

Negligence

Legal information for Australian community organisations

This fact sheet covers:

- duty of care
 - legal tests for breach of duty
 - legal tests for damage and causation
 - vicarious liability
 - risk management, and
 - sources of negligence law.
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Your community organisation will need to consider your duty of care, and the standard of care you need to meet, when providing services to your clients or the public.

Your organisation may have a duty to prevent its employees, volunteers, clients or the public from suffering damage (ie. personal injury, property damage or financial loss) under the common law (judge made law) of negligence, or under the negligence provisions in state and territory legislation (detailed below in the Source of Law table).

If your organisation:

1. owes a duty of care
2. breaches this duty, and
3. the breach is the cause of damage to a person to which the duty is owed,

it may be found liable (legally responsible) for the damage caused. Each of these concepts are discussed in further detail below.

Duty of care

Generally speaking, a person or organisation will only be held liable for the damage caused to another person if they were under a duty to prevent such injury or loss from occurring – that is, if they had a ‘duty of care’.

Whether or not a duty of care exists in a particular situation is guided by common law principles. There are some circumstances where it is well-established by the courts that a duty of care exists, including:

- employer to employee

- an occupier (ie. person responsible for premises) to entrants to their premises
- landlord to tenant
- service provider to customer
- road users to other road users, and
- schools to students.

Outside the established categories, whether or not a duty of care exists may be a complex question to be determined by a court, having regard to the particular circumstances of the case.

Some of the common matters taken into account in determining whether a duty of care exists are:

- the foreseeability (ie. predictability) of the damage suffered
- the degree of vulnerability of the person who has suffered the damage (including whether or not the person could have taken steps to protect themselves from suffering the damage), and
- the ability of the person or organisation in charge to control or manage the risk of damage.

In short, your community organisation unequivocally owes a duty of care to any person it employs. Although dependent on the circumstances of the case, you should also assume that your organisation owes a duty of care to its volunteers, to the people it assists (including people who rely on any material it might publish) and to people who enter its premises.

NOTE & CAUTION – CHANGES TO LAW IN NEW SOUTH WALES & VICTORIA



NSW and Victoria have recently introduced changes to the legislation dealing with negligence. Broadly speaking, these changes impose a duty of care on organisations exercising care, supervision or authority over a child to take reasonable precautions to prevent an individual associated with the organisation from perpetuating child abuse. More information can be found in the NSW and Victoria screening guides, available on Not-for-profit Law's website at www.nfplaw.org.au/recruitment.

Standard of care

If your organisation owes a 'duty of care' to a person or category of person, your organisation needs to treat those persons with an appropriate standard of care.

Basically, in all of the states and territories, the standard of care expected is the standard of 'the reasonable person' in the same position and with the same knowledge as the person being judged.

So, in any negligence proceedings, your organisation will be judged by reference to a reasonably competent and prudent organisation, in the same position, and with the same knowledge as your organisation.

The legislation in both South Australia and the ACT contains a definition of 'standard of care', which is used as a starting point to determine if particular conduct is negligent. The other states and territories rely on the common law rule (described above), which is essentially equivalent.

NOTE

State and territory legislation contains specific provisions relating to the standard of care owed by professionals. If the activities of your community organisation involve the provision of professional services (eg. legal, health, financial), it is worth noting that the legislation says that the standard of care expected of professionals is one that is accepted by their peers as competent professional practice. Relevant legislative provisions are detailed in the Source of Law table below.



Breach of duty

If your organisation does not meet the applicable standard of care, it will be considered to have 'breached its duty'. In every state and territory other than the Northern Territory (whose legislation does not address breach of duty) the starting point for determining whether there has been a breach of duty is the legislation. These statutory provisions are basically an expression of the pre-existing common law principles. So, the same general principles apply in the Northern Territory.

The relevant provisions in the various states and territories are virtually identical, and set out general principles which can be summed up as follows for the purposes of your community organisation:

Your organisation will be considered negligent for failing to take precautions against a risk if:

- the risk was one which your organisation should have known about
- the risk was 'not insignificant', and
- a 'reasonable' organisation in the same position as yours, would have taken precautions against the risk.

