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## BREACH OF DUTY

### 1. STANDARD OF CARE = WHO IS THE REASONABLE PERSON? OBJ/SUB

- **Children** (*McHale*) – the standard of care is lowered
- **Extra skill** (*Imbree*) – standard of care is raised to the average of that body of skill
- **Mental illness** (*Carrier*) – standard of care is not lowered (reasonable person)
- **Professional** (CLA 50+5P) Bolam principle (*Rogers*) – if defendant can argue he or she is a professional, may be able to take advantage of the provisions. Need to establish that:
  - Is the defendant a professional
  - Is the defendant "providing a service"
  - Is the service "widely accepted"?
  - Is the opinion irrational?

### 2. REASONABLE FORESEEABILITY OF RISK OF INJURY “NOT INSIGNIFICANT” [CLA s 5B]

### 3. CALCULUS OF NEGLIGENCE [CLA s 5B]

- Probability (*Romeo, Dederer*)
- Likelihood seriousness (*Paris v Stepney*)
- Burden of taking precautions (*Woods*)
- Social utility (*E v Red Cross*)

## BREACH OF DUTY:

- Focuses only on the defendant, and whether or not he or she breached their duty
- To establish a breach of duty, the plaintiff must prove that the defendant’s conduct **fell below the required standard of care**. Compare the defendant to a “reasonable person”
  - *Blyth v Birmingham Waterworks Co:* ‘negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do’.
- What is considered **reasonable** in the circumstances of the case will be influenced by current community standards. *Bankstown Foundry Pty Ltd v Braistina* (1986)

### GENERAL PRINCIPLES FOR ESTABLISHING A BREACH OF DUTY

*Wyong Shire Council v Shirt:* Common law test for breach of duty:
- Must examine “whether a reasonable man in the defendant’s position would have **foreseen that his conduct involved a risk of injury** to the plaintiff or to a class of persons including the plaintiff…the perception of the reasonable man’s response calls for a consideration of the **magnitude of the risk** and the **degree of the probability of its occurrence**, along with the **expense, difficult and inconvenience of taking alleviation action** and any other conflicting responsibilities which the defendant may have”.

## 1. STANDARD OF CARE

### WHO IS THE REASONABLE PERSON?

The standard of care against the defendant’s conduct is measured as the objective one of the **reasonable person** in the circumstances - with no allowance for a defendant’s individual idiosyncrasies. *(Vaughan v Menlove)*

**Age: Children** (pp. 451-454)

**McHale v Watson** (1966) 115 CLR 199

**Facts:** Watson, aged 12, threw a piece of sharpened scrap metal at a hardwood post. It either missed the post or hit it and glanced off and hit 9 year old McHale, blinding her in one eye.

- Children are expected to exercise a degree of care one would expect, not of the average reasonable man, but of a **child of the same age and experience**.
Childhood is not an idiosyncrasy – it is a normal stage of human development.

In the present case, Watson did not have enough maturity of mind to foresee that the dart might miss or glance off the hardwood and injure another.

Watson’s conduct was symbolic of ‘the tastes and simplicity of boyhood’ – however a reasonable person of the same age would not have foreseen such a risk.

**Mental illness and disability (pp. 454-456)**

*Carrier v Bonham [2002] 1 Qd R 474*

- **Facts:** Carrier was driving a bus when Bonham, a mentally ill patient walked in front of it intending to commit suicide. Carrier suffered nervous shock and was unable to continue working as a bus driver.

- **Insanity does not attract immunity under the law of negligence.**
  - It has no effect on the standard of care owed – judged by the standard of the ordinary and reasonable person.
  - This is because, unlike childhood (in *McHale v Watson*¹), unsoundness of mind is not a normal condition and it is not a stage of development – it is an idiosyncrasy.

**Learners/ Inexperienced practitioners (pp. 456-462)**

*Imbree v McNeilly; McNeilly v Imbree (2008)*

- **Facts:** Imbree allowed McNeilly, who was 16 years old to drive a four-wheel drive without a learners permit. McNeilly lost control of the vehicle, which overturned and seriously injured Imbree.

- **Learners (as in learner car drivers or beginners in a profession) will be held to the same standard of care as anyone else – to take reasonable care to avoid injuries to others**

- Compare the defendant to a parson with a license and driving experience (average driver on the road)

- Courts decided that if you hold yourself out as able to do something, then that is the standard of care you will be held to
  - Rejected the decision in *Cook v Cook* which held that ‘special and exceptional facts’ may transform the relationship between driver and passenger such that it would be unreasonable to measure the standard of care required as that which is reasonably expected of an experienced and competent driver.

