

**Am I my brother's keeper?  
A cursory introspection of some of Jamaica's tort<sup>1</sup> law**

The law requires that we take reasonable care to avoid acts or omissions, which we can reasonably foresee would be likely to injure our 'neighbour'. This falls squarely into the basic tenets of our Christian tradition; that we should love our neighbour or care for our brother. Curiously however the law does not also demand that we be 'Good Samaritans': a man is entitled to be as negligent as he pleases towards the whole world if it is deemed that he owes no duty to them. Is there ambivalence in the law?

As a Plaintiff lawyer, I have often been confronted with questions from litigants about what duty is owed to those closely connected to them; persons such as invited or uninvited guests into occupiers'<sup>2</sup> homes, businesses, hotels or premises; enquiries relating to the extent of responsibility for employees or their acts against other workers; and the extent of responsibility for persons they collide into accidentally at public places, like at the pool or bar.

The following hopefully will offer some clarity on how much 'you are your brother's keeper' or in other words, how much responsibility the law will place on you for your actions that result in harm or injury to other persons?

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<sup>1</sup> The word "tort" is used to mean a civil wrong against a person or property.

<sup>2</sup> The words "occupier" is used interchangeably throughout with the word "owner" to mean any person having a sufficient degree of control of premises including landowner, tenant or a legal occupant of premises.

**1. Am I responsible for guests who suffer injury while in my home or premises?**

The owner or occupier of premises owes a visitor a 'common duty of care' which is a duty to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the person is invited or permitted to be there.

Any danger that may exist due to the state of your home, business, hotel or premises or due to anything constructed or omitted to be constructed on it and the corresponding steps taken or not taken to avoid the danger, will be used to determine whether reasonable care is taken and consequently whether there has been a discharge of the 'common duty of care'. Take for example a genuine case where a hotel guest, despite warnings from the hotel staff, insisted on tipping back his chair on the back legs and placing his weight on those legs, suddenly collapsed violently to the floor and suffered injury. The Court held that the hotel owed the guest a duty of care against injury and that duty of care extended to the provision of a fit and suitable chair for the seating of the guest. In the stated case in point the alleged obesity of the guest did not relieve the hotel of its duty of care pursuant to the principle that 'the defendant must take the victim as he finds him'.

You will see that this 'common duty of care' is of a relatively high standard, and as an owner or occupier of premises if you cannot present proof that you acted responsibly or reasonably, you could be found not to have discharged this burden and be liable for injury suffered by your guests.

**2. Am I responsible for uninvited persons who enter my home or premises and while there suffer some harm?**

An uninvited person who enters your premises could in law be regarded as a visitor or a 'trespasser'. In either case there is a duty of care owed by the owner of the premises. Where a determination is made that the person is a 'visitor', the owner is held to the higher standard of a 'common duty of care' and where the determination is made that the person is a trespasser, the owner is under a duty to take reasonable steps to enable the trespasser to avoid danger.

The legal status of a person entering your home or premises may change in the course of the person being there. The person could begin by being invited onto a business premises and be deemed a visitor and in the circumstances he goes to a section of those premises where he knows he is not to go, and which section is clearly excluded from the public, such person's status in relation to the premises could then change to that of a trespasser. Also, where someone had been invited onto the premises under a contract for services and he leaves his work area to venture for cigarette in a part of the premises he knew to be unauthorized and dangerous, he too would be considered a trespasser. In the first instance the owner is required to take such care as in the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises. As the status changes the owner is taken to know of circumstances that make it likely that the visitor would either come onto a prohibited area of his land knowing of activity carried out on the land which would constitute a serious danger to persons unaware of those

facts; in such circumstances the owner is under a duty to take reasonable steps to enable the visitor turned trespasser to avoid danger.

The law therefore imposes a duty on you in respect to invited and uninvited guests, to visitors and trespassers alike; and you may be held responsible for any harm that may befall them. In determining whether you would have discharged your duty consideration will be given to the dangers posed due to the state of your premises, such as any structural defect or things done or not done on the premises.

