

STUDENTVIP

70311

Torts

23 March 2015



Dear 

**In Honour of Your Outstanding Achievement:
Invitation to UTS:Law Awards Ceremony**

In recognition of your outstanding performance in the 2014 academic year, you have been awarded the **Ashurst Litigation Award** for best performance in 70311 Torts. As the recipient of this award, the UTS Faculty of Law invites you and up to two guests to attend the annual Law Awards Ceremony held on **Wednesday 22 April 2015**.

The Awards Ceremony will be held at Aerial Function Centre, UTS Building 10, Level 7, 235 Jones St, Ultimo. The evening will commence with canapés and light refreshments from 5.30pm. The official ceremony will commence at 6.15pm.

The evening provides an important opportunity for public recognition by the Faculty of your achievement in 2014. It also allows you to meet with award donors as well as student colleagues who have also won awards.

An online registration system can be accessed via the event listing at law.uts.edu.au/events to enable you to conveniently respond to this invitation and to reserve places on the evening for yourself and your guests. If you are unable to attend, we ask that you consider nominating a representative to accept the award on your behalf. Please register by **Monday 13 April 2015**.

For any enquiries or for further information, please don't hesitate to email law@uts.edu.au.

Please accept my congratulations on your achievement and I look forward to seeing you on the night.

Yours sincerely

Professor Lesley Hitchens
Dean
UTS Faculty of Law

UTS:Law
APRIL
22
2015
AWARDS CEREMONY
TIME Refreshments served from 5:30pm. Official ceremony
LOCATION Aerial Function Centre, UTS City Campus, Level 7
RSVP by 7 April 2015 online via the UTS:Law website law.uts.edu.au

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POSSIBLE CLAIMS AVAILABLE TO P.

Trespass actions

- Trespass to person
 - Assault / battery / false imprisonment
- Trespass to land
- Trespass to goods
 - Trespass to chattels / detinue / conversion
- Defences to trespass action
 - Consent / self-defence / necessity
- Remedies
 - Damages / injunctions / self-help

Negligence

- Negligence, damage to property
- Negligence, death
- Negligence, pure mental harm
- Negligence, pure economic loss
- Negligence, pure omission, failure of statutory authority to exercise discretionary statutory powers
- Defences to negligence including
 - Contributory neg / *volenti non fit injuria* / joint illegal enterprise / statutory defences, illegality + intoxication + recreational activities + obvs risk + good Samaritans

Other

- Action on the case (for intentional infliction of mental harm)
- Breach of statutory duty action
 - The elements of the action
 - Defences
- The nuisance actions
 - Private nuisance / public nuisance
 - Defences + remedies
- Vicarious liability and non-delegable duties of care
 - Contract of service / circumstances where employer VL / non-delegable duties

Trespass Actions

- Trespass to Persons
- Trespass to Land
- Trespass to Goods
- Defences to Trespass Action

1. TRESPASS TO PERSON

___ lunged at ___ and _____. These facts give rise to torts of assault and battery.

Directness

- The interference must be direct and not consequential; the interference that the P suffers must be immediate upon the D's act.
- Must be direct causal connection btwn D's conduct and injury in trespass
- Trespass torts protect against direct interference NOT INDIRECT INTERFERENCE
 - Eg. log left lying on road v. hit with a log
- Must be part of D's act not merely consequence of it - Reynolds v Clark / Scott v Shepherd
- "did the impact follow so closely on the D's act that it might be considered part of that act"

BATTERY

Battery is 'a direct act by the defendant causing bodily contact with the plaintiff without his/her consent'

In this case there has been an intentional application of force by _____ without _____'s consent.

Therefore the elements of battery are:

1. **A positive voluntary intentional (deliberate or negligent) act**
2. **directly causing**
3. **physical bodily contact /interference with the P**
4. **without consent of the P: Consent is a matter for defence in Australia**

Secretary, Department of Health and Community Services v JWB (Marion's Case) (1992)

Element 1. A positive voluntary intentional act

Intention includes deliberate, negligent or reckless acts. One of these must be established in order to prove fault.

- No requirement of damage result from act
- Enough that D intends to perform act, not necessary that intent of D extend to harming the P: *Wilson v Pringle*
- Must be intentional or negligent → does not matter did not intend consequences, only act was intentioned: *McNamara v Duncan*. Purpose was to get P out of his way. He had intention. He intended to position elbow in way he did.
- Positive act: mere omission does not suffice. *Innes v Wylie*: officer stood at door to prevent P from entering. Held not battery. Except: *Fagan v Metropolitan Commissioner of Police*.
 - not passive act. must be some 'application' by the D → *Innes v Wylie* no battery by D standing in a doorway preventing PO from entering. By simply obstructing entrance. No assault committed.
- Omitting to act: deliberately ignoring plea + purposefully delaying removal was battery: *Fagan*

- Not amount to battery if occurs in **course of ordinary conduct of daily life**: *Rixon v Star City*
 - *Mr. Rixon was playing roulette at the Star City casino when Mr. Sheldon (a security officer) spun him around, asking him to confirm his name and inquiring as to whether he knew that he was an excluded person. Mr. Rixon said he felt pain in the neck as a result.*
 - Held: There was no battery as the physical contact was for the purpose of engaging Mr. Rixon's attention and was not in excess of that used in everyday life.
- Must be determined whether above ordinary conduct
 - E.g.- For an adult to jump on another and snatch her shoulder bag is clearly unacceptable. Between 13 year old schoolboys it might perhaps be seen as 'unremarkable as shaking hands'.
- Hostility will not be necessary in an act of battery. **The required act is unwanted contact**, whether it is hostile or not. **Contact must be in excess of what is accepted in everyday life and offensive to the plaintiff.**
- ***Collins v Wilcock (1984)***
- *Police officer holds plaintiffs arm (who is a prostitute) with a view to restraining her after the plaintiff declines to answer questions and begins to walk away.*
- Held: **Battery was found**. **The court held that it is important for police officers to act within and not outside their authority.** No felony was being committed at the time (the police officer did not witness the plaintiff in the act or prostitution) and the police officer had no right to touch the plaintiff in any way.

McHale v Watson (1964)

Defendant (a 12 yr. old boy) threw a sharpened piece of steel at a wooden post that bounced off and struck P in the eye. D found not negligent as a boy of his age could not be expected to foresee that the dart would not stick into the post but would go off at a tangent and hit someone.

Williams v Milotin (1957)

A child riding a bicycle was hit in the street by a truck driven negligently by the defendant. There was no suggestion that the defendant intended to strike him.

Held: This case established that trespass includes **negligent conduct**. Negligent battery.

Element 2. Directly causing

The interference must be direct and not consequential; the interference that the P suffers must be immediate upon the D's act.

Scott v Shepherd (1773)

- D held to be **liable in trespass (battery) to P** bcos injury was held to occur because of a **'direct' act of the D**
- The acts of W and R were not regarded as breaking chain of directness, as W/R not regarded as free agents, but acting under **compulsive necessity** for own **safety/preservation** --> their action was inevitable consequence of D's unlawful act

Hutchins v Maughan

- *The defendant laid poisonous baits on unfenced land where the defendant grazed his horses. The plaintiff's dogs ate the baits and died as a result.*
- Held: There was no trespass as the act of laying the baits by itself did not interfere with the plaintiff's property. Herring CJ- 'Before (the plaintiff) could suffer an injury, he had himself to intervene by coming to the land and bringing his dogs thereon'.

Southport v Esso Petroleum

- *Oil from the Esso vessel washed up on Southport beach.*
- Held: No trespass. It was not the direct act of the Esso vessel spilling oil in the river which caused the oil to wash up on the Southport beach. When the oil went in the river, the river itself carried the oil to Southport and therefore it was not a direct act.

Element 3. Physical bodily contact / interference

Battery requires **contact with the body** (R v Cotesworth); though contact may be through a medium (Pursell v Horn).

- *Cole v Turner* – unpermitted contact regardless of hostility
- Contact that is offensive/outside accepted usages + accidents of daily life
 - In a 'rude and inordinate fashion' (*Cole v Turner* 1704)
 - In a way which is not an everyday occurrence (*Wilson v Pringle* 1987)
- *Collins v Wilcock* – PO took arm of A to restrain her, without intending to arrest → beyond scope of duty in circumstances short of arresting
- This contact does not have to be physically touching the plaintiff
- Cutting hair: **Forde v Skinner**
- Spitting in face: **R v Cotesworth**
- Throwing of object: **Scott v Shepherd**
- **R v Cotesworth (1704)** - offensive behaviour such as spitting in someone's face, an unwelcomed kiss, or hitting a person with an object.
- **Fisher v Carrousel Motor Hotel (1967)** - touching plaintiff's body, taking something from someone's hand sufficient.
- **Pursell v Horn (1838)** - throwing boiling water over someone, no need for any contact with body of the plaintiff, the water is enough.
- Plaintiff does not need to be conscious- **Chatterton v Gerson (1981)** - surgeon who operated on the wrong limb of a patient was liable in battery.
- **Must be a positive act, omissions do not constitute battery.** **Innes v Wylie (1844)** - officer stood at door to prevent Plaintiff from entering. Held not battery. **Exception:** **Fagan v Metropolitan Commissioner of Police (1969)** - Motorist accidentally drove car over foot of policeman, before delaying the removal of the car from the plaintiff's foot. This constituted a battery.
- Hostility will not be necessary in an act of battery. **The required act is unwanted contact**, whether it is hostile or not. **Contact must be in excess of what is accepted in everyday life and offensive to the plaintiff.**

