

LAW5003 TORTS EXAM

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BREACH OF DUTY

DID D BREACH THEIR DUTY OF CARE (DOC)?

P would allege D's breach was [breach].

Step 1: What is D's standard of care?

The standard of care expected of D is that of a reasonable person (RP) in D's position (s48(1)(c) - Wrongs Act 1958 (Vic) – all sections following in exam are from the Wrongs Act).

As relevant:

Modifications that <i>could decrease</i> expectation on D	
Minor	As a minor, D will be held to the standard of care of an ordinary, [age]-year-old child (McHale).
Disability	Though D has a mental impairment, they will still be held to the standard of a reasonably 'mentally competent' person (Carrier).
Inexperience	No account will be taken for D's inexperience in [activity] compared to a RP who is experienced (Imbree).
Modifications that <i>could increase</i> expectation on D	
Special knowledge, skill and expertise	A person with special skills will be held to the standard of care of a RP possessing those skills (Philips). P has the specific skill of [skill]. Per s58, P would argue D holds themselves as possessing the particular skills of [special knowledge]. Therefore, the standard of care would be increased (s58(a); Philips – Jeweller held to higher standard). <i>Note: D doesn't have to have this skill in reality.</i>
Professionals	Apply steps under special skills below here.
Judge Ds conduct on what they knew at time of negligence, not before.	

Conclusion

Therefore, the standard remains a RP or the standard is decreased/increased to a reasonable X.

Step 2: Did D fall below that standard?

Reasonable foreseeability (RF): Y/N: was general harm RF?

It is RF that if D [specific breach/negligent act by D], this might cause harm of some general kind to P (or class of P) as [evidence] (s48(1)(a); Wyong Shire Council).

Reasonable foreseeability

Is the risk of general harm to P (or a class to which P belongs) reasonably foreseeable based on the specific conduct by D?

E.g. is the risk of harm to Beyonce or any guest at Kelly's house reasonably foreseeable based on Michelle planting the herb in the garden?

Not insignificant risk: Y/N: is risk of general harm from above a 'real risk'?

Per s48(1)(b),(3), it is likely the risk of general harm to P was:

- not insignificant. It was more than insignificant and not far-fetched or fanciful that [how harm may occur – e.g. may use herb in cooking].
- insignificant. It was far-fetched or fanciful and not a significant risk that [how harm may occur].

How to categorise risks

- **Not insignificant:** (1) risks that are more than insignificant and (2) significant risks.

- **Insignificant:** (1) far-fetched and fanciful risks and (2) insignificant risks.

Calculus of negligence: **main part of answer**

The issue is whether a reasonable [person/adjusted standard] in D's position would have taken more care in the circumstances (s48(1)(c),(2)).

Probability of harm: s48(2)(a)

- **Low:** While it seemed probable that [event], only a small number of people had been [harmed], similar to **Bolton**. D did not have an obligation to entirely prevent injury or eliminate all risks (**Roads and Traffic Authority**).
- **High:** Probability of harm was moderate to high as [facts], indicating prior harm (distinguished from **Bolton**).

Conclude: As the probability of harm is low, the breach is less likely / As the probability of harm is high, the breach is more likely.

Probability of harm

- **Bolton v Stone:** The very low risk of harm (= the risk of a ball exiting the ground and causing injury) made the outcome very unlikely. Only six times in 30 years had a ball been hit over the fence. The greater the risk of harm occurring, the greater the degree of care a reasonable person would take (i.e., the more likely it is to be a breach).
- **Roads and Traffic Authority (NSW) v Dederer:** D's obligation is to take reasonable care - not to entirely prevent injury or eliminate all risks. People had dived for years off a bridge without injury. Council sign said 'no diving'. P dived and became paraplegic. Probability of harm was low.

Seriousness: s48(2)(b);

If [harm] occurred, the likely seriousness was [high/low] as [P could die/drown/suffer serious injury] (**Paris**).

Conclude: As the likely seriousness of harm is low, the breach is less likely / As the likely seriousness of harm is high, the breach is more likely.

If D is aware of uniquely grave impact

Paris v Stepney Borough Council: Special risk increased required precautions. P worked in garage and D knew they were already blind in 1 eye. Injury at work blinded good eye and P wasn't wearing safety goggles. The more serious the harm, the greater care a RP would have taken.

Burden of precautions: s48(2)(c);

The alternatives to D's conduct would be [alternatives] (**Graham Barclay Oysters v Ryan**). These precautions would/wouldn't have been 'extremely burdensome' to D, as [were they the equivalent of D ceasing commercial operations in **Graham Barclay**?].

The precautions were/weren't burdensome as [analyse expense, inconvenience or difficulty].

Conclude: As the burden of taking precautions is low, the breach is more likely / As the burden of taking precautions is high, the breach is less likely.

Social utility: s48(2)(d):

- **Irrelevant:** Social utility does not assist on the facts as [activity] does not appear to relate to the broader public, unlike in **Watt**.
- **Relevant:** D would argue there was social utility of activity as it was [choose one example from below] so they needed to take less precautions (**Watt**).
 - o On balance, the activity did not provide the same utility as the emergency services in **Watt** so would not be relevant.

VOLUNTARY ASSUMPTION OF RISK

When proven, this is a full defence.