- **Held that knowledge was not relevant in determining the standard of care** – as this was inconsistent with the principle that the standard of care is objective and does not fluctuate with an individual person’s “aptitude of temperament” (Imbree)

- If an instructor/supervisor could have influenced the outcome it may be that the supervisor acted without regard for personal safety – a matter of contributory negligence.
  - In the present case, contributory negligence was held at 30%.

**Professionals (pp. 462-471)**

- The fact that the defendant possesses more than an average degree of skill due to the nature of his or her occupation and training raises the standard of care

- For professionals and those with special skills, ‘the standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill’ *Rogers v Whitaker*

**Bolam Principle**

“…a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt different practice. In short, the law imposes the duty of care: but the standard of care is a matter of medical judgment”

- Sections 5O and 5P of the CLA are modified from the Bolam and Rogers

¹ (1966) 115 CLR 199.
**Rogers v Whitaker (1992)**

- **Facts:** The plaintiff (Whitaker) had surgery over a defective eye. In the process of the surgery, the defendant (Rogers) injured the plaintiff’s good eye, thereby blinding her completely. Rogers completed the surgery with the required skill and care. However, he had failed to warn her of the small chance of a rare complication, even though she had asked numerous times.

- The law requires that doctors have a duty to warn of **material risks inherent in the proposed treatment**. A risk is material if:
  - A reasonable person in the patient’s position, if warned, would be likely to attach significance to it, or
  - The medical practitioner is or should be reasonably aware that the particular patient, if warned of the risk, would be likely to attach significance to it.

- Whether a careful and responsible doctor would disclose information depends upon a number of complex factors: *F v R* (1983)
  - The nature of the matter to be disclosed.
  - The nature of the treatment.
  - The desire of the patient for information.
  - The temperament and health of the patient.
  - The general surrounding circumstances.

- **Rejected the Bolam principle:**
  - While evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to determine what the appropriate standard of care is.

- In the present case, although the respondent did not ask a specific question relating to complications that could cause damage to her good eye, she made it clear that she had great concern that no injury should befall her good eye.
  - The risk was material as a reasonable person in Whitaker’s position would attach significance to the risk.

**Civil liability legislation ss 50 and 5P**

- Section 50 is a modified version of the Bolam principle – it operates as a defense. In *Vella v Permanent Mortgages Pty Ltd* - Hungerford J said: ‘the plaintiff may still present his/her case in exactly the same way as prior to s 50. If there is no evidence called as to peer professional practice, then the court decides the matter in the same way as it always has decided the matter. However, if evidence is called… as to what is peer professional practice in Australia, then it may be that it is the profession that sets the standard’.

- Section 5P (distinction between giving advice and provision of service) is used for issues regarding warning: such as in *Rogers v Whitaker.*

**2. REASONABLE FORESEEABILITY OF RISK OF INJURY “NOT INSIGNIFICANT” (CLA S5B)**

**Foreseeability of risk of injury (pp. 380-383)**

Assessment of the issue of breach depends upon identifying the relevant risk of injury. *RTA v Dederer* (2007)

- Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd: ‘the breach question requires proof that it was reasonably foreseeable as a possibility that the kind of carelessness charged against the defendant might cause damage of some kind to the plaintiff’s person or property…’

**Wyong Shire Council v Shirt** (1980) 146 CLR 40

- **Facts:** The plaintiff became a quadriplegic after striking his head on the bottom of a lake while water skiing. The water at that point was just over one meter deep. The plaintiff argued that he
was misled into believing the lake was generally deep and safe for inexperienced skiers, by a nearby ‘Deep Water’ sign erected by the Council’s engineer.

- A risk of injury being ‘foreseeable’ has nothing to do with the probability or improbability of its occurrence. It is simply asserting that the risk is not one that is ‘far-fetched or fanciful’.
  - Although, a greater degree of probability will mean it is more readily perceived as a risk. However, if a risk is unlikely to occur, it does not mean it is unforeseeable.
- In the present case, a reasonable man might have concluded that the sign was ambiguous and read it as an indication of deep water beyond rather than in front of, the sign. A reasonable man may also have concluded that a water skier might be induced to ski in that zone, mistakenly believing it to be deep.
  - Therefore, the court concluded that the risk was foreseeable.

**Doubleday v Kelly [2005] NSWCA 151**

- **Facts:** The seven year old plaintiff was injured when she attempted to roller skate on a trampoline while staying at the defendant’s house.
- The actual events as they happened are not the circumstances to which consideration of foreseeability is applied; what is to be considered is foresight in more general terms of risk of injury.
  - The risk that was foreseeable was that a child would not use a trampoline in a competent way and would injure herself if not supervised.
- The warning against using the trampoline without supervision did not adequately discharge the duty. The Court suggested that an effective method of preventing children from using the trampoline without supervision was to turn it over so that the jumping surface is on the ground.

Section 5B(1)(b) - The requirement that the risk be “not insignificant” was intended to be a more stringent test than the common law position ([Ipp Report](#)) – but most cases have treated it as the same as “not fanciful or farfetched” ([Doubleday v Kelly](#)). Contrastingly, in [Shaw v Thomas](#) the ‘not insignificant’ requirement was held to be more demanding, but ‘not by very much’.

### 3. CALCULUS OF NEGLIGENCE

Once foreseeability of a ‘not insignificant’ risk has been established, it is necessary to determine what the reasonable person’s response to this risk of injury would be. This requires the court to consider a range of factors. (Non prescriptive)

Section 5B(2) does not alter the common law. Rather it is a reiteration of Mason J’s remarks in [Wyong Shire Council v Shirt](#).

Emerging from the case of [Wyong Shire Council v Shirt](#), s 5B(2) of the CLA requires consideration of:

- a) The **probability** of the harm occurring
- b) The magnitude or **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

There is no formula or rule for deciding the wight given to each consideration. It is a factual question that depends on the circumstances of each case ([Mulligan v Coffs Harbour City Council](#))

**Determining breach – the general approach (pp. 387-391)**

[Romeo v Conservation Commission](#) (1998) 192 CLR 431

- ‘It is quite wrong to read past authority as requiring that any reasonably foreseeable risk, however remote, must in every case be guarded against’.
  - Precautions only need to be taken when it is required by the **standard of reasonableness**, [Phillis v Daly](#) (1988)
- Relevant circumstances:
Courts must bear in mind the limited resources of a public authority. Spending in one area will divert resources from something else which is perhaps more important.

- Expensive to erect fences at all areas of the cliff.
- Preservation of the aesthetics of a natural environment.
- Obviousness of the risk.

- Due to the remote possibility that an accident would occur (due to the obviousness of the risk) and the expense of alleviating conduct, breach was not established.

**Vairy v Wyong Shire Council (2005) 223 CLR 390**

- **Facts:** The plaintiff suffered serious injury after diving into water and striking their heads on the sand below. The plaintiff saw many other people diving safely at the same place.
- When determining the standard of care, it is necessary to judge what a reasonable person would have done to avoid the risk.
  - This is to be judged by looking forward at the prospect of the risk of injury.
- In the present case, although the risk of injury was reasonably foreseeable, a reasonable council would not have marked every point in its municipal district from which a person could enter a body of water, and warned against or prohibited diving from that point.

**RTA v Refrigerated Roadways Pty Ltd [2009] NSWCA 263**

- **Facts:** An employee of the respondent was killed whilst driving a truck along the freeway when a concrete blocked was dropped from an overhead bridge. The RTA was aware that there was a problem of people dropping objects from overheard bridges and had developed an order of priority for screening bridges. However, this process was slow due to budgetary constraints.
- Section 5B(1) sets out three **preconditions** that must co-exist before liability in negligence can arise.
  - Subsection (2) provides a non-exhaustive list of factors that the court is required to consider when determining s 5B(1)(c).
    - Justice of Appeal Ipp explained that the purpose of s 5B(2) was to direct courts to focus on the issue of ‘whether it would be reasonable to require precautions to be taken against a particular risk’. *Waverley Council v Ferreira* [2005]
    - It involves weighing up the facts set out in ss 5B(2)(a) and (b) against those in ss 5B(2)(c) and (d).
- It is always predictable that someone might drop an object from a bridge, and the possibility of that happening is not ‘far-fetched or fanciful’ (or ‘not insignificant’ if the CLA imposes a test which is different in substance). *Drinkwater v Howarth* [2006]
  - In *Brodie v Singleton Shire Council* - held that the rejection of the so-called ‘immunity’ for highway authorities does not mean they are obliged in all cases to exercise their powers to repair roads or to ensure that they were kept in repair.
  - There are **financial considerations** – prioritizing more pressing dangers.

**Probability of harm (pp. 400-406)**

In the *Wagon Mound (No 2)*: Lord Reid said: gave effect to the qualification that it is justifiable to not take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbor, would think it right to neglect it’.

- In *Romeo v Conservation Commission* the probability of the risk of injury was so low and the risk so obvious that it justified no action.

