<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>BREACH</td>
<td>1</td>
</tr>
<tr>
<td>WHO IS THE REASONABLE PERSON</td>
<td>2</td>
</tr>
<tr>
<td>FORESEEABILITY</td>
<td>3</td>
</tr>
<tr>
<td>CAUSATION (CLA)</td>
<td>6</td>
</tr>
<tr>
<td>CAUSATION (COMMON LAW)</td>
<td>8</td>
</tr>
<tr>
<td>NOVUS ACTUS</td>
<td>10</td>
</tr>
<tr>
<td>REMOTENESS</td>
<td>11</td>
</tr>
<tr>
<td>DEFENCES TO NEGLIGENCE</td>
<td>16</td>
</tr>
<tr>
<td>VICARIOUS LIABILITY</td>
<td>21</td>
</tr>
<tr>
<td>NON-DELEGABLE DUTY</td>
<td>24</td>
</tr>
<tr>
<td>BREACH OF STATUTORY DUTY</td>
<td>26</td>
</tr>
<tr>
<td>DAMAGES</td>
<td>29</td>
</tr>
<tr>
<td>DAMAGES TABLE</td>
<td>31</td>
</tr>
<tr>
<td>- ECONOMIC LOSS</td>
<td></td>
</tr>
<tr>
<td>- NON-ECONOMIC LOSS</td>
<td>35</td>
</tr>
<tr>
<td>SIMPLE APPLICATION TESTS</td>
<td>39</td>
</tr>
</tbody>
</table>
Breach of Duty

**Breach**

The element of breach is the fault element. To establish a breach of duty, the plaintiff must prove that the defendant’s conduct fell below the required standard of care.

- *Blyth v Birmingham Waterworks* (1856): 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.

The standard of care is determined by reference to the actions or omissions of a notional reasonable person in the same circumstance of the defendant. It requires an assessment of whether the defendant responded to a reasonably foreseeable risk of harm to another person by taking precautions that a reasonable person in their position would have taken in the circumstances existing at the time.

- Involves consideration of the magnitude of the risk, the probability of its occurrence, and the burden of taking precautions to avoid the risk: *Wyong Shire Council v Shirt* (1980).
- The notion of the reasonable person is codified in s 5B of the *Civil Liability Act* (NSW).
- The notion of reasonableness varies over time and place and depends on the specific circumstances of each case: *Bankstown Foundry v Braistina* (1986).

**General Principles: Establishing a Breach of Duty**

The judgment of Mason J in the case of *Wyong Shire Council v Shirt* (1980) laid down the common law test in Australia for breach of duty:

1. Would a reasonable person in the defendant’s position foreseen that their conduct involved a risk of injury to the plaintiff or to a class of person including the plaintiff?
2. If yes, it must be determined what said reasonable person would do when turning to the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other responsibilities which that defendant might have.

- The *Wyong Test* has been affirmed recently by the High Court as the common law test in Australia for breach of duty – *NSW v Fahy* (2007).
- The *Wyong Test* has been codified in s 5B of the *Civil Liability Act* (NSW).
  - It has been argued that s 5B(1)(b) imposes a more demanding standard than in *Shirt* as it requires the risk to be “not insignificant”.

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1
Who is the Reasonable Person?

The conduct of the defendant is measured by the standard of the “reasonable person” in the given circumstances.

- The standard of care against the defendants conduct is measure as the objective one of the reasonable person in the circumstances with no allowance for their individual idiosyncrasies – *Vaughn v Menlove* (1837).

Conaghan argues that the standard reasonable person made out tends to reflect that of a suburban middle class male and does nt address the issues encountered by a female. One of the most visible changes that occurred when the *CLA* codified the common law *Shirt* test was the change from the reasonable man to the reasonable person.

Although the standard used to define the reasonable person is an objective one, there are still circumstances where subjective related to the defendants are taken into account.

1. Age: May be taken into account to lower the standard of care. Age is not an idiosyncrasy – *McHale v Watson* (1966).
3. Learner: Held to the same standard as others. Though, can generalize a reasonable person within a learner category – *Imbree v McNeilly* (2008).
4. Professional (or someone professing to have a special skill): The standard of care required from a professional is that the reasonable skilled professional in the circumstances – *Rogers v Whitaker* (1992).
   - There is an established list of professionals who must ‘exercise reasonable professional care and skill’ to the standard of the ‘ordinary skilled person professing to have said skill’:
     - Architects / Engineers / Solicitors / Accountants / Insurance Brokers etc.
     - Specialists within certain fields are also held to a higher standard.
   - Ordinary people are not expected to have special knowledge or advanced skills, so if a plaintiff has agreed to employ a defendant knowing that they possess only a particular level of skill the defendant will not necessarily be held to a higher standard.
     - Wilson, Deane & Dawson JJ noted in *Cook v Cook* (1986) that if a person asked a blacksmith to fix their watch, the blacksmith would not be held to the standard of a watchmaker, instead to that of a skilled blacksmith.
Breach of Duty

The Civil Liability Act (NSW) does not define professional – Only outlines a person ‘practicing a profession’ under s 5O. This is largely a matter of fact and construction.

### Foreseeability of Risk of Injury

It is crucial to understand that to determine a breach it is essential to identify the relevant risk of injury or harm – *RTA v Dedder* (2007).