In deciding whether a reasonable organisation would have taken precautions against the risk, a court will consider (among other things):

- **the social utility of the organisation's conduct that created the risk** - ie. Did the incident happen during meal preparation in your organisation's soup kitchen? If so, the court will consider the benefit of your work to your community when determining whether there was a breach of duty. The court does not want to discourage people from participating in important work of this kind
- **the burden for the organisation of taking precautions to avoid the risk** - ie. Was there an easy and inexpensive way to prevent the incident from happening, such as putting up a cautionary sign to prevent a slip on a wet floor? If so, it is more likely that you breached your duty of care. If the only way for your organisation to avoid the risk was to install expensive equipment, which your organisation could not afford, you are less likely to have breached your duty by failing to do so, and
- **the gravity of the risk** - ie. Was the risk that your organisation failed to mitigate one that could result in serious harm? If so, your duty would involve going to greater lengths to avoid that harm eventuating than it would were the potential consequences of your conduct less serious.

As you can see, whether or not your organisation will be found to have breached its duty will involve a detailed assessment of what was reasonable conduct in all of the circumstances of the case. As mentioned above, the standard of care expected of your organisation is that of a reasonably competent and prudent organisation, in the same position, and with the same knowledge as your organisation. So, if your organisation acts in accordance with an established practice within the community sector, you will be less likely to be found to have breached your duty of care in a particular situation.

CASE EXAMPLE



In a recent decision of the Supreme Court of Queensland ([Beven v Brisbane Youth Service Inc \[2016\] QSC 163](#)), a not-for-profit organisation based in Queensland was found to have breached its duty of care to an employee. The employee was a family support worker, who was providing support services to a young mother with a history of drug abuse, violence and sexualised behaviour. The employee was sexually assaulted by the client, as a result of which she suffered serious psychiatric illness. The court found that the organisation had breached its duty of care to its employee. The reasons for finding a breach of duty included that the organisation was aware that other employees had ceased working with this particular client as they felt unsafe due to her sexualised and violent behaviour and threats. The court considered that the risk of the client assaulting an employee was foreseeable to the organisation (although it was not inevitable) and given the potentially serious consequences of the foreseeable risk of harm to its employees eventuating, the organisation should have taken steps to protect its employee from harm such as declining to continue offering services to this particular client. Although the court did not suggest this, the organisation could have taken other steps such as always sending a second support person with any employee providing services to this client. While the court considered the importance and social value of the organisation's work, this did not displace its obligation to provide its employees with a safe workplace. This case highlights the tension faced by some organisations between supporting its clients and its employees. It demonstrates that an employer's duty of care to protect its employees from harm is likely to trump its duty to provide services to clients who may pose a risk of injury to its employees.

Damage and causation

Your organisation cannot be found negligent unless:

- someone has suffered **some type of damage recognised by the law** as giving rise to a cause of action – if no legally recognised damage is suffered, there will be no negligence, even if your organisation has not conducted itself appropriately. The most common categories of damage in negligence are personal injury, property damage and financial loss, and
- its failure to take reasonable care has actually **caused the damage complained of**. Notably, the person who has suffered damage carries the burden of establishing that the negligence caused their damage.

With the exception of Queensland and the Northern Territory, causation has been defined in legislation nationwide. Again, the common law treatment of causation is not substantially different to that of the statutory regimes. As such, the same general principles will apply in Queensland and the Northern Territory.

In the relevant legislative provisions, to establish causation it must be shown that the negligence was 'a necessary condition of the occurrence of the harm'. The question to ask here is whether the damage would have occurred 'but for' your organisation's conduct.

