

Liability of Storekeepers to Persons Who Come Onto the Premises to Buy

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Commentary

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LIABILITY OF STOREKEEPERS TO PERSONS WHO COME ONTO THE PREMISES TO BUY Once a shop is open for business the shopkeeper is potentially liable for injuries suffered by customers while on his premises.

First, he is responsible for negligent acts committed either by himself or his servants in the course of their employment. Secondly, he is liable as the occupier of property for injuries caused by defects in the premises themselves. It is with this second aspect of his responsibility that this article is specifically concerned.

The general principles of negligence do not apply to the occupier of property. There is not one single standard of reasonable care the breach of which results in an obligation to all persons injured because of such negligence. Instead, we find a complex set of rules which classifies persons entering property in accordance with their business interests. Once persons are classified, a corresponding duty is imposed on the occupier on an ascending scale from a nominal duty towards a trespasser to the more onerous duty toward a person invited to the premises for a legitimate business reason.¹ This judicial approach was strongly criticized by Denning L.J. (as he then was) in *Dunster v. Abbott*,² where he remarked:

A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him, it seems rather strange that your duty towards him should be different when he comes up to your door from what it is when he goes away.

He further observed that the system was too rigid, resulting either in injustice in borderline cases or the expansion of existing categories to meet cases falling clearly within the accepted areas.

However, in the case of *White v. Imperial Optical*,³ Barlow J. recently reaffirmed that the categories of invitee, licensee and trespasser remain the basis of defining an occupier's liability in the Province of Ontario.

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¹ *Robt. Addie & Sons (Collieries) Ltd. v. Dumbreck*, [1929] A.C. 358.

² [1953] 2 All E.R. 1572.

³ (1957), 6 D.L.R. (2d) 496 (Ont.).

Persons entering a shop may be either licensees, whom the shopkeeper merely permits to be there, or invitees who enter for a valid business reason. To the former, the shopkeeper owes only the duty to warn of hidden dangers of which he is, in fact, aware, but to the latter he owes a higher duty based on the apparent economic benefit he is likely to derive from such a visit. A *bona fide* customer is an invitee who is expressly or impliedly invited to enter the store in order to do business with the occupier and, according to *Indermaur v. Dames*,⁴ the authoritative decision in this branch of the law, it is this alleged invitation coupled with the potential benefit to the occupier which is the governing factor for the imposition of such a high duty on the storekeeper.

In his article *Business Visitors and Invitees*⁵ Dean William L. Prosser disagrees with the notion of implied invitation as the basis of the storekeeper's liability. He is averse to this view that the occupier owes a duty to the "invitee", or the American counterpart, "the business visitor", because of the apparent economic benefit he will receive. In contrast, having examined the cases prior to *Indermaur v. Dames*, he finds that the courts have emphasized that the storekeeper "holds out" to the general public that his premises are safe for the purpose for which they are open, without reference to the potential profit. If this second test were used, it would not be so difficult for the courts to decide who was using the shop in relation to the business and who was in the store for purely personal purposes. Further, since the shopkeeper holds out that his premises are reasonably safe for the purposes for which they are open, there is a *general* duty on him to keep them safe. With modern developments in insurance protection this would seem to be a practical business approach. Dean Prosser does not eliminate the categories; he merely changes the method of classification, imposing a positive duty on the occupier to keep his premises reasonably safe for those persons who enter the shop for purposes related to his business.

Returning to the authority of past decisions, one finds that the Canadian courts have extended the class of "invitee" to such a point that it covers nearly as great a segment of the public as that suggested by Dean Prosser on the basis of "holding out" although the route has been of a more devious nature. A person visiting a shop need not make a purchase in order to become an invitee; it is enough if he enters with the mental prospect of making a purchase.⁶ For example, in the case of *Taylor v. Alexander* it was held that a person who went to a shop on business and returned later to retrieve an article which he had previously left behind was an invitee on the return visit.⁷ Also, those who take advantage of free services offered by a store in the interests of advertising or goodwill are also classed

⁴ (1866), L.R. 1 C.P. 274.

⁵ (1942), 20 Can. Bar Rev. 357.

⁶ *Benardz v. Burgess*, [1937] O.W.N. 497.

⁷ *Taylor v. Alexander*, [1935] O.R. 406.

as invitees and are given the added protection of this category. Thus a person stopping to put air in the tires of his car would be an invitee of the garage operator. In short, most adult persons visiting a shop would be classed as invitees except where it can be proved that they came for purely personal reasons, as for example, to visit an employee therein, to take a short cut through the store or to use the premises as protection from the rain.

An interesting illustration of how far the courts have extended this concept of "invitee" is found in cases of injury to children who have accompanied an adult on a shopping expedition. Obviously, infants are not themselves potential customers, but Quillian J. summed up the attitude of the American courts in such circumstances as follows⁸:

Not only is it customary for small children to be carried into stores, bakeries and similar shops but it is done in connection with the proprietor's business, because the patronage of the parents depends upon the privilege of bringing children. . . . That the custom is recognized by merchants is conclusively shown by the devices designed for the amusement of children generally found in the stores.

