

BUSINESS LAW BTF1010

EXAM SUMMARY NOTES

CONSUMER PROTECTION

PROHIBITION OF MISLEADING OR DECEPTIVE CONDUCT

“A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive” – **Section 18 of Australian Consumer Law**

Disclaimers in advertising: if it contradict, restrict or negate the main message there potential to mislead consumers increases.

Online endorsements: online review platforms that **do not** remove reviews that are known to be fake are at risk of breaching ACL.

Reviews may mislead consumers if they were presented as impartial but written by:

- The reviewed business
- A competitor
- Someone paid to write the review who has not used the product
- Someone who has used the product but written an inflated review in order to receive benefit.

Section 18 can be used for one competitor to take action against another competitor.

Section 18 and pre-contractual representations: s 18 of the ACL may be used by those who are induced into a contract as a result of misrepresentation made during the course of negotiations leading to the contract.

Silence constituting as misleading conduct: there are two situations where non-disclosure or silence may contravene s 18 of the ACL.

- a) Where information provided isn't complete, and there are half-truths which may mislead when the full truth is told. Or when something has changed where what was once true is no longer true.
- b) Where the applicant has a “reasonable expectation” that, in all the circumstances, disclosure will be made.

However, in relation to non-disclosure commercial matters, s 18 does not compel a party to disclose information that would merely assist the decision-making party to the negotiation.

Consumers have the option to either enforce remedies against either the manufacturer of goods or the retailer, however retailers are not liable for repair network and spare parts.

Major failures are:

- Goods that would not have been acquired by a reasonable consumer who was fully acquainted with the failure
- Goods depart in significant respects from their description, sample or demonstration model
- Goods are substantially unfit for purpose for which goods of the same kind are commonly supplied and they cannot be easily remedied to make them fit such purpose
- Goods are not of acceptable quality or are unsafe: **s 260**

If goods are not a major failure, the consumer may require the supplier to remedy the failure within reasonable time, or reject goods and recover costs incurred by failure: **s 259(1)-(2)**.

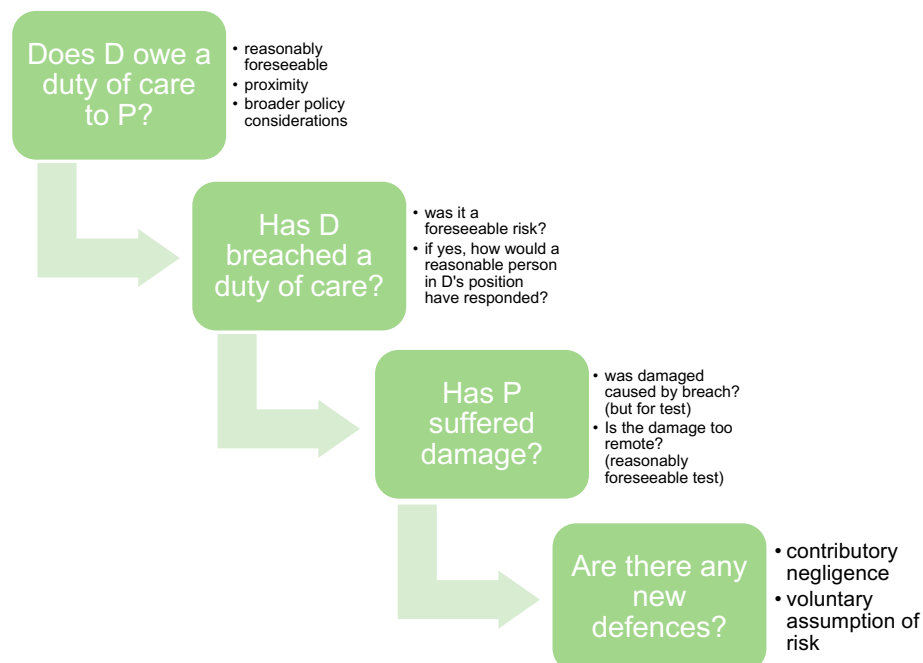
If goods are a major failure and cannot be remedied, they may reject the goods and recover compensation for any reduction in value of the goods below price paid **s 259(3)**, and they may recover damages for reasonably foreseeable loss or damage caused by failure to comply with guarantees: **s 259(4)**.

LAW OF TORTS

“tort” is considered a civil wrong, and the “law of torts” is concerned with providing a remedy for one person’s wrongful interference with another person’s personal property or rights.

NEGLIGENCE

Negligence Criteria:



There are five specific situations where duty of care may be breached:

1. Negligent acts causing physical harm
2. Negligent acts causing mental harm
3. Liability for omissions

4. Negligent acts causing pure economic loss
5. Negligent statements causing pure economic loss

BREACH OF THE DUTY OF CARE

A person does not breach a duty to **take precautions against a risk of harm** unless:

- (a) The risk was foreseeable and
- (b) The risk was not significant and
- (c) A reasonable person would have taken precautions

Standard care for professionals/statutory test: a professional does not breach a duty of care if the conduct in question is widely accepted by peer professional opinion as sound professional practice.

The Civil Liability Act 2002 (NSW) provides **s 50**:

- (1) A person practicing a profession does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that was widely accepted in Australia by peer opinion.
- (2) However, peer professional opinion cannot be relied on for purposes of this section of the court considers opinion is irrational
- (3) The fact that there are differing peer professional opinions does not prevent any one or more of those opinions to be relied upon
- (4) Peer professional opinion does not have to be universally accepted

Defence: s 50 provides a defence that is available once a breach of duty has been established.

Damages: the plaintiff must prove for an action in negligence to succeed that:

- (a) It was caused by the defendants negligence
- (b) That it is appropriate for the "scope of the defendants liability" to extend to the loss or damage or injury.

RE MOTENESS OF DAMAGE

The test for determining if a damage is too remote is whether the damage was reasonably foreseeable by the defendant.

DEFENCES TO AN ACTION IN NEGLIGENCE

Defences: there are two principle defences for action for negligence

1. **Contributory negligence**: the failure to take reasonable precautions against a foreseeable risk of injury in concern with the plaintiffs concern for their own safety. Damages recoverable will be reduced to such an extent that the court thinks just and equitable.
2. **Voluntary assumption of risk**: unlike contributory negligence, it can be used as a complete defence.
 - Vicarious liability occurs where a person is regarded by law as responsible for the acts of another, such as employer and employee. Therefore an employer is vicariously liable for the acts or omissions committed by his or her employee. However, they are not for an independent contractor.