Highway battery

Burden of proof is reversed (*Venning v Chin*)

CASE EXAMPLES

Sam v Ben

- intentional (or reckless or careless) act by Ben directly causing unwanted (harmful or offensive) contact with the body of another (*Collins v Wilcock*, *Rixon v Star City*)
- If Sam saw it coming (*MacPherson v Beath*), then also assault
- intentional act by Ben creating in Sam a reasonable apprehension of imminent unwanted bodily contact (*Rixon*)
- would a reasonable protester apprehend that the threat would be carried out (*MacPherson v Beath*)
- Conditional threat → as trespass, could use reasonable force to remove but setting him on fire excessive response (*Rosza v Samuels*) and there are other less harmful means of removing him (*Fontin*)

Rosie v Fleur

- D has accidentally tripped P over. A trip would satisfy the elements of battery, being an act which directly makes bodily contact (*Rixon*) in the context of a sporting match, however, the defence of consent extends to commonly encountered infringements of the rules, and an accidental trip would satisfy the defence: *Giumelli v Johnston* (1991)

Fleur v Referee

- Referee bandaged F's head, constituting a prima facie battery. Altho ref would likely succeed defence of necessity. Impracticable to communicate, as she was unconscious and the action taken seems reasonable in her best interests: *Re F (Mental Patient: Sterilisation)* [1990]
- Defence of necessity not overcome refusal of consent. At CL, 'parental power to consent...diminishes gradually as the child's capacities and maturity grow.' Can consent provided they have sufficient understanding: *Marion's case* 1992. If incapable of understanding, then mother entitled to consent, battery fail. If she is capable, refusal consent valid and ambulance driver liable.
- Although did not intend to strike, may be argued he was at fault as he acted carelessly. Altho not a hostile act, it could not be regarded as conduct 'acceptable in the ordinary conduct of everyday life': *Rixon*
- As a highway case, onus of proving fault (carelessness) on the part of the D rests with the P: *Venning v Chin* (1974). Requirement appears to be satisfied on the facts. Therefore, probable that ____ would succeed in trespass to person.
- Directness requirement contemplates unbroken link btwn act and conduct or apprehended contract + must be physical contract that is made or threatened
- Directness can be problematic. If raising of arm is a deliberate act to prevent door from slamming, injury is indirect. If it is reflex action, injury will be direct

Negligence

- Negligence, damage to property
- Negligence, death
- Negligence, pure mental harm
- Negligence, pure economic loss
- Negligence, pure omission, failure of statutory authority to exercise discretionary statutory powers
- Defences to negligence

5. MENTAL HARM

Pure mental harm

- Defined as mental harm other than consequential mental harm: **s 27**

For ____ to succeed in an action for pure mental harm, the following must be established:

Element 1. recognised psychiatric illness - s31

- The condition must be recognisable (under statute, CLA s 31)
- Bob's condition was not mere 'grief and sorrow'. It was a 'catatonic state', a rec psychiatric illness (under DSMV). Thus this condition is satisfied

Element 2. Reasonable foreseeability – s32(1)

