

# 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



**Your community organisation must consider the duty of care it owes to employees, volunteers, clients and the public when providing services, and the standard of care it needs to meet.**



### Disclaimer

This fact sheet provides general information about a community organisation's duty of care. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this fact sheet.

Your organisation may have a duty to prevent its employees, volunteers, clients or the public from suffering damage (personal injury, property damage or financial loss) under:

- the common law (judge made law) of negligence, or
- the negligence provisions in state and territory legislation



Your organisation may be found liable (legally responsible) for damage caused if it:

- owes a duty of care
- breaches this duty, and
- the breach causes damage to a person to which the duty is owed

We discuss duty of care, breach of duty, and damage and causation below.



# Your duty of care

Generally, a person or organisation will only be liable (legally responsible) 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 a duty of care exists in a particular situation is guided by common law principles.

In some circumstances, it's well-established by the courts that a duty of care exists, including in the following situations:

- employer to employee
- 'host employer' to labour hire employee
- an occupier (person responsible for premises) to entrants to their premises
- landlord to tenant
- service provider to customer
- medical practitioner to patient
- road users to other road users, and
- schools to students



## Note

Outside established categories, whether a duty of care exists may be a complex question to be determined by a court, having regard to the circumstances of the case.

In determining whether a duty of care exists, the following are considered:

- the foreseeability (predictability) of the damage suffered
- the degree of vulnerability of the person who has suffered the damage (including whether 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

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.

Depending on the nature of your organisation's work, you should consider whether the risk of psychological injuries due to vicarious trauma are foreseeable. For example – if your organisation works with individuals who have experienced trauma (like refugees or survivors of domestic violence), there's a risk that this work can negatively impact the mental health of employees. To prevent this, it's important to take proactive steps to ensure the work can be performed safely.



### Note – Negligence laws and child abuse

In New South Wales, Victoria, Queensland, South Australia, the Northern Territory and Tasmania, under legislation, an organisation has a duty of care to take reasonable precautions to prevent the physical or sexual abuse of children by individuals associated with the organisation (this includes volunteers, board members, employees and independent contractors).

Under these laws, the organisation is taken to have breached the duty unless it took all reasonable precautions to prevent the abuse from happening (the 'onus of proof' is reversed). Reasonable precautions could include implementing the policies, procedures and safe-guards.

Western Australia and the ACT are progressing towards legislating this duty.

See our [screening guides](#) for more information.

## The standard of care required

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

In all 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 some jurisdictions contains a definition of 'standard of care', which is used as a starting point to determine if conduct is negligent. The other states and territories rely on the common law rule (described above), which is largely the same.



See the table at the end of this fact sheet which summarises the state and territory laws on negligence.



### Note – professionals

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 (for example, legal, health or financial services), note that the standard of care expected of professionals is one that is accepted by their peers as competent professional practice.



# Breach of your duty of care

If your organisation doesn't 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 doesn't 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:**

1. the risk was one your organisation should have known about
2. the risk was 'not insignificant', and
3. 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**

For example, 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 doesn't want to discourage people from participating in important work of this kind
- **The burden for the organisation of taking precautions to avoid the risk**

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's 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.
- **The gravity of the risk**

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.
- **The seriousness of the harm**

If the risk of harm is 'not insignificant' then your organisation should have done something to prevent it.

Generally, if someone is injured, the risk is likely to be found as significant.



## In summary

Whether your organisation will be found to have breached its duty will involve a detailed assessment of what was reasonable conduct in all the circumstances of the case. 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 in the community sector, you will be less likely to be found to have breached your duty of care in a particular situation.



## Case example

A family support worker, employed by a Queensland based not-for-profit organisation, provided support services to a person with a history of drug abuse, violence and sexualised behaviour. The employee suffered serious psychiatric illness as a result of being sexually assaulted by the client.

The Supreme Court of Queensland found that the organisation had breached its duty of care to its employee.

The reasons for finding a breach of duty included:

- the organisation was aware that other employees had stopped working with this client as they felt unsafe due to the client's sexualised and violent behaviour and threats, and
- the risk of injury to the employee was not insignificant

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 client.