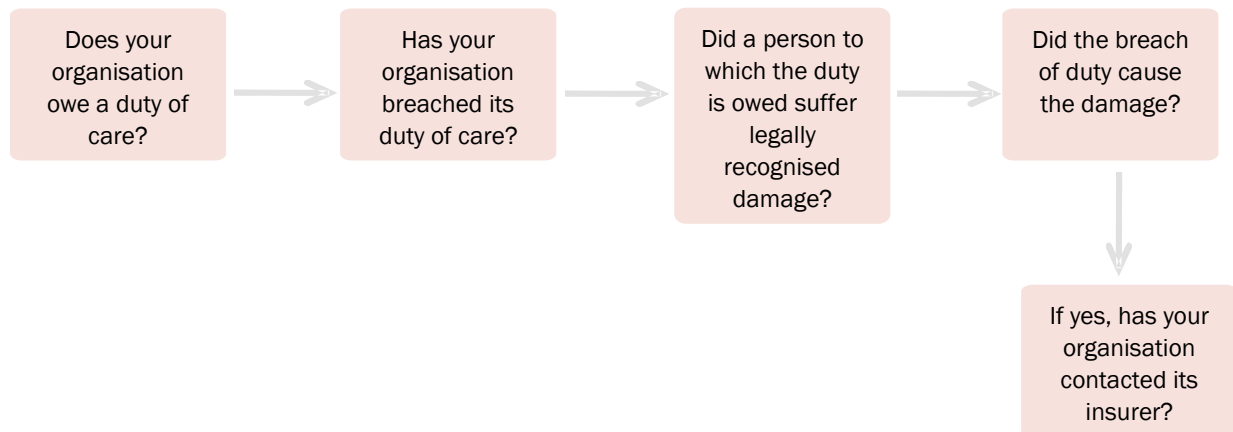
EXAMPLE

An employee cleaned the floors of your organisation's premises and, contrary to policy, forgot to put up the sign to caution people that the floors were slippery. Unaware of the slippery floors, someone tripped and broke their back. If the injured person can establish that, had the sign been up, she would not have walked across the floor (and therefore would not have slipped), causation will be established.

If, however, there is evidence that the injured person routinely ignored such cautionary signs, and she would likely have walked across the slippery floor regardless, she will find it difficult to establish that, 'but for' your organisation's negligence, she would not have been injured.



In summary, your organisation should ask itself the following questions:



Vicarious liability – your organisation's legal responsibility for actions of its employees and volunteers

In some circumstances, your organisation may be held liable for the actions (or any failures to act) of its employees and volunteers.

Vicarious liability for employees

Under the common law principle of vicarious liability, your organisation can be held liable for the negligent conduct of an employee if that conduct was performed 'within the course or scope of employment'.

Your vicarious liability for your employees can extend to conduct that you have not authorised or, in some circumstances, to conduct that you have expressly prohibited. The relevant test is whether your employee's conduct was sufficiently connected to their employment.

The fact that a wrongful act committed by an employee is a criminal offence, does not prevent your organisation from being found vicariously liable. In considering whether your organisation should be held responsible for the criminal conduct of an employee, the court will consider any special role that you have assigned to your employee and the position in which your employee has been placed vis-à-vis the victim, that may have 'provided occasion' for the wrongful act. Some matters considered are authority, power, trust, control and the ability to achieve intimacy with the victim.

CASE EXAMPLE



In *Starks v RSM Security Pty Ltd* [2004] NSWCA 351, an employer was found vicariously liable for the conduct of a security guard (which amounted to assault) when removing a customer from a hotel. In this case, the customer was asked by the security guard to leave the hotel. When the customer challenged the request, he was head-butted by the security guard.

The court accepted the general rule that an employer is liable for the wrongs committed by an employee 'in the course of employment'. In this case, although the security guard's violence had not been authorised by the employer, his conduct was considered to be 'so directly connected with his authorised acts, that the employer was vicariously liable for the damage caused'. In reaching this conclusion, the court noted that the security guard's actions were 'unreasonable, uncalled for and not a usual mode for a security officer to use to persuade a customer to leave hotel premises'. However, the fact was that the act occurred in the context of the security guard attempting to eject the customer from the premises, which was something he was authorised to do.

Your organisation can also be held liable for any discrimination and/or harassment that occurs in the workplace (which would extend to a work-related social event or conference). An individual who harasses, bullies or discriminates in the workplace will be held directly responsible for their behaviour. However, as an employer, unless you can show that you have taken 'all reasonable' steps to prevent the conduct from occurring, you could be held jointly liable for this conduct.