- Harm is defined as personal injury or death in s 5 of the Civil Liability Act (NSW).
- The risk must not be “far fetched or fanciful” – *Wyong Shire Council v Shirt* (1980).
  - A risk need not be probable, an unlikely risk can still be foreseeable.
- Only the possibility of the events and or injuries need to be foreseen, not the specifics – *Doubleday v Kelly* (2005).
- Particular or special knowledge of of the risk of harm, such as an employer’s knowledge of the plaintiffs particular vulnerability to blindness because he was already blind in one eye, will be determinative of the foreseeability question – *Paris v Stepney Council* (1951).

Under s 5B of the Civil Liability Act (NSW) the common law test has been slightly modified to state that the risk to be foreseen has to be that which is not insignificant.

#### Calculus of Negligence: Responding to the Foreseeable Risk

Once a foreseeable risk has been established the court must determine what the response of a reasonable person to the risk would be in the circumstances. According to Gleeson CJ: “What is involved in the process to which Mason J was referring is not a calculation, it is a judgment”.

- The Civil Liability Act (NSW) addresses the calculus in s 5B(2), where the four factors a court must take into account when determining whether there was a reasonably foreseeable risk of injury:
  1. **Probability**: The probability that the injury will occur if you proceed with the negligent conduct. Low probability favours the defendant.
  2. **Gravity/Seriousness**: If the conduct is continued is there likely to be a very grave/serious injury?
  3. **Burden**: If the conduct is ceased, will that create a large burden upon the defendant?
  4. **Utility**: Is there some greater good/societal benefit that justifies the conduct?
These four factors are determinative of breach and must all be considered.
These four factors are also found in *Wyong Shire Council v Shirt* (1980).

**Probability**
In many situations, although a risk may be reasonably foreseeable, the reasonable person would not take steps to prevent it because the likelihood of its occurrence would be so improbable. Such a determination cannot be addressed in hindsight; it must be based on the information available to the defendant prior to the accident.

- *Bolton v Stone* (1951): Woman struck on head by stray cricket ball hit from field across from her house. The House of Lords affirmed the trial judges decision, which held that there was no negligence: “It is justifiable to not take steps to eliminate a real risk if it is small and circumstances are such that a reasonable man... would think it right to neglect it”.

- *RTA v Dederer* (2007): A 14-year-old jumps from bridge into water. There are no jumping signs, but fence with horizontal bars. Many people jump from here. It was held that the probability of harm was low as no one else had hurt themselves until this time. Further, it was held that the burden of reasonable response (modifying the handrail) was too expensive, intrusive and potentially ineffective. Further, the RTA did not control the voluntary actions of the 14-year-old or the water level (outside of its control).
  - The RTA did have a duty of care to users on the bridge, but one meeting the criteria of a reasonable person who themselves are exercising reasonable care.

**Gravity/Likely Seriousness**
If aware of a person’s particular vulnerability to a greater injury, a defendant will owe them a level of care above and beyond that of someone who in the same situation is not vulnerable.

- *Paris v Stepney Borough Council* (1951): Plaintiff who had only one eye worked in a garage. A piece of metal entered his good eye whilst at work, leaving the plaintiff almost completely blind. The House of Lords confirmed the trial judgment in favour of the plaintiff:
  - The standard of care is affected by the consequence of the actions on an individual, not a class or people.
  - “It seems to me to follow that the known circumstance 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”.

**Burden of Taking Precaution**
If taking a precaution is too expensive, inconvenient or difficult compared to the probability and magnitude of a risk of harm, the defendant might be excused.

- **Woods v Multi-Sport Holdings (2002)**: The plaintiff was hit in the eye during an indoor game of cricket, losing 99% of his sight. They argued that head gear and eye protection should be provided. The majority of the High Court held that it was not reasonable to “expect the respondent to provide players such as the appellant with a form of 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 there were consideration of convenience and safety that provided good reasons why such head gear was not worn”. The burden would be too high.

- **Graham Barclay Oysters v Ryan (2002)**: There was too high a burden financially to either cease selling oysters or sell them with a warning. They could not have done more than they already had.

**Social Utility of the Activity**

A risk may be justified if it held a high social utility. For example: driving speed limit to get someone to a hospital to save their life (though reasonable care in the circumstances will still be required: there is not point killing several people to try and save one – *Morgan v Pearson*). In cases where the social utility (benefit to society) of an act outweighs the probability and magnitude of the risk, a standard will be lowered.

- **Watt v Hertfordshire County Council (1954)**: Denning J said “you must balance the risk against the end to be achieved... the saving of life an limb justifies a considerable risk”.

- **E v Australian Red Cross (1991)**: The plaintiff contracted AIDS from a blood transfusion – the blood had been gather by the Red Cross through their donor drive. Questions arose over the screening process. The court found that any further testing could significantly decrease the amount of available blood and have a negative impacts broadly (potentially costing lives). Wilcox J said that in the absence of that consideration: result would differ.

- **Romeo v Conservation Commission of NT (1998)**: Plaintiff (drunk 16 yr old) fell 6.5 metres from top of unfenced cliff.
  - Found that there is a general duty to take care, not to prevent any and all reasonably foreseeable injuries.
  - One must take reasonable care of themselves.
  - Thus, one must take reasonable care to take care of others who themselves are taking reasonable care.

- **Vairy v Wyong Shire Council (2005)**: It would not be reasonable for the council to mark every single part of water. Must look to the risk prospectively – not retrospectively.