Canadian courts appear to take a similar view although we cannot find it expressed in such unequivocal language. In *Sangster v. T. Eaton Co.*⁹ it was found that the duty set forth in *Indermaur v. Dames* applied to a child two and one-half years old who accompanied his mother to a store and was injured by a wall mirror which had accidentally fallen. It should be noted that the mother took the child to the store in order to purchase clothes for him from which act it might be inferred there was an economic benefit in his coming. However, in *Hudson's Bay Company v. Wyrzykowski*¹⁰ Hudson J. referred to the *Sangster* case holding that the principles of *Indermaur v. Dames* applied "in the case of a small child accompanying its mother in a department store" without making reference to the purpose of their visit. These cases suggest that children accompanying an adult will be classed as customers and that the category of "invitee" has been stretched to its very limits to accommodate modern social customs.

Now that customers have been classified as invitees, what then is the duty imposed upon the shopkeeper towards said invitees? Professor Prosser suggested it should be that of keeping the premises reasonably safe for the purposes for which the store is open. However, the standard of care actually applied has been authoritatively stated by Willes J. in *Indermaur v. Dames*:¹¹

⁸ *Cooper v. Anderson*, 101 S.E. 909 (1920).

⁹ (1893), 25 O.R. 78.

¹⁰ [1938] S.C.R. 278.

¹¹ *Supra*, footnote 4, at p. 288.

And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger of which he knows or ought to know; and that, where there is evidence of neglect, the question of whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact.

Although this statement is still accepted as the standard of care required of the invitor, subsequent cases indicate it is somewhat ambiguous on practical application. In practice, there are two primary considerations.

First, the plaintiff customer must prove that his injury was caused by some negligence on the part of the shopkeeper. It was held in *Lastiwka v. Shymka*¹² that where the plaintiff, invitee, fails to prove that the storekeeper was negligent there is no liability on the occupier even though injury occurs while the invitee is shopping on the premises of the defendant.

This principle was applied in *Noble v. Hudson's Bay Co.*¹³ where the plaintiff who entered the defendant company's store on a snowy day, slipped and broke her ankle on a floor which was covered with cinders and melting snow. The defendant proved the floor had been cleaned on the morning in question and that he employed a janitor whose duty it was to keep the floors at the entrances clean. In this case the court held that the plaintiff had not satisfied the onus on her of showing that the defendant had failed to use reasonable care to make his premises safe for invitees. To have held otherwise would have been to infer that the defendant was under an obligation to keep the floor clean despite a snow storm from which customers came in at the rate of one every twelve seconds—obviously an unreasonable degree of care in the circumstances.

Secondly, once negligence has been proved the court must still decide if it was in relation to some "unusual danger" about the premises, of which the shopkeeper knew or ought to have known. The standard is that of the reasonable and prudent shopkeeper and thus the plaintiff in *Openshaw v. Loukes*¹⁴ failed to recover for injuries sustained when she slipped while shopping in the defendant's store. In falling, she struck a glass show case, breaking the glass and severing a nerve in her arm. After the court had found no negligence by the defendant in relation to the condition of the floors on which the plaintiff slipped, it concluded that a shopkeeper was not legally bound to use in his show cases glass of such strength as would resist the force of a shopper falling against it.

Even so, the word "unusual" defies a comprehensive definition because it relates not only to the superior knowledge of the property imputed to the invitor, but also to what the invitee might expect, or

¹² (1945), 1 W.W.R. 529 (Alta.).

¹³ [1947] 1 D.L.R. 387 (Alta.).

¹⁴ (1957), 21 W.W.R. 378 (B.C.).

in fact knows, about the condition of the premises. The customer is expected to take reasonable care to avoid obvious dangers and if he chooses to take a chance then the shopkeeper is not liable for any injuries so incurred. Consequently, whether or not the defect amounts to an unusual danger must be decided as a matter of fact in each case. With regard thereto, structural defects in a building are considered unusual dangers as are foreign materials found on the floor of a store. Thus in *Diederichs v. Metropolitan Stores Ltd.*¹⁵ the plaintiff recovered against the defendant shopkeeper when she slipped on a plastic trinket which had fallen from a counter. Other cases indicate that the operators of fruit and vegetable stores must exercise extreme care to prevent vegetable matter from remaining on the floors where it might cause injury to a customer. On the other hand it may be inferred from *Carroll & Carroll v. Chicken Palace Ltd.*¹⁶ where a blind customer failed to recover for injuries sustained, that although the shopkeeper invites the general public including the infirm as well as the physically fit to enter his store, he need not take special precautions to prevent injury to handicapped persons.

