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Breach

Steps to follow

1. Standard of Care - Who is the reasonable person? 2. Is the defendant protected by s 50?	3. Was there a Reasonable foreseeability of risk of injury? 4. Calculus of Negligence – How should the reasonable person respond?
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Standard of Care – Who is the reasonable person?

<ul style="list-style-type: none"> - Breach occurs if the defendