that the gallery did not take all reasonable steps to protect patrons and might hold the gallery liable if a patron were injured. The court would look at the factors outlined above to determine if the museum had taken all reasonable steps to prevent injury and to alert patrons sufficiently to the dangers involved.

It is a constant balance of curatorial purpose and reasonable risk management. There is no one answer. As soon as members of the public are allowed into the institution's premises, each of their actions can be seen as an opportunity to injure themselves, another person, or collection material. Stairs are not a means of accessing the floor above: they are a hazard for falling down. A casement in the middle of a room is not a means of allowing the public close inspection of an exhibition item: it is an obstruction and a hazard to anyone who doesn't see it because other exhibits distract them. The polished floor ... well, need I go on? It is important that the institution can be seen to have taken reasonable steps to protect its visitors but that reasonableness will always be judged in retrospect – after harm has happened.

The court will infer that the collecting institution has a duty to make the premises as safe as reasonable care and skill can make them. Certainly, it 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 administration would fence off the dangerous area and provide

[11] See also the *Occupiers' Liability Act 1985* (WA), s 5; and the *Wrongs Act 1936* (SA), s 17C. The wording of these provisions is essentially the same as the Victorian provision.

warnings of the danger to the public. That is easy, but in practice, for example where there are third parties involved in the decision-making, the risk management decisions can be more difficult: say, where one of the exhibition objects is a sharp-edged sculpture and the artist insists that it must not be roped-off. How is that risk, the duty of care, to be managed? Can the artist be persuaded to change his mind? Can the issue be solved by the placement of the piece in a position that will minimise the likelihood that visitors will bump into it? Can the exhibition designer find some other solution? Will the work have to be withdrawn from the show?

What Duty of Care Is owed To Trespassers?

A trespasser is a person who comes onto property without permission, or stays on the property when requested by the occupier to leave. It may be a person who enters the premises unlawfully, who stays in the building after closing time, or who enters parts of the building without proper authority. In legal terms, even a lost child wandering off into parts of a building or opening doors into parts of the premises that are supposed only to be for staff, is a "trespasser". Occupiers owe a duty of care to trespassers but, as may be expected, that duty will not always be as high as with other categories of visitor.

Prior to the development of a common duty of care, the courts established a guideline of "common humanity" to guide the duty of occupiers towards trespassers. After 1987, the duty to trespassers was subsumed within the general category of care, with attention paid to the circumstances of the entry and the ability of the occupier to foresee and prevent injury to trespassers.[12]

This is always a question of fact and will vary in each case. It is clear that the security officer 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

[12] See also the checklists provided by the Statutes. The WA statute excludes trespassers from protection if they have entered the premises with the intent to commit an offence punishable by imprisonment.

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 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.

Children

The courts have been very willing to find that the duty of care exists when children are injured. As noted, this is not merely because of sentimentality. The fact is that many things that act as warnings for adults act as a lure for children, and the sorts of notices and measures taken to guard against risks to adults may not be effective ways of discharging a duty of care to a child. Each case has to be taken on its individual facts.

Because the law in this area tends to favour children who have been injured, it is essential that the administrators of all collecting organisations take them into account when designing and implementing warnings and other preventive measures. Barricades that may impede the progress of a car, merely act as monkey bars for children. Large dark holes are things to be explored and large signs, things that are either incomprehensible or to be ignored. Where 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.

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.

LIABILITY FOR ADVISORY 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.

The Legal Principles Relating To Advice

In 1963 the English case of *Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd*.[13], 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*[14] and *L. Shaddock and Assoc. v. Parramatta City Council*[15] and many others. This is not the place to provide a detailed analysis of these cases, but their ramifications for the organisation and its staff, are clear: errors made in the furnishing of their opinion and advice can be very expensive indeed.

For example, unless the museum makes an express disclaimer of liability or gets a signed waiver, museum personnel should 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.

WAIVERS & DISCLAIMERS

We live in a litigious world and, win or lose, all legal disputes are expensive. Irrespective of whether you are in the right or the wrong, litigation eats up money, time, focus and morale.

Even though you make enormous efforts to ensure that your interaction with the public meets the highest standards of professionalism, one day, some time, someone will go “oops”. This is the everyday risk of running an organisation that

[13] (1964) A.C. 465

[14] (1970) 122 C.L.R. 628

[15] (1979) 1 N.S.W.L.R. 556

promotes interaction with the general pubic. It's no different from being a rock music or a sports promoter: to be successful you have to attract crowds but every person who comes through the door is a potential plaintiff.