According to Willes J., the duty of the shopkeeper is to prevent damage from unusual danger and there is no general duty to prevent the unusual danger itself. He has the alternative of either keeping the premises reasonably free from unusual danger or giving adequate protection to invitees against such dangers of which he knows or ought to know by means of lighting devices, guarding, etc. This view was recently affirmed by Lord Porter in *London Graving Dock v. Horton*¹⁷ where he held that an invitee cannot require the occupier to make alterations to his premises in order to render them safe. He must take them as they are, subject to the occupier's duty to use reasonable care to protect him from unusual dangers. Such a conclusion means that the existing law differs from the contention of Professor Prosser that the shopkeeper "holds out" to the public that his premises are reasonably safe for the purposes for which they are opened to the public.

Whether the invitor has taken reasonable precautions to protect his customers from existing dangers is again a question of fact to be decided in each case. However, it was further laid down in *London Graving Docks v. Horton* that a warning as to existence of the danger is enough to discharge the duty placed on the shopkeeper. Where the invitee has been forewarned of the nature of the danger by the shopkeeper, or has otherwise obtained knowledge of it, then this knowledge amounts to a complete bar to recovery for any injuries suffered rather than merely being important evidence in favour of the invitor. This was also the opinion of the court in *Reid v. Mimico*¹⁸ where the plaintiff failed in an action for injuries sustained

¹⁵ (1956), 20 W.W.R. 246 (Sask.).

¹⁶ [1955] 3 D.L.R. 681 (Ont. C.A.).

¹⁷ [1951] A.C. 737 at p. 745.

¹⁸ (1926), 59 O.L.R. 579.

when she tripped in a hole in the pavement, inasmuch as she was aware of the existence of the hole. It should be noted, however, that the warning of the nature and extent of the danger must be sufficient to allow the invitee to estimate the risk involved.

Is there then no room in our law for contributory negligence in relation to the occupier of property? According to *Reid v. Mimico* there is not, the reason being that there is no general duty on the occupier to keep his premises reasonably safe. He must only protect invitees from damage from unusual danger and if he is negligent in carrying out this duty, either by not repairing or by not giving proper warning, then the injured customer recovers regardless of any negligence on his own part. If, on the other hand, the shopkeeper has fulfilled his duty then the customer who ignores the warnings or protection offered is deemed to have acted unreasonably and has no cause for action. This question was discussed in both *Whitehead v. North Vancouver*¹⁹ and *Brown & Brown v. B. and F. Theatres Ltd.*²⁰ In the latter case an opposite result was reached and the plaintiff recovered damages in an amount reduced in proportion to his own negligence. It must be stated, however, that there a theatre patron had purchased an admission ticket, so that the *Brown* case does not directly apply to the shopkeeper situation. It was argued that the duty imposed in *Indermaur v. Dames* was defined before The Negligence Act was instituted and should today be altered accordingly. However, in the light of the persuasive decision of *London Graving Docks v. Horton*²¹ which has been generally adopted in Canada though not specifically in regard to this point, there does not appear to be much room for the Negligence Act with regard to contributory negligence in these cases.

The shopkeeper only incurs liability to the invitee within the geographic limits of his invitation. If a customer should stray beyond the areas of the store open to customers, he will then become a trespasser or, at best, a licensee. The shopkeeper may by his conduct extend the invitation beyond that normally extended to customers. If so, the customer will then become an invitee to that part of the store. In *Rudlen v. Bridgeman*,²² when the plaintiff asked if there were any peas for sale, the clerk replied in the affirmative, pointing to a shelf in a part of the store not normally frequented by customers. While fetching the peas, the plaintiff fell through an open trap-door; it was held that the conduct of the clerk was an implied invitation to go to the shelf and, further, that the plaintiff was not guilty of contributory negligence in not seeing and avoiding the open trap door when his eyes were raised to the shelf.

¹⁹ [1939] 3 D.L.R. 83 (B.C. C.A.).

²⁰ [1947] 3 D.L.R. 593 (S.C.C.). Also, *Greisman v. Gillingham*, [1934] S.C.R. 375.

²¹ *Supra*, footnote 17.

²² [1930], 3 D.L.R. 224 (Ont.).

Although the special obligation towards invitees exists only while the visitor is physically present in that part of the premises which the occupier has thrown open to the public, it extends to all parts of the store which the visitor may reasonably expect are open to him. Therefore if a telephone or other facility is provided and maintained for the use of customers, the customer is an invitee while he makes use of it.²³ However, if such a convenience is maintained for the private use of the occupier and his employees, the customer is at most a licensee if he should choose to take advantage of the device.²⁴

A final consideration in the storekeeper's role is that the duty of the invitor applies to the occupier and not necessarily to the owner of the premises. If the shopkeeper rents his store, he alone, and not the landlord, is liable to the customer. Similarly, the duty is personal in that the occupier may not delegate his responsibilities to his servants, agents or independent contractors to avoid liability.²⁵

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²³ *Clow v. Tracey*, [1949] O.R. 827.

²⁴ *Great Atlantic & Pacific Tea Co. v. Randolph*, 64 F. 2d. 247 (1933).

²⁵ *Thomson v. Cremin & others*, [1953] 2 All E.R. 1185.

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