Although the court didn't suggest this, the organisation could have taken other steps such as 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 didn't 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.

The Supreme Court decision ([Beven v Brisbane Youth Service Inc \[2016\] QSC 163](#)) was upheld on appeal ([Brisbane Youth Service Inc v Beven \[2017\] QCA 211](#))



# Damage and causation

Your organisation can't be found to be negligent unless:

- someone has suffered some type of damage recognised by the law as giving rise to a cause of action, and
- your organisation's failure to take reasonable care has actually caused the damage complained of

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.

Notably, the person who has suffered damage carries the burden of establishing that the negligence caused their damage.



## Note

Except for 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 the Northern Territory.



## Causation

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'.

So the question to ask is whether the damage would have occurred 'but for' your organisation's conduct.

**In summary, for your organisation to be found to be negligent, the answer to each of the following questions must be 'yes':**

- Does your organisation owe a duty of care?
- Has your organisation breached its duty of care?
- Did a person to which the duty is owed suffer legally recognised damage?
- Did the breach of duty cause the damage?



## Example

An employee cleaned your organisation's premises floors. Contrary to policy, they forgot to put up the sign warning of slippery floors. Unaware of the slippery floors, someone tripped and broke their back. If the injured person can establish that, had the sign been up, they wouldn't 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 they would likely have walked across the slippery floor regardless, it will be difficult for them to establish that, 'but for' your organisation's negligence, they wouldn't have been injured.

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



## What is vicarious liability?

Vicarious liability is the responsibility an organisation has for the actions of their employees or volunteers in the course of their work

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

The actions must be performed within the course, or scope, of the employees’ or volunteers’ work for the organisation to be held vicariously liable.

## Vicarious liability for employee actions



### Note

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

The fact that a wrongful act committed by an employee is a criminal offence, doesn’t 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 in relation to the victim that may have 'provided occasion' for the wrongful act. Factors that are considered include authority, power, trust, control and the ability to achieve intimacy with the victim.

Your organisation can also be held liable for any bullying, discrimination or harassment that occurs in the workplace (which would extend to a work-related social event or conference). In this regard, an organisation has a non-delegable duty to take all reasonable steps to prevent this type of conduct from occurring and to provide a safe workplace.



### Case example 1 – security worker in a hotel

In *Starks v RSM Security Pty Ltd [2004] NSWCA 351 (Starks' case)*, an employer was found vicariously liable for the conduct of a security guard (assault) when removing a customer from a hotel.

In this case, the security guard asked a customer to leave the hotel. When the customer challenged the request, the security guard head-butted them.

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, their conduct was considered to be 'so directly connected with their 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 act occurred in the context of the security guard attempting to eject the customer from the premises, which was something they were authorised to do.



### Case example 2 – security worker in a hotel

*Day v The Ocean Beach Hotel Shellharbour Pty Limited [2013] NSWCA 250*, a security guard injured a hotel patron while ejecting the patron from the hotel. The guard was employed by an organisation that no longer existed, so the court considered whether the hotel could be vicariously liable for the conduct of the security guard (who was not directly employed by the occupier).

In circumstances where the hotel was not the guard's employer, the court considered:

- whether the guard was acting as a true agent of the hotel with authority to bind the hotel, and
- whether the guard's actions were expressly authorised by the hotel

The court found that the guard was not a true agent of the hotel and the guard's actions were not expressly authorised by the hotel. On this basis, the hotel was **not** vicariously liable for the guard's conduct.



For more information about discrimination, sexual harassment and other unlawful workplace behaviours, see [our webpage on managing people](#).

For guidance and resources for employers to prevent discrimination and harassment in the workplace, see the [Australian Human Rights Commission Vicarious Liability Fact Sheet](#).



## Vicarious liability for volunteer actions



### Note

In some circumstances, your organisation could be held liable for the negligence of its volunteers.