**3. If I were to safeguard my premises against intruders, would I be legally responsible for any ill that may befall them?**

While safeguarding your premises may seem a reasonable step to take, the law stipulates that an occupier is not at liberty to safeguard premises in such a way that could cause harm to trespassers: there is a duty to act with 'common humanity' or to act 'in accordance with common standards of civilized behaviour'.

The responsibility of an occupier may include a duty to erect and maintain a suitable notice board or fencing, or give suitable oral warnings or have a practice of chasing away trespassers or some other act to deter trespassing on the land where injury could befall a trespasser. Take for example, the case where an old man attempting to protect valuable items stored in a brick shed was awoken in the middle of the night by the sound of an intruder attempting to break in; and without being able to see whether there was anybody directly in front of the door, the old man fired his loaded shotgun through a small hole in the door, wounding the

intruder in the arm and chest. Although the intruder was subsequently prosecuted and pleaded guilty for various offences that he had committed that night, the intruder thereafter brought proceedings against the old man, claiming damages for breach of the duty of care and for negligence. The Court found that although the old man could reasonably have anticipated that he might hit the intruder and was thus negligent by reference to the standard of care to be expected from the reasonable man placed in the old man's situation; the court also found that the old man had used greater violence than was justified in lawful self-defence.

Even in cases of preadial larceny where farmers habitually lose their crops to known intruders, farmers are not permitted to take drastic measures of setting up land mines or traps of barbedwires inconspicuously to protect their crops and farm animals. Farmers are under a duty to take reasonable steps to avoid danger to 'trespassers' as the law will impose sanctions for deliberate and reckless acts that would create danger and cause harm to persons even those who habitually enter the land without permission and with constant warnings to refrain from entry.

As an occupier of premises, if you personally create danger you may be expected to take greater measures to protect against persons entering the land and to take such reasonable care in all the circumstances of the case to see that an intruder does not suffer injury on your premises, even where the intruder or trespasser may be engaged in a criminal enterprise.

**4. I was a customer in a supermarket when I slipped and the manager claimed that because the “wet floor” warning signs were clearly posted they are not to be held responsible for my injury. Is this so?**

Generally speaking the posting of a warning sign does not discharge the owner of premises from a duty of care. The warning is not to be treated without more unless in all the circumstances it was enough to enable a visitor to be reasonably safe and where damage is caused to a visitor by a danger of which the visitor had been warned the owner is not necessarily without liability,

‘Slip and fall’ accidents frequently take place in supermarkets, hotels and airports, notwithstanding visible warning signs. The essential determination is whether the warning of the danger was sufficient to enable the visitor to be reasonably safe and in the circumstances amounts to a discharge of the occupier’s duty of care. For instance, where a woman fell down a flight of steps and the court was not convinced of the evidence that there was a sign which read "watch your step", the owner of the store was held to have failed to provide adequate warning of steps which were concealed and/or not immediately obvious to the user; the owner had failed to take reasonable care to see that customers would be reasonably safe in using the premises.

Merely posting warning signs does not discharge the duty of care that an owner has to visitors to his premises. The circumstances of the case will be relevant to assess the reasonableness of an owner’s efforts to avert any incidents vis-à-vis any

contribution you may have to your own injury, having full knowledge of the risk and maybe your willingness to accept the risk.

**5. I employed someone to do electrical work. Am I responsible for injury to my guest arising from defective electrical work?**

If you engage an independent contractor to perform any construction, maintenance or repairs to your premises, you may not be called to answer for the danger arising from the faulty execution unless in the circumstances, you did not act reasonably in entrusting the work, or satisfying yourself that the contractor was competent or that the work had been properly done.

The law makes a distinction between an employee and an independent contractor and if the person you engaged was recognized as an employee, you would be responsible for the acts of your employee. If on the other hand the person you engaged was not supervised by you and he/she came with special skills to complete the task, the law would likely consider that person an independent contractor.

The situation may be such that you had prior knowledge of certain complexities of the repairs and nonetheless employed an incompetent or inexperienced contractor to undertake the work; then you would not be absolved from responsibility, as you would not have discharged your statutory “common duty of care” to your visitor. Apart from the statutory “common duty of care”, if you had knowledge of the

faulty work on the premises, a duty of care would nonetheless exist and liability could arise in negligence.