RELATED RESOURCES



For more information about discrimination, sexual harassment and other unlawful workplace behaviours and volunteers, see the People Involved topic on the Not-for-profit Law website at www.nfplaw.org.au/people

Vicarious liability for volunteers

In some circumstances, your organisation could be held liable for the negligence of its volunteers. State and territory legislation sets out a special protection for volunteers from personal liability for anything done or not done in good faith when performing community work for a community organisation.

Each jurisdiction has different laws governing this situation, but generally, if a volunteer is protected (that is, all of the tests under the relevant legislation have been met), the volunteer will not be personally liable to pay any compensation to anyone whom they may have caused personal injury,

property damage or financial loss, as a result of their own actions or failures to act. Instead, if harm is caused by a volunteer, the community organisation may be liable rather than the volunteer individually.

Note that in NSW and Queensland this does not occur and, instead, an organisation is provided the same protection as the volunteer and therefore cannot be held vicariously liable for the volunteer's acts or omissions covered by the legislation. Despite this protection, there are still circumstances where an organisation could be liable, including where it has been negligent (as discussed above).

NOTE & CAUTION – VICARIOUS LIABILITY FOR CHILD ABUSE

There is case law that demonstrates that organisations can be found vicariously liable (that is, legally responsible) for the sexual abuse of children by employees. In the case of *Prince Alfred College Incorporated v ADC* [2016] HCA 37, the High Court considered whether a school could be held vicariously liable for the perpetration of child sexual abuse by an employee. The court held that in cases where an employee commits a 'wrongful act' in the context of employment, the relevant approach to determine whether an employer is 'vicariously liable' is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed in relation to the victim. In determining whether the apparent performance of such a role may be said to have provided not only an opportunity but also the occasion for the commission of the wrongful act, authority, power, trust, control and the ability to achieve intimacy with the victim should be taken into account.



RELATED RESOURCES

For more information about the legal responsibility for volunteers in different states and territories, see our National Volunteer Guide at www.nfplaw.org.au/volunteers.



Consequences of liability

If your organisation is found negligent or vicariously liable for the actions of an employee or volunteer, the court will order that a remedy be provided to the person who has suffered damage as a result of the relevant conduct. This remedy is almost always in the form of monetary compensation, with the aim being to put the person who has suffered damage (personal injury, property damage or financial loss) in the position they were in before the act (or failure to act) occurred.

If a person has suffered non-monetary loss (in particular, personal injury) it is impossible to put the injured person back into her original position, but best attempts will be made by the court to provide 'full and adequate' compensation, which caters for an injured person's past and future needs. Compensation will be assessed by the court on a 'once and for all' basis, and your organisation will be ordered to pay a lump sum that cannot be revised at a future date.

Proportionate liability

In some cases, damage can be caused by the negligent conduct of multiple people or organisations.

All of the states and territories have 'proportionate liability' provisions in legislation, which, in claims for financial loss or property damage, may limit the liability of any one wrongdoer to the proportion which reflects their responsibility for damage suffered.

EXAMPLE

If your organisation is one of three organisations that negligently caused damage to property, provided certain conditions are met, you will only need to contribute to the sum of damages awarded by the court - a percentage which is considered to reflect your share of the responsibility.



The proportionate liability provisions do not apply to claims for personal injury. Where a person has been injured by the negligent conduct of multiple people, each wrongdoer is 'jointly and severally liable' for the whole loss. This means that an injured person can recover the whole award of damages from any one person or organisation found to have caused or contributed to their injury. This shields injured persons from the risk of being short-changed if some of those responsible for their injury are unable to pay the damages.

This is a complex area of the law and your organisation will require legal assistance if this situation arises.

Risk management

While negligence claims against community organisations are relatively uncommon, your organisation should look to operate in a way that reduces the risk of damage (including personal injury, financial loss or property damage) to your clients and the public. Things to consider include:

- the risk that your volunteers or employees will be injured whilst volunteering or working for your organisation, and
- any obligations you may be under to make background checks on the people involved in your organisation, such as Working with Children Checks .

