

LAW1012/LAWS5001 TORTS NEGLIGENCE EXAM SCAFFOLD

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For psychiatric injury case (replace Step 1 above)

Step A: identify the Plaintiff

- rescuers for pure mental harm – **Wicks & Sheehan v State Rail**

Step B: CLA s32

- Requires for a DOC to be owed there needs to be a reasonable foreseeability of psych injury arising in a person of normal fortitude.
- CLA S32(1) the provision is put in negative terms
 - the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognized psychiatric illness if the reasonable care were not taken (negative **Tame**)
- CLA s32(2) circumstances where ‘normal fortitude’ can be found:
 - (a) whether or not the mental harm was suffered as the result of a sudden shock,
 - (b) whether P witnessed, at the scene, a person being killed, injured or put in peril,
 - (c) the nature of the relationship between P and any person killed, injured or put in peril,
 - E.g. neighbours; daughter
 - (d) whether or not there was a pre-existing relationship between P and D.
- CLA s30(1) – Apply when the injury count as psych illness
- CLA s30(2) can recover damages when
 - (a) The P witness
 - If the P did not witness at the scene, court says ‘The Plaintiff is required to have seen the victims "Being killed, injured or put in peril", still satisfy – **Wicks v SRA**
 - (b) is a close family member
 - CLA s30(5)(c) meaning of close family member
- CLA s31
 - Actionable when recognized psychiatric illness
 - Not an emotional distress – e.g. sad, sorrow – **Tame**
- Conclusion: DOC → **Step 2 BREACH**

Step 2: Was there a breach of this DOC?(Question of fact)

- CLA s5B(1) (**Wyong Shire Council v Shirt** adopted)
 - Was the risk of injury foreseeable?
 - The D is not negligent in failing to take precaution unless:
 - S5B(1)(a) – the risk was foreseeable (in the sense that the defendant knew or ought to have known of the risk)
 - S5B(1)(b) – the risk was not insignificant
 - The risk must be “real”, “not far-fetched” to the P or to a class of persons including the P – **“Wagon Mound” (No 2)**
 - S5B(1)(c) – in the circumstances, a reasonable person in the defendant’s position would have taken those precautions
 - CLA s5B(2) - Reasonableness of plaintiff’s pleaded precaution depends on:
 - (a) probability of harm occurring
 - the probability that the harm would occur if care were not taken
 - low probability of risk → no breach → reasonable person take no further action to remove that risk – **Bolton v Stone**
 - Obvious risk → no breach – **Romeo**
 - (b) the likely seriousness of the harm
 - Serious may cause death – **Wyong v Shirt**
 - (c) burden of the precaution to avoid risk of harm
 - Expense, difficulty and inconvenience of taking alleviating action
 - Expensive → no breach – **Romeo**
 - Low burden → breach – **Wagon Mound 2**
 - (d) social utility (usefulness) of the activity that creates the risk of harm
 - E.g. demonstrate the natural beauty of NT – **Romeo**
 - CLA s5C
 - CLA s5C(a) What a reasonable response to the risk would be – Mason J in **Wyong v Shirt**
 - The D failed/ not fail to do what a reasonable person in their position and this had breached a duty.
 - Conclusion

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For failure to warn cases – standard of care (replace Step 2 above)

Step A: Burden of taking precautions

- relationship between parties may be significant and “*may have practical consequences, as to what it is reasonable to expect by way of protection or warning*” – Gleeson CJ in ***Woods v Multi-Sport Holdings***

Step B: Bolam principle

- the standard of care required of a professional is “*that of the ordinary skilled persons exercising and professing to have that special skill*” does not apply.

Step C: CLA s5P Divisions DOES NOT apply to duty to warn of risk

- If NOT a failure to warn case → Step D CLA s50
- If failure to warn → Step E: ***Rogers v Whitaker***

Step D: CLA s50 Standard of care for professionals (apply to peer professional BUT NOT failure to warn)

- (1) The standard of care for a professional in the provision of professional services is that they act in a manner which is widely accepted in Australia by peer professional opinion as competent professional practice
- (2) peer professional opinion will not be relied on if it can be considered irrational
- (3) Varying opinions can be relied upon:
- (4) does not have to be universally accepted to be considered widely accepted
- Conclude whether there is a BREACH

Step E: Rogers v Whitaker (apply to peer professional AND failure to warn)

- standard of care:
 - reference to nature of treatment, desire for information and general surrounding circumstances
- Peer professional opinion:
 - while evidence of acceptable medical practice is a useful guide for the courts, it is for the