**6. Am I responsible for children wandering onto my premises and suffering injury?**

There is a duty of “common humanity” to act ‘in accordance with common standards of civilized behaviour’ which extends to when children enter your premises.

You are required to take precautions that would be sufficient to safeguard against intrusion by children trespassers. The situation may vary when there is a substantial probability of intrusion by children too young to appreciate the danger or understand a warning notice. In such a case you would be under a greater responsibility to ensure that prohibited areas are secured from intruding children. The posting of warning signs in such an instance is not of itself sufficient to absolve you from liability to children that may be ‘trespassing’. A court of law may impose that more should have been done and will look at all the circumstances to see if even with warning signs whether that was enough to enable the children to be reasonably safe.

If the children are deemed to be lawfully on your land they would be considered visitors and you would have the higher standard of care, that of the “common duty of care” and the characteristics of the children are to be taken into account as you must be prepared for children to be less careful than adults.

**7. I frequently see signs that say “owners not liable for any damage or injury”, is this legal?**

The law permits an occupier in certain circumstances, to contract out of liability, as in to restrict, modify, or exclude by agreement or otherwise the duty to take care of visitors. This is applicable in situations of a business enterprise or premises used for business.

The posting of a notice used to exclude liability to visitors or limit visitors' entry to be at their own risk, may be taken to mean that a person entering the premises would have read the notice and accepted the terms of entry thereby relieving the occupier from liability. However, it is not necessarily so clear-cut as any term of a contract may be set aside in circumstances where it may be reasonably fair to so do. Each case will be assessed upon its own facts and an exclusion notice may not necessarily suffice to exclude liability and an occupier could still be responsible for any injury that may occur. Even in circumstances where there is legitimate exclusion of an occupier's common duty of care, there is a lesser standard that would apply, that of the duty of “common humanity” (the duty owed to trespassers) which an occupier cannot be relieved from. There may be situations of negligence on the part of the occupier, and in such instances, any attempt to exclude liability for death or personal injury would not be legal.

**8. Am I responsible for employees who suffer injury while at work and what obligations generally do employers owe to employees?**

There is a special relationship between employers and employees, - akin to a master and servant relationship - which imposes positive duties of assistance or protection. Firstly, an employer owes a personal, non-delegable duty to take reasonable care for the safety of all workers. An employer has what is called a 'common law duty', which is a duty to take reasonable care not to subject employees to unnecessary risk.

For example, in a case where a steel fitter was electrocuted when the steel bars he was fitting to a house under construction came into contact with the power lines of the utility licensing company supplying electricity, the building and construction company was held to be in breach of the employer's duty of care – more particularly failure to take adequate and effective precautions for the safety of its employee and for negligence and liability.

Any exposed risk will be measured against whether the employer could reasonably foresee and guard against it, taking into consideration any measures that might have been taken and the convenience and expense of so doing.

An employer's personal duty at common law is to provide competent staff; adequate (material) plant and equipment; proper and effective supervision; and a safe place of work. Apart from the common law duty, an employer may be under a statutory duty to make specific provision for the safety of employees/workmen in factories, in mines and quarries, on building sites; to name a few.

While every case depends on its own set of circumstances, an employer could be held liable to provide medical assistance in cases of illness or injury in no way attributable to the employer; or to warn employees to be medically examined if the employer has knowledge of hazardous working conditions that could cause harm. While the duty is not absolute it is up to the employee to prove the employer's failure to fulfill the requisite care and skill.

**9. Can an employer be held responsible for an employee giving a lift to his friend in the employer's vehicle, which the employer did not authorize and the friend is injured through the employee's negligent driving?**

The law holds a 'master' liable for any (civil wrong or) injury committed by his 'servant' while in the course of the servant's employment, irrespective of whether the master authorized or approve the activity and even though the master may have expressly forbidden it. An important distinction exists as to whether the person employed is a 'servant' or an independent contractor; since an employer is liable for the torts of his servants and not generally liable for those of his independent contractor.