Most importantly, your organisation should ensure it has adequate and sufficient insurance coverage to protect you from liability. You cannot be certain of avoiding liabilities but you can be certain of having appropriate insurance cover. In the event that your organisation is unsure as to the type or extent of cover required, you should contact an insurance broker. Alternatively you may wish to refer to the Insurance Resources, set out below.

If you think your organisation may be exposed to legal action you should notify your insurer and also seek legal advice as soon as possible about its potential liability (if the action is covered by your insurer, they may do this on your behalf).

RELATED RESOURCES

For more information on insurance and risk management, including volunteer personal accident insurance read Not-for-profit Law's Risk Management and Insurance guide on the Not-for-profit Law website at www.nfplaw.org.au/riskinsurance.



Sources of Law

	Relevant Act (unless otherwise specified)	Duty of Care	Standard of Care	Professional Standard of Care	Breach of Duty	Causation	Vicarious Liability for Volunteers	Proportionate Liability
ACT	<i>Civil Law (Wrongs) Act 2002</i>	Common law	s.42	Common law	s.43, 44	s.45, 46	Yes – s.9.	2.107F
NSW	<i>Civil Liability Act 2002</i>	Common law	Common law	s.50	s.5B, 5C	s.5D, 5E	No – s.3C.	Chapter 7A
NT	<i>Personal Injuries (Liabilities and Damages) Act</i>	Common law	Common law	Common law	Common law	Common law	Yes - s.7(3).	<i>Proportionate Liability Act 2005</i>
QLD	<i>Civil Liability Act 2003</i>	Common law	Common law	s.22	s.9, 10	s.11, 12	Position uncertain – common law.	Part 2
SA	<i>Civil Liability Act 1936</i>	Common law	s.31	s.41	s.32	s.34, s.35	Yes – s.5 <i>Volunteers Protection Act 2001</i>	Part 3 - <i>Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001</i>
TAS	<i>Civil Liability Act 2002</i>	Common law	Common law	s.22	s.11, 12	s.13, 14	Yes – s.48.	Part 9A
VIC	<i>Wrongs Act 1958</i>	Common law	Common law	s.59	s.48, 49	s.51, 52	Yes – s.37(2).	Part IVA
WA	<i>Civil Liability Act 2002</i>	Common law	Common law	s.5PB (health care professionals only)	s.5B	s. 5C, 5D	Yes – s.7 <i>Volunteers and Food and other Donors (Protection from Liability) Act 2002</i>	Part 1F

Resources

Related Not-for-profit Law resources

The Not-for-profit Law Information Hub at www.nfplaw.org.au has further information on the following related topics:

✔ Volunteers – www.nfplaw.org.au/volunteers

The Volunteers page provides resources covering key legal issues on identifying your volunteers, screening potential volunteers, inducting new volunteers, managing volunteer safety and potential liabilities for volunteer actions and ending the volunteer relationship.

✔ Recruitment – www.nfplaw.org.au/recruitment

✔ The Recruitment page features a comprehensive guides on Screening Checks Insurance – www.nfplaw.org.au/riskinsurance

Download the Not-for-profit Law Risk Management and Insurance Guide from this page.

Related resources

✔ [Australian Human Rights Commission Vicarious Liability Fact Sheet](#)

This fact sheet contains guidance and resources for employers to prevent discrimination and harassment in the workplace.

✔ [Volunteering Australia's Risk Management Guide](#)

This guide provides a step by step outline of the risk management planning process and includes a number of tools (risk register, risk treatment schedule and risk action plan).

Legislation

✔ [Civil Law \(Wrongs\) Act 2002 \(ACT\)](#)

✔ [Civil Liability Act 2002 \(NSW\)](#)

✔ [Personal Injuries \(Liabilities and Damages\) Act \(NT\)](#)

✔ [Civil Liability Act 2003 \(Qld\)](#)

✔ [Civil Liability Act 1936 \(SA\)](#)

✔ [Civil Liability Act 2002 \(Tas\)](#)

✔ [Wrongs Act 1958 \(Vic\)](#)

✔ [Civil Liability Act 2002 \(WA\)](#)

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