- The requirement under CLA **S32(1)** is that D must have reasonably foreseeable that a person of **normal fortitude** in the P's position would suffer mental harm (Also in *Tame, Annetts*)
 - No definitive test for 'normal fortitude' however recommendations of community standards
 - Court may take into account whether 'D knew or ought to have known about fortitude of the P': s32(4)
- The relevant circumstances in determining this are **in s32(2)**, although none of these factors by themselves will be decisive. HC interpretation of s32(2) 'being' injured can take place over an extended period of time and it must be understood against the background provided by CL of negligence: *Wicks v State Rail Authority of NSW* (2010). Thus reference made to cases to assist.
 - Whether mental harm from sudden shock
 - *Tame and Annetts* HC rejected notion harm must be 'sudden shock' → the decisive consideration
 - Did not witness accident, but witnessed Sam while he was still trapped and in danger (sufficient: *Wicks*)
 - Whether P witnessed, **at the scene** a person being killed, injured, or put in peril.
 - Nature of relationship btwn P and person injured/put in peril
 - *Mount Isa Mines* – P employed by D and was rescuer to V
 - *Annetts* – D was employer of the teenage victim who had given assurances to P's parents
 - *Jaensh v Coffey* – P was wife of V
 - Whether there was pre-existing relationship btwn P and D
 - *Rowe v McCartney 1976* – P suffered psychiatric illness after friend gravely injured in a car accident, he was solely to blame. P was passenger, and it was her car. Her illness developed from feelings of guilt surrounding the accident and recovery was denied. The court said that the type of mental illness that would have been reasonably foreseeable was one arising from nervous shock from seeing or hearing about the injury or another or shock or worry about her own injury.

- although a pre-existing relationship with ASE is not so clear, Joe was intending to climb and would have used an ASE harness and so the manufacturer/consumer relationship may be enough.
- Here _____. The court will find any person of normal fortitude will / will not suffer from a recognised psy illness after such an event.

Element 3. Limitation on recovery arising from shock

- NSW limit shock to either close family members or witnesses: s30(2)(5)
- S30(2)(a)** is satisfied, as the P witnessed, at the scene, the V being killed, injured or imperilled
 - Requires present at scene of accident. Changed from CL, can no longer recover where witnessed immediate aftermath of accident if not fam member
 - Assuming aftermath was time he remained trapped, it satisfied s30(2)(a) (*Wicks*)
- S30(2)(b)** satisfied, as D is a _____ and is thus a close family member as defined by s30(5)
 - defines close member** as: **parent**/other person with parental responsibility; spouse or partner; child or stepchild of V; a bro/sis, half-bro/sis, step-bro/sis
 - In NSW, rescuers attending the scene after an accident has occurred would be excluded unless they happened to be related to one of the Vs: *Sheehan v SRA 2009*
- It should also be noted any CN by Sam would also reduce Jane's dmgs (**s30(3)**).
- However, this will be contingent on earlier conclusion. If Don's guilty of contrib neg, Bob's dmgs will be reduced in the same proportion (s30(3)) and if Don's action defeated by s50 (intox) or s54 (illegality) → **S30(3)(4)** or 3rd party defences means damages reduced for contributory negligence of primary victim.
 - In NSW, defence which would defeat 3rd party's claim will also defeat P's claim for shock. P's damages reduced to reflect any contributory negligence by third party. Confined to shock cases
- Further Notes
 - Psychiatric injury resulting from 'shock' where someone other than the P or D has been injured, killed or endangered.
 - P's own shock-induced illness resulting from fear for his own safety within CL duty: *Dulieu v White 1901*
 - 'peril' seem to require some element of imminence, as well as something more than mere risk of minor injury. May also require that harm be possible.

Conclusion

- ASE would probably owe Joe a duty of care in relation to his pure mental harm – overall the facts appear a lot closer to *Annetts* than *Tame*.

6. NEGLIGENCE

Elements

1. DUTY OF CARE
2. BREACH OF DUTY
3. CAUSATION
4. REMOTENESS
5. DEFENCES

[sample omitted parts]

Element 2 - Breach of duty

Having established existence of duty owed by D to P, it is then necessary to establish the 2nd element of breach of that duty.

S5B(1)(a)

- Would reasonable person in D's position have foreseen that his conduct involved a risk of injury to the P or to a class of persons including the P? S5B(1)(a)
- The risk of injury is foreseeable because _____ S5B(1)(a)
 - → lots of ppl could have gone, students, drunks, attraction of building site. S49 P's intoxication does not alter standard of care
 - Presence of children, climbing by children foreseeable (Shaw v Thomas)
 - Chapman v Hearse (precise manner need not be foreseeable)

S5B(1)(b)

- In order to breach a duty, it is necessary for the risk of harm to be not insignificant (CLA s5B(1)(b)) or traditionally under common law that it not be far-fetched or fanciful (Wyong Shire Council v Shirt), though Drinkwater v Howarth held that the risk that caused the Ps injuries will often satisfy both the CL test and the statutory test. This appears to be the case.
- It was or not insignificant bcos _____: s5B(1)(b)
 - → there are many hazards. Hard floor. Depth of pit. Pain was real.