**RTA v Dederer (2007) 324 CLR 330**

- **Facts:** The plaintiff jumped off a bridge into water below and was severely injured. Many people used the bridge for the same activity and until the plaintiff’s case, no one has been injured. There were signs on the bridge saying ‘fishing and climbing prohibited’ and Dederer acknowledged seeing and understanding the ‘no diving’ pictogram. However, the plaintiff alleged, among other things, that the Council should have replaced the horizontal railings with vertical railings.
• All duties of care are discharged by the exercise of **reasonable care**. They do not impose a more stringent or onerous burden.
  - Reasonable warnings can ‘fail’, but the question is always the reasonableness of the warnings and not its failure.
• Determining what a reasonable response would be requires the **correct identification of the risk**.
  - The risk of injury was not flowing from the act of diving off the bridge, it was the risk of impact upon jumping into the potentially shallow water.
  - The RTA could not control the plaintiff’s voluntary actions and it did not control the natural variations in the depth of the estuary beneath.
• The risk of injury of jumping or diving into water of variable depth is reasonably foreseeable.
  - The magnitude of the injury was grave.
  - **The probability of the injury was low** – the facts showed that not one was injured until the plaintiff.
  - Expense and inconvenience of taking precautions:
    - The installation of pool-type fencing would be expensive and intrusive (over $100,000). Furthermore, evidence was given that fencing of this sort did not stop people from jumping off a nearby bridge.
• A prohibition against diving is sufficient in the eyes of the law (although a warning of the dangers of diving is perhaps more effective).

**The gravity or likely seriousness of the harm (pp. 406-411)**
‘the degree of care which that duty involves must be proportioned to the degree of risk involved if the duty should not be fulfilled’ *(Northwestern Utilities Ltd v London Guarantee & Accident Co Ltd)*
• A reasonably prudent man would... exercise a ‘keener foresight’ or a ‘**degree of diligence so stringent as to amount practically to a guarantee of safety**’, or a ‘high degree of care in effect to an insurance against risk’ or ‘the greatest care’ or ‘consummate care’*. *(Adelaide Chemical & Fertilizer Co Ltd v Carlyle)*

**Paris v Stepney Borough Council [1951] AC 367**
• **Facts:** The plaintiff was employed as a fitter in the defendant’s garage. The defendant knew that the plaintiff only had use of one eye. While removing a bolt, a chip of metal flew off and entered his good eye, almost totally blinding him.
  • **A higher standard of care is owed to particularly vulnerable individuals.**
    - ‘...that a particular workman is likely to suffer a graver injury than his fellows from the happening of a given event is one which must be taken into consideration in assessing the nature of the employer’s obligation to that workman’.
  • In *Mackintosh v Macintosh* Lord Neaves noted that ‘the amount of care will be proportionate to the degree of risk run, and to the magnitude of the mischief that may be occasioned.
    - It is clear that the risk of total blindness is greater for a one-eyed man.
    - Therefore, the standard of care owed is greater and **goggles should have been supplied.**

**Burden of taking precautions (pp. 411-418)**
**Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460**
• **Facts:**
  - The plaintiff suffered serious eye damage during a game of indoor cricket. Certain safety equipment was supplied, but not including helmets or pads.
  - It was not reasonable to expect the respondent to provide players with protective headgear in circumstances where none had been designed for the game, none was worn by players elsewhere, the rules of the game did not provide for such headgear, and the manner in which the game was played meant that there were considerations of convenience and safety that provided good reasons why such headgear was not worn.
In relation to the warning – the court held that the risk was so obvious that reasonableness did not require the respondent to warn players.

**Neindorf v Junkovic (2005) 222 ALR 631**
- **Facts:** The respondent suffered injury when she tripped on an uneven surface in the driveway of the appellant’s home while attending a garage sale.
- All suburban houses contain hazards of some kind, such as unevenness of the surface.
  - The unevenness of the surface that the respondent tripped on was so **ordinary** and so **obvious** that reasonableness did not require any action on the part of the occupier.

**Social utility of the risk creating activity (pp. 418-422)**
*Watt v Hertfordshire County Council:* 'you must balance the risk against the measures necessary to eliminate the risk... you must [also] balance the risk against the end to be achieved...the saving of life or limb justifies taking considerable risk'.
- Contrastingly, in *Patterson v McGinlay:* the driver of a police car was found guilty of contributory negligence for speeding through a red light, even though the lights were flashing and the siren sounding.
  - Similar, in *Morgan v Pearson:* it was emphasised that there is no point killing several people in the course of a journey designed to save the lives and property of others.

**E v Australian Red Cross Society (1991) 27 FCR 310**
- **Facts:** The plaintiff contracted AIDS from a blood transfusion supplied by the defendant.
- The matter must be judged in **prospect** and not in retrospect. The likelihood of injuries of incapacitating occurrence, the likely extent of the injuries which the occurrence may cause, the nature and extent of the burden of providing a safeguard against the occurrence and the practicality of the specific safeguard which would do so are all indispensable considerations in determining what ought reasonably to be done.
  - The magnitude of the risk was grave - most likely resulting in death.
  - However, there was considerable difficulty in predicting the chances of infection from a blood transfusion.
    - The cost would be wastage of useable blood supplies in the circumstances of a constantly increasing demand for blood transfusions.
- **The social utility of blood transfusions outweighs the risks of infection.**
  - If blood is not available, operations will be postponed and will cause inconvenience or death.