For example, every organisation 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 that should be used or a waiver that should be obtained in every case.

What are they?

Waivers and disclaimers are common and effective risk management techniques for limiting your exposure to legal actions. Whilst it is understood that no reputable 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 organisation and everyone who participates in it.[16]

One may contract out of any liability for losses resulting from all sorts of liabilities. These are contracts (or terms in larger contracts) that permit the organisation, its staff and its directors to limit their liability in the event that a member of negligence causes loss, injury or damage.

Both waivers and disclaimers are contractual in nature but they arise in different circumstances and have a quite distinct dynamic.

What's the difference?

The difference between a waiver and a disclaimer is really one of perspective, or point of view.

Waivers[17] are agreements by which party A agrees that it will not sue party B if party A suffers damage or loss as a result of party B's negligence. In short, the person granting a waiver is saying, "I have a right, but I agree that I will not enforce it against you."

With a disclaimer, it is party B that says to party A that if A wants to participate in a certain activity, party B will not be responsible for any damage of loss that A may suffer as a result of their participation.

In short, in a waiver party A says, "I won't sue you" whereas with a disclaimer, it is party B that says, "You are not allowed to sue me."

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[16] e.g. its staff, officers, contractors, volunteers and directors.

[17] Waivers are also known as 'waiver of liability agreements'.

Form

Although a 'disclaimer' tends to be more generic and less formal than a waiver, both are contractual and both have similar intentions and results.

For example, rather than being a document, a disclaimer might take the form of a warning on a sign at the entrance (or on the ticket) stating:

> *Except to the extent required by law, 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.
The courts tend to 'read down' waivers and disclaimers. Where there is room to do so tend to interpret them in favour the party who suffers loss rather than the negligent party relying on a waiver for protection. To avoid this, prudence demands careful drafting.

There are many situations in which a waiver or a disclaimer makes good commercial sense. For example where a service or program offered to the public by the organisation involves 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, and except to the extent required by law (including under the Australian Consumer Law), 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.*

Characteristics

If you are responsible for getting waivers signed, you should develop procedures that are likely to reduce the risk that the waiver will be either read-down or declared ineffective:

- Make sure that waivers and disclaimers are clear and unambiguous.
- Avoid legalese but make sure that they have been checked by a qualified lawyer – not a bush lawyer – and that they've been drafted for your

organisation and situation (and not merely copied from another organisation that may have different needs, or that may be using wording that is no longer as effective as it might be).

- It is often prudent to include the organisation, its staff, officers, contractors, volunteers and directors in the waiver.
- As unappealing as it may be, specify as many of the obvious and foreseeable risks as possible – the more general the exclusion of liability the more likely it is to be 'read down'.
- Specifically exclude liability for negligence. The courts have often held that even where the exclusion seems to be in the most general of terms, they will not exclude liability for negligence unless it is specifically mentioned.
- Ensure that those to sign the waiver are given a copy in advance, at a convenient time[18], have a reasonable opportunity to read it, and that they are likely to understand it.[19]
- Don't arrange the signing to take place in highly informal situations (such as where alcohol is being served). It doesn't have to be signed in an office or somewhere carpeted and varnished: You just want to avoid the suggestion that the person signing away their rights understood the importance of what they were doing.
- Don't allow changes to the document without formal approval of the organisation. Even small changes can have large legal effects.
- Where possible, have the signing done in front of you or some other witness.
- Remember that the courts will be particularly loathe to exclude liability towards children and that if you ask children to waive their rights, it is advisable to get a parent to sign on behalf of the child.[20]

[18] i.e. a time when they are not preoccupied with other things.

[19] If it is likely that the person waiving their rights might not sufficiently understand the language, it is essential to the waiver's effectiveness (and thus the effectiveness of your risk management strategy) to ensure that you can prove that the effect of the document was understood and that the consent or agreement was real.

Even after all this, remember that one can never be certain of the effectiveness of a waiver or disclaimer until it has been tested in court. It is a form of risk minimisation but it is not a guaranteed release from all liability.

[20] Or have both the child and a parent sign. In some jurisdictions the parent has to state that they believe that the contract is to the benefit of the child.