S5B(1)(c)

- What would a reasonable person do by way of response to the foreseeable risk? s5B(1)(c).
- [D] has fallen below the standard of care expected of a reasonable [person; facts] in the [D]'s position: s5B(1)(c).
 - could have respond to prev complaints, padlocked site, remove keys from crane
 - more secure fence line. Or close off the area. → which they did – not enough to establish breach or constitute an admission, s 5C(c), but evidence of practicability, Caledonian Collieries

If more analysis needed:

- The test is objective, however it also has some limited subjective elements. In establishing what is 'reasonable' and to determine whether the defendant has breached the standard of care, the objective test is a two-step process where the court first determines the standard of care which applies, and secondly, assesses the conduct of the defendant against that standard.

- **However the following classes of people require particular consideration when evaluating how objectively they would foresee and take care with respect to risks of harm:**
- [D] is child = lower standard (McHale v Watson)
 - Appropriate to set standard according to what child of same age/experience as D. however, held that where child engages in adult activity, standard should be that of a reasonable adult and not a reasonable child: *Tucker v Tucker*
 - *Zanner v Zanner* → activity whose importance beyond understanding of 11 year old kid.
- [D] is elderly = lower standard
 - *Daly v Liverpool Corporation*: elderly crossed street and injured by D. **Held: liable** as not expect her to possess same agility of younger person. Contributory negligence → should've taken more care themselves, take into account they're old.
- [D] is disabled = no change (Carrier v Bonham)
 - No change → *Adamson v Motor Vehicle Insurance Trust*: D (insane) stole car and hit P and cyclist. Knew what he was doing.
- [D] has professional knowledge = may raise standard
 - **SPECIAL SKILLS** → judged according to those skills if fact situation demands it.
 - Standard of care set by prof standards (Bolam). Although Court can set it if irrational.
 - s5O defence to be pleaded & proved by the Defendant: *Dobler v Halvorsen*
 - **“the paramount consideration that a person is entitled to make his own decisions about his life”** *Rogers v Whitaker*
- [D]'s inexperience = no change (Imbree v McNeilly;)
 - held that the standard of care owed by a learner driver to a supervising passenger was the ordinary standard of a reasonable prudent driver.
- [P] with known disability = high standard (Paris v Stepney BC)
- [P] is intoxicated = no change (March v Stramare; Manley v Alexander)
- [P]'s knowledge of intoxication = low standard (Insurance Commissioner v Joyce)
 - ✚ what would reasonable inexperienced driver have done in response to the reasonably foreseeable risk. Balancing factors such as likelihood of injury and seriousness of injury, the fact he was travelling at 2x legal limit, and fact he had practical precautions like reducing speed, as finding of fact, he breached duty. Breach may be discerned from how he was driving in the first place. ‘if an activity, in order to be performed safely, requires a certain degree of skill, undertaking the activity without the requisite skill may itself be a form of negligence’: **Imbree**, Gleeson CJ at 515
 - ✚ **NO BREACH** → In *Scholz v Standish 1961* driver momentarily lost control after being stung on nose by a bee, considered that ensued was inevitable accident; not proved that a reasonable person would have acted any differently. As there is nothing on the facts to suggest that Con has breached duty, action likely to fail. Factors like speed + he paid attention to road.
 - ✚ *Thompson v Smiths Shiprepairers*: P suffered progressive hearing loss for working 40+ years. Hearing protection not provided by D until mid 1970s, reflecting common practice not to supply until 1975. **Held**: liable. Reasonable shipyard employer **aware of needing** to protect hearing loss from 1963, and **should have provided** protection earlier.

Breach is considered by reference to the calculus factors mentioned in s 5B(2) and these indicate a failure to take reasonable care.

S5B(2) – calculus of negligence

- It could be said that though low probability, comparative seriousness, more likely to find negligent. Burden of taking precautions was _____ as D could have taken comparatively simple steps to avert foreseeable harm such as _____ [facts]. No social utility.

