

Step 2: Was duty of breach of duty of care?

1. Statutory reform applies a two-stage inquiry for determining whether there has been a breach of duty. Section 48(1) Wrongs Act 1958 (Vic)

S 5B(1)(a) - Was the risk foreseeable?

An ordinary reasonable person does not take precautions against unforeseeable risks. This means that a defendant is not required to respond to every imaginable or theoretically possible risk, but only to those that are foreseeable by the reasonable person. As Lord Normand said in Bolton v Stone (1951) at 861–2: 'It is not the law that precautions must be taken against every peril that can be foreseen by the timorous.'

S 5B(1)(b) Was the risk not insignificant?

Ordinary reasonable people do not take precautions against unforeseeable risks; and neither do they always take precautions against every foreseeable risk. The foreseeable risk must also be one that is 'not insignificant'.

- Bolton v Stone (1951) -> Risk of harm too small
- Wyong Shire Council v Short (1980) = no real or foreseeable risk

2. How would a reasonable person have responded? - Section 48(2)

*In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) **Weighting test = Wrongs Act (Vic) s48(2) AND Wyong Shire Council v Short*

- S 5B(2)(a) = The probability that that harm would occur if precautions were not taken
 - A risk of harm that is plainly foreseeable may be ignored, if, when balanced against the other factors, the probability of it occurring is too small to warrant a response.
 - In Bolton v Stone (1951), the cricket case noted above, the House of Lords decided that the risk of harm, while foreseeable and of a serious kind, was nevertheless too small and therefore not significant enough to require the club to have taken precautions.
 - RTA v Dederer = low probability because harm was obvious
- S 5B(2)(b) = the likely seriousness of the harm
 - Paris v Stepney Borough Council (1951) = risk of blindness in two eyes