

## Negligence: Breach of Duty

### What is negligent conduct?

#### - S 43

##### Definitions

In this Part—

"court" includes tribunal, and, in relation to a claim for [damages](#), means any [court](#) or tribunal by or before which the claim falls to be determined;

"damages" includes any form of monetary compensation;

"harm" means [harm](#) of any kind and includes—

- (a) [injury](#) or death; and
- (b) damage to property; and
- (c) economic loss;

"injury" means personal or bodily [injury](#) and includes—

- (a) pre-natal [injury](#); and
- (b) psychological or psychiatric [injury](#); and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an [injury](#) or disease;

"negligence" means failure to exercise reasonable care.

#### - S 45

##### Exclusions from Part

(1) This Part does not apply to the following claims for [damages](#)—

- (a) a claim to which Part 3, 6 or 10 of the [Transport Accident Act 1986](#) applies;  
[S. 45\(1\)\(b\) amended by No. 67/2013 s. 649\(Sch. 9 item 36\(11\)\)](#).
  - (b) a claim to which Part IV of the [Accident Compensation Act 1985](#) or Part 5 of the **Workplace Injury Rehabilitation and Compensation Act 2013** applies;
  - (c) a claim in respect of an [injury](#) which entitles, or may entitle, a worker, or a dependant of a worker, within the meaning of the [Workers Compensation Act 1958](#) to compensation under that Act;
  - (d) a claim in respect of an [injury](#) which entitles, or may entitle, a person or a dependant of a person to compensation under any of the following—
    - (i) Part V of the [Country Fire Authority Act 1958](#) or the regulations made under that Act;  
[S. 45\(1\)\(d\)\(ii\) substituted by No. 51/2005 s. 58\(13\)](#).
    - (ii) Part 4 of the [Victoria State Emergency Service Act 2005](#) ;
    - (iii) Part 6 of the [Emergency Management Act 1986](#) ;
    - (iv) the [Police Assistance Compensation Act 1968](#) ;
    - (v) Part 8 of the [Juries Act 2000](#) or Part VII of the [Juries Act 1967](#) ;  
[S. 45\(1\)\(d\)\(vi\) amended by No. 24/2006 s. 6.1.2\(Sch. 7 item 49\)](#).
    - (vi) Part 5.6 of the [Education and Training Reform Act 2006](#) ;
  - (e) subject to subsection (2), a claim for [damages](#) in respect of an [injury](#) that is a dust-related condition within the meaning of the [Administration and Probate Act 1958](#) ; or
  - (f) subject to subsection (2), a claim for [damages](#) in respect of an [injury](#) resulting from smoking or other use of tobacco products, within the meaning of the [Tobacco Act 1987](#) , or exposure to tobacco smoke.
- (2) A claim for [damages](#) referred to in subsection (1)(e) or (1)(f) does not include a claim for [damages](#) that relates to the provision of or the failure to provide a health service.

(3) This Part does not apply to claims in proceedings of a class that is excluded by the regulations from the operation of this Part.

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### Application to contract

(1) This Part does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract (the **express provision**) in relation to any matter to which this Part applies and does not limit or otherwise affect the operation of the express provision.

(2) Subsection (1) extends to any provision of this Part even if the provision applies to liability in contract.

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### Effect of this Part on the common law

Except as provided by this Part, this Part is not intended to affect the common law.

### *Wrongs Act 1958, s 48*

- (1) A person is not negligent in failing to take precautions against a risk of harm unless:
- a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);
  - b) the risk was not insignificant; and
  - c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

### Breach of Duty of Care

1. Was risk **foreseeable** and **not insignificant**?
  2. Did the def **take precautions** a reasonable person would have taken? – standard of care
    - a. Was response to risk reasonable
- D is at fault when he/she falls short of standard of reasonable care

## First requirement: Reasonable foreseeability of Risks

### 1. Foreseeability of risk:

- a. Threshold question
  - i. Reasonable foreseeability is a **necessary**, not sufficient, condition for liability
- b. Doesn't require probability

#### **Wyong Shire Council v Shirt (1980) 146 CLR 40**

- Not statement as to **probability or improbability** of occurrence
- Only asserting risk isn't **far-fetched or fanciful**
- Factors that reasonable person weighs up in deciding whether to respond and if so, what extent
  - Calculus of negligence (see below)
- Reasonable person doesn't always take precautions in face of foreseeable risk
- **Foresight, not hindsight**

#### **Vairy v Wyong Shire Council**

- Whether council breached duty of care owed to A by not erecting more signs warning against/prohibiting diving
- Before A injured, ask:
  - Would **reasonable man** in the **council's position** have **foreseen conduct** involved **risk of injury** to A or to class of persons including A
    - If affirmative
      - It is for **tribunal of fact** to determine what reasonable man would do by way of response to risk
- Only by looking forward
  - Due weight can be given
    - Consider **magnitude** of **risk**, **degree** of **probability** of its **occurrence**
  - Due account taken of
    - **Expense, difficulty, inconvenience** of taking alleviating action
- If looked back
  - Separated from reasonableness
    - D would be found to have **acted without reasonable care** if alleviating action not taken
    - No matter how diffuse risk was
      - Diffuse in sense:
        - Occurrence improbable
        - Place it came to pass not confined with reasonable bounds

2. Needs **not be reasonably foreseeable** that kind of **carelessness** by D might **cause damage of some kind** to P

***Blyth v Birmingham Waterworks Co* (1865) 11 Ex 781, 784, 156 ER 1047, 1049**

- “Negligence is the omission to do something which the reasonable man, guided upon those considerations which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”
- Reasonable person is ‘personification of supposed community standards of justice and fairness’

***Glasgow Corp v Muir***

- Standard of foresight of reasonable man – **impersonal** test
  - o Eliminates personal equation
  - o **Independent of idiosyncrasies** of particular person
  - o Free from both over-apprehension and over-confidence

***Mount Isa Mines Ltd v Pusey***

- Reasonable person
  - o Notionally stood in shoes of D
    - Had such **knowledge**
    - **Capacity** for care
    - **Foresight** D actually had

How objective is the objective test?

- Reasonable person test is an **objective** standard
- Reasonable person is a **prudent** person
  - o ***Vaughan v Menlove***
- However, standard of care expected is that of ‘a reasonable person in the person’s position’
  - o ***S 48(1)(c) Wrongs Act***

Law and Fact

- Does finding of court whether D’s conduct was negligent in circumstances have quality of legal rule?
  - o ***Swain v Waverley Municipal Council* (2005) 220 CLR 517**
- **Question of law – judge’s question**
  - o Is there **sufficient** evidence upon which a finding of breach could reasonably be based in circumstances
- **Question of fact – jury question**
  - o Did **conduct** of D in circumstances **breach standard of care**