

Can the defendant's specific action/inaction be reasonably foreseen to harm the class of plaintiff?

| Wrongs Act 1958 (Vic) Part X Section 48 – General principles | |
|---|---|
| 1. | A person is not negligent in failing to take precautions against a risk of harm unless— <ul style="list-style-type: none"> a. the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and b. the risk was not insignificant; and c. in the circumstances, a reasonable person in the person's position would have taken those precautions. |
| 3. | For the purposes of subsection (1)(b) — <ul style="list-style-type: none"> a. Insignificant risks include, but are not limited to, risks that are far-fetched or fanciful; and b. Risks that are not insignificant are all risks other than insignificant risks and include, but are not limited to, significant risks. |

2.3 Negligence calculus

| Wrongs Act 1958 (Vic) Part X Section 48 – General principles | |
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| 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)— <ul style="list-style-type: none"> a. The probability that the harm would occur if care were not taken; b. The likely seriousness of the harm; c. The burden of taking precautions to avoid the risk of harm; d. The social utility of the activity that creates the risk of harm. |

| Case | Probability | Severity | Burden | Social utility | Outcome |
|----------|------------------------------------|--------------------|---|---|-----------|
| Wyong | Likely that sign misinterpreted | Paralysis | Easy to place better signs | - | Breach |
| Oysters | 2 nd Hep A in 100 years | Hep A is curable | Destroy/disrupt business | - | No breach |
| Thompson | Low probability of TSS | Death | Warning stickers in 24 hours | Women could use unhygienic alternatives | |
| Dederer | No injury in 40 years | Significant injury | Signs are ignored, fence would be expensive | Fence would harm enjoyment of bridge | No breach |

| | | | | | |
|-------|-----|-------------------------|-------------------------------|---|--------|
| Paris | Low | Especially severe for P | Easy to supply safety goggles | - | Breach |
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Originally articulated by **Mason J** in **Wyong Shire Council v Shirt**

Use foresight, not hindsight

2.4 Intoxication and illegal activity

| Wrongs Act 1958 (Vic) Part IIB Section 14 G – Consideration of intoxication and illegal activity | |
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| 1. | This section applies to a claim for damages in respect of death or personal injury brought by a person (the plaintiff) against another person (the defendant) alleging negligence. |
| 2. | In determining whether the plaintiff has established a breach of the duty of care owed by the defendant, the court must consider, among other things— <ul style="list-style-type: none"> a. whether the plaintiff was intoxicated by alcohol or drugs voluntarily consumed and the level of intoxication; b. whether the plaintiff was engaged in an illegal activity. |

2.5 Duty to warn

| Wrongs Act 1958 (Vic) Part X Section 50 – Duty to warn of risk—reasonable care | |
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| A person (the defendant) who owes a duty of care to another person (the plaintiff) to give a warning or other information to the plaintiff in respect of a risk or other matter, satisfies that duty of care if the defendant takes reasonable care in giving that warning or other information. | |

3. Causation

ss 51-2: two requirements:

- a. Breach was a factually necessary condition for harm
- b. It is appropriate to extend the scope of liability to the harm caused

| Wrongs Act 1958 (Vic) Part X Section 51 – General Principles | |
|---|---|
| 1. | A determination that negligence caused particular harm comprises the following elements— <ul style="list-style-type: none"> a. that the negligence was a necessary condition of the occurrence of the harm (factual causation); and |

- b. that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (**scope of liability**).
2. In determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to **consider** (amongst other relevant things) **whether or not and why responsibility for the harm should be imposed** on the negligent party.
3. If it is relevant to the determination of factual causation to determine what the person who suffered harm (the **injured person**) **would have done if the negligent person had not been negligent**, the matter is to be determined **subjectively** in the light of all relevant circumstances.
4. For the purpose of determining the **scope of liability**, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm **should be imposed on the negligent party**.

Section 52 – Burden of proof

In determining liability for negligence, the **plaintiff** always bears the **burden of proving**, on the balance of probabilities, any fact relevant to the issue of causation.

3.1 Factual causation

‘but for’ test – would the harm have happened ‘but for’ the breach?

- In **Adeels v Moubarak**, absence of security guards was not a necessary condition of the harm
- In **Strong v Woolworths**, infrequent cleaning was a necessary condition of the slip

Factual causation can be inferred or proven on the balance of probabilities

There may be multiple necessary conditions, it may suffice for the breach to have made a material contribution to the harm in special circumstances

If D can show that P would have ignored the warning, then no factual causation

- In **Rosenberg v Percival**, subjective test shows that P would have proceeded in spite of warning, therefore lack of warning was not factual cause of injury

3.2 Scope of liability – New Intervening Acts

New intervening acts – a voluntary human action that could break the causal chain

2 classes of NIA: (**Haber v Walker**)

1. Voluntary human action
2. Coincidence

Voluntary human action by third party

- In **Lothian v Richards**, third party criminal breaking the pipes was NIA, true cause of the injury, rather than poor installation of floorboards
- In **STA NSW v Chu**, third party criminal sexually assaulting victim is NIA, the fact that she was on crutches was not true cause
- Less likely to be accepted if there is pre-existing special relationship between parties (link to duty stage)
 - In **Chomentowski**, bank robbery was not NIA because employer had to guard against this

Voluntary human act by plaintiff

- In **Haber v Walker**, suicide found not to be NIA because not sufficiently voluntary

Subsequent negligent acts

- Per **Mahony v Kruschich**, subsequent medical negligence will only be NIA if 'grossly negligent'

3.3 Scope of liability – Remoteness

If the injury or damage is too remote, then the defendant will not be required to compensate the plaintiff, even though the injury or damage was caused by the defendant's negligence.

- Third reasonable foreseeability test - narrowest

The remoteness test per **Wagon Mound (No 1)**:

- damage of the **same class, character or kind** as that suffered by P must have been **reasonably foreseeable** as a **consequence** of D's negligence
- Courts have some discretion in terms of how broadly they categorise the harm (**Inglis v Metrolink**)

D does not need to have foreseen the **exact** harm, just harm of a like kind (**Hughes v Lord Advocate**)

D does not need to foresee the **extent** of the harm, take P as you find them (eggshell skull)

- **Nader**: psychiatric vulnerability irrelevant
- **Kavanagh**: minority religion irrelevant

^ this has been altered by s 74, which makes it harder for P to claim damages for consequential mental harm