Step 1: P knew of facts constituting the risk of harm (not facts about D's negligence)

On the facts, P did not have actual knowledge of the facts giving rise to the risk of harm (Imbree). While P knew [of other risk] P did not know that [of actual risk, e.g. shark in water].

As relevant: P did not have knowledge of the **full extent** of the risk as [facts] (Randwick – knowing how slippery floor is, not just that it is slippery).

Step 2: P fully appreciated the risk of harm

P did not actually, fully appreciate the risk of harm as [facts] (ICI v Shatwell).

The court would take a narrow construction in defining the risk, so the risk was [e.g. risk was shark in water, not swimming], similar to *Kent v Scattini* (risk was driving at high speed, not playing games in car).

As relevant: Obvious risks

D may argue P is presumed to be aware of the risk (s54) as the risk of [risk] would have been obvious to a RP in P's position that [why risk was obvious] (s53). [Apply s53(2)-(4) as relevant].

P would argue the risk was not obvious as [apply s54(2)(a) and 53(5) as relevant].

If obvious risk: As there is likely an obvious risk, the first two elements of knowledge and understanding are automatically made out (unless P can disprove).

S53:

- 2) Obvious risks include those that are a matter of **common knowledge**
- 3) A risk can be obvious even if it has a **low probability** of occurring
- 4) Risk can be obvious even if it is not prominent, conspicuous or **physical observable**

Risk **not obvious** if:

S54(2)(a): it is in relation to a **professional/health service**

S53(5): it is created because of a failure by another to properly operate, maintain, replace, prepare or care for the thing

Step 3: P freely and willingly consented to the risk of harm

→ Consider pressure if P in competition; Did P consent to different harm?

No pressure

P did not freely and voluntarily consent to the risk of harm as there was pressure from [person] to accept the risk when [facts] (*Insurance Commissioner v Joyce*).

Real and practical choice

D may argue P still had a real and practical choice to [action] (*Insurance Commissioner v Joyce*).

Step 4: Conclusion

It is likely D can/cannot rely on the defence of voluntary assumption of risk.

OTHER DEFENCES

Illegality

D may not be liable in negligence where P is harmed in the course of acting illegally, although this is not automatic (**Henwood**). Illegality is a complete defence.

P's illegal act is [act].

D would argue the purpose of the law being contravened by P is (either - choose 1):

- intended to preclude such a duty being owed by D as [apply, e.g. **Henwood** – purpose of law was not to preclude P from recovering in negligence] (**Henwood**)
- incongruous with a duty being owed by D as it intended to [apply, e.g. **Miller** – purpose of law against stealing cars is to impose joint liability on offenders] (**Miller**).

Alternatively – P's argument: D could not argue the purpose of the law being contravened by P is either intended to preclude such a duty being owed by D (**Henwood**) or incongruous with a duty being owed by D (**Miller**) as it actually intended to [intention of law that is not 1 of 2 options].

Volunteers

Per s37, a volunteer is not liable for anything done or not done in good faith in providing a service in relation to community work organised by a community organisation. Should liability arise, the community organisation would be liable. This is a complete defence.

Step 1: Volunteer

Per s35(1), P is a volunteer if they are an individual who provides the service of [service] in relation to community work on a voluntary basis.

Step 2: Good faith

P's actions [were/were not] done in good faith as [analysis].

Step 3: Community work

Per s36(1), P did/didn't provide a service in relation to community work as it was done for a [apply example].

36(1):

- a) **religious, educational, charitable** or benevolent purpose;
- b) purpose of promoting or encouraging **literature, science or the arts**;
- c) purpose of **sport, recreation, tourism or amusement**;
- d) purpose of conserving or protecting the **environment**;
- e) purpose of establishing, carrying on or improving a **community, social or cultural centre**;
- f) **political** purpose;
- g) purpose of promoting the common **interests of the community** generally or of a particular section of the community;
- h) for any other purpose specified in the regulations for the purposes of this section.

Step 4: Community organisation

Per s34, P's service was organised by a community organisation as it (need to meet both):

- is [choose option from below] and
- organises the doing of community work by volunteers (refer to answer above).

S34: community organisation means

- incorporated association under Associations Incorporation Reform Act 2012
- municipal council or other incorporated local government body
- any other body corporate

- | |
|--|
| - any public entity or public service body |
|--|

Step 5: Conclusion

X

Good Samaritans

Per s31B, D will not be liable if they are a good Samaritan, which is a complete defence.

Need to meet all of the below.

Step 1: Good faith

Per s31B(2), P acted/didn't act in good faith as [analysis].

Step 2: Provides assistance, advice or care to another person

Per s31B(2)(a)-(b), P: (choose one)

- provided [assistance/advice/care] at the scene of the [emergency/accident]
- provided advice by [telephone/other means of communication] to a person at the scene of the [emergency/accident]

as [apply facts].

Step 3: Emergency or accident where person is at risk of death/injury

Per s31B(1)(b), P provided [assistance/advice/care] to [another person] who, as a result of the emergency or accident, was [at risk of death/injury, was injured, was apparently at risk of death/injury, or was apparently injured].

Step 4: Without expecting money or financial reward

Per s31B(1)(s), P did not expect money or other financial award for providing assistance as [analyse].

Step 5: Conclusion

X