An employer can be held responsible for the acts of an employee if the employee is firstly liable and secondly if the act was done during the course of the employment. The employer could also be vicariously liable for breach by an employee of the duty of care, which that employee owes to his fellow employee.

In examining the particular circumstances of an employee giving lift to a friend, there are a few factors to consider in assessing employer's liability for the employee's tortious act. Determination would be made as to whether the employee was in the course of employment; was doing the work he was employed to do; whether he was driving within the employee's authorized route or if it was a substantial detour to render the employee to be on a 'frolic on his own'. Again, every case would have to be determined on its own set of facts, but an employer could be responsible for acts even with express prohibition.

**10. Am I obliged to render assistance to someone I see drowning at a public pool?**

Whilst it may be considered by some as morally reprehensible, there is generally no legal duty to come to the rescue of a person who finds himself in peril; as long as you are not the source of the peril you may ignore the call for help of a drowning person, even when it would take little risk or effort to save the person.

Take for instance a case where a man became dangerously ill and sent for his family doctor, told the doctor of his illness, tendered his fee for services and stated that no other physician was procurable in time; without any reason whatsoever, the doctor refused to render aid to the man and death ensued; the deceased family sued the doctor. The court found that notwithstanding being granted the license (permission) to practice medicine, the state does not require, and the licensee does not promise that he will practice at all or on other terms than he may choose to accept.

There however may be a situation where for example a rescue is attempted and without any danger to the rescuer the venture is abandoned. In such instance the apparent rescue attempt may have deprived the drowning person of the assistance of others or, in some cases, of the opportunity to take alternative steps himself.

There could be a duty and obligation to finish a task that you have commenced and legal responsibility could arise from an apparent undertaking or expectation to carry the task through. In such instance there may not be any legal immunity.

**11. I understand that a bartender could be held liable for serving alcohol to a drunken patron who consequently causes injury to himself or someone else. Is this true?**

A bartender could be called to answer for injuries suffered or caused by an intoxicated patron. Depending on the relationship a Court could very well impose a duty upon someone who, in the circumstances, is positioned to take care of someone else who is unable to take care of himself.

While cultural norms would be a relevant factor, it is worth noting that a Canadian Court thinks that there is “a duty on every tavern-owner to act as a watch dog for all patrons who enter his place of business and drink to excess”. The knowledge of a patron’s somewhat limited capacity for consuming alcoholic stimulants without becoming befuddled and sometimes aggressive, seizes the tavern owner with a duty to be careful not to serve a patron with repeated drinks after the effects of

what the patron had already consumed should have been obvious. In the specific case, the breach of the bartender/tavern owner's duty gave rise to liability.

As to whether our Jamaican Courts would boldly impose a similar duty is yet to be tested. Our Courts however, would be remiss in not assessing the relationship of the parties and the presumed risk. The end result could very well be that a bartender could have a duty to a drunken patron if the bartender knows of the obviously intoxicated state and notwithstanding continuously serves alcohol. There is a duty to take reasonable care to safeguard against the likely risk of personal injury and if the patron's intention to drive is foreseeable, the bartender and/or the tavern owner could be held accountable for injuries sustained by third parties.

## **Conclusion**

Generally speaking a person will only be liable for his/her actions, which cause injury or damage to another if it is found that that person owed a duty of care in law to the injured individual. Our courts impose a duty of care where the relationship is characterised as one constituting 'proximity' or 'neighbourhood' creating a legal relationship between the parties. Further, the courts consider whether the relationship or situation is one where it would be fair, just and reasonable to impose a duty of care. Once a duty is established and a breach of that duty of care occurs wherein a complainant sustained damage or injury, the courts will impose sanction.

It is at times uncertain when the courts will impose a duty and correspondingly impose sanctions for a breach of that duty. There are ever increasing challenges being made in our courts to extend the (legal) duty owed to those we can reasonably contemplate will be affected by our actions and omissions. Being your 'brother's keeper' or a Good Samaritan may not always be a legal obligation; but it could if you approach the task responsibly safeguard you against possible legal consequences.

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