S5B(2)(a) the probability that the harm would occur if care were not taken,

- *Bolton v Stone* → there was only a very remote chance of the accident taking place at any particular time.
- *RTA v Dederer* → low probability of harm
- **FACTS:** 14/yo dived off flat railing on bridge. RTA had control of bridge, put up 2 signs 'no fishing or climbing on bridge' + no diving pictogram. Jumped off and hit sand bar. Sued Council and RTA. He himself had 50% CN for voluntary action in diving.
- Probability about injury → ppl jumped regularly, only 1 got injured **low probability of harm**
- **ISSUE:** WHETHER DoC fully discharged through use of signs. It was known to them as a common activity.
- **HELD:** magnitude was high. Suggested measures offered by P would be ineffective (signs, modifying platform – probs ignored) or too expensive (fence \$100k) measure of care by RTA – warning sign, is sufficient to discharge them DoC. P fails. Kirby dissent, argued on allurements. Infrastructure is a lure for kids.

S5B(2) (b) the likely seriousness of the harm,

- *Paris v Stepney Borough Council* → particularly grave consequences, as already blind in one eye. SD knew about P's danger. Should have taken more precautions. Foresaw seriousness.
- *Haileybury College v Emanuelli* → D driving car/trailer on hot day and strong winds. Back wheel of trailer came off throwing sparks on grass and damaged P's property 12 k away. Held: liable as "the risks were most serious. The cost of eliminating them was comparatively minimal".

S5B(2) (c) the burden of taking precautions to avoid the risk of harm,

- **Subsequent action suggests not overly burdensome**
- **Burden of taking precautions was _____ as D could have taken comparatively simple steps to avert foreseeable harm such as _____ [facts].**
- *Graham Barclay Oysters v Ryan* →
- *S5C(a)* → means Court must consider not only burden of taking precautions to avoid risk of harm which eventuated, but must also consider burden of taking precautions to avoid similar risks of harm for which D is also responsible eg. must erect new warning signs for other places, not just where P suffer injury
- *Caledonian Collieries v Speirs* → P's husband killed when car hit by train, out of control down steep gradient. Held: liable as installation of catch points was inexpensive/easy, outweighing seriousness of accident.
- *Romeo v Northern Territory Coastal Commission:* reasonably foreseeable that P may incur from falling over edge of unfenced cliff in nature reserve. BUT not liable as fencing along long line of cliffs in nature reserve was a huge, expensive undertaking for injury that was low risk of occurring. Would have failed under CLA.

S5B(2) (d) the social utility of the activity that creates the risk of harm.

- Greater social utility of D's act, more likely to be considered reasonable (lower SOC).
- *Watt v Hartforshire County Council* → P fireman rode on fire truck to rescue woman. P injured when unsecured **jack rolled forward** as no other fire truck which could secure jack was available at time of emergency. Held: **not liable** as "one must balance the risk against the measures necessary to eliminate the risk".
- *Daborn v Bath Tramways Motor* → wartime driver of left hand drive ambulance turned without signalling. Car close behind her. Signalled with her left hand that she was going to turn right, no rear view mirror and sign on back of ambulance warned of left hand drive. Collided. Held: ambulance driver had lower SOC as she had done all that was reasonably necessary.
- *E v Australian Red Cross Society* (1991) → testing of blood for AIDS would have led to substantial amounts of blood discarded.

Conclusion

In consideration of all the above, breach of duty would be found.

S5C – other principles

- S5C(b) → makes clear the fact that a harm would not have eventuated had something been done diff by a D does not give rise to liability for the way in which the thing was done
- S5C(c) → makes clear if D subsequently takes some action, does not give rise to liability.

Standard of care for professionals (CLA s.50,P).

- S50(1) → no liability if widely accepted in Aus by peer professional opinion
- S50(3) → widely accepted: *Vella v Permanent Mortgages*
- S5P → there is still a duty to warn of a material risk.
- Duty of Care
- A duty of care is owed from doctor to patient (*Rogers v Whitaker*)
- Breach
- Breach, s5B is discussed above
- However, in this case, there is no breach as s50(1) provides there is no liability if the work done by the profession was widely accepted by peer professional opinion at the time. The facts suggest that peer opinion favours Dr Smith.
- However, judges are still left with the responsibility of deciding which expert opinion(s) to accept. S50(2)(3).
 - In *McKenna v Hunter & New England Local Health District*, when despite it being 'accepted that a body of their peers would have found it reasonable to discharge' a patient the court rejected the submission due to the inability to identify a 'widely accepted practice'
 - *Cox v Fellows*, a doctor's independent surgical expert evidence was rejected because it contradicted the weight of evidence of other witnesses.
 - *Varipatis v Almario* → scope of a practitioner's duty of care in that it stopped short of an exercise in futility