State and territory legislation sets out 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 the tests under the relevant legislation have been met), the volunteer will not be personally liable to pay any compensation for personal injury, property damage or financial loss, they may have caused as a result of the volunteer's 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.**



### Caution

The position in NSW and Queensland may differ.

In NSW a volunteer will not be liable for their acts or omissions while volunteering unless they fall into an exception in the legislation, and where a volunteer is not liable, the organisation will ordinarily not be liable for the volunteer's acts or omissions.

In Queensland, legislation protects volunteers from liability but, unlike NSW, the protection is not extended to the organisation. Queensland courts may be willing to extend protection to the organisation from liability from its volunteers' acts and omissions, but the position is uncertain.



See the table at the end of this fact sheet which summarises the state and territory laws on negligence.



### Remember

There are still circumstances where an organisation could be liable, including where it has been negligent (as discussed above).



### Note and caution – vicarious liability for child abuse

Organisations can be found vicariously liable (that is, legally responsible) for the 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 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 considered.

Check the legislation in your state or territory – this may extend the vicarious liability of organisations for associated individuals and for persons exercising functions akin to employees in matters of child abuse.



For more information about the legal responsibility for volunteers in different states and territories, see our [National Volunteering Guide](#).

## 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's impossible to put the injured person back into their 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 can't 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 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.



### Note

The proportionate liability provisions don't apply to claims for personal injury.



### 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.

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 aim 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 while 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 can't be certain of avoiding liabilities but you can be certain of having appropriate insurance cover. If your organisation is unsure about the type or extent of cover required, you should contact an insurance broker.



### Caution

If you think your organisation may be exposed to legal action you should notify your insurer and 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).



For more information on insurance and risk management, including volunteer personal accident insurance see our [risk management and insurance guide](#).

For a step-by-step guide to the risk management planning process (including tools such as a risk register, a risk treatment schedule and a risk action plan), see [Volunteering Australia's Risk Management Guide](#)



## Sources of negligence law

	Relevant Act	Duty of care	Standard of care	Professional standard of care	Breach of Duty	Causation	Vicarious liability for volunteers	Proportionate liability
ACT	<a href="#"><u>Civil Law (Wrongs) Act 2002</u></a>	Common law	Section 42	Common law	Sections 43, 44	Sections 45, 46	Yes – section 9	Chapter 7A
NSW	<a href="#"><u>Civil Liability Act 2002</u></a>	Common law	Common law, section 5B	Section 50	Sections 5B, 5C	Sections 5D, 5E	In limited circumstances only – section 3C and Part 9 (sections 61-66)	Part 4
NT	<a href="#"><u>Personal Injuries (Liabilities and Damages) Act 2003</u></a>	Common law, section 17D	Common law	Common law	Common law	Common law	Yes – section 7(3)	<a href="#"><u>Proportionate Liability Act 2005</u></a>
QLD	<a href="#"><u>Civil Liability Act 2003</u></a>	Common law	Common law, section 9	Section 22	Sections 9, 10	Sections 11, 12	Position uncertain – common law	Part 2
SA	<a href="#"><u>Civil Liability Act 1936</u></a>	Common law	Section 31	Section 41	Section 32	Sections 34, 35	Yes – section 5 of the <a href="#"><u>Volunteers Protection Act 2001</u></a>	Part 3 - <a href="#"><u>Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001</u></a>
TAS	<a href="#"><u>Civil Liability Act 2002</u></a>	Common law	Common law, section 11	Section 22	Sections 11, 12	Sections 13, 14	Yes – section 48	Part 9A
VIC	<a href="#"><u>Wrongs Act 1958</u></a>	Common law, section 48-50	Common law, section 48, section 58	Section 59	Sections 48, 49	Sections 51, 52	Yes – section 37(2)	Part IVAA
WA	<a href="#"><u>Civil Liability Act 2002</u></a>	Common law	Common law, section 5B	Section 5PB (health care professionals only)	Section 5B	Sections 5C, 5D	Yes – section 7 of the <a href="#"><u>Volunteers and Food Donors (Protection from Liability) Act 2002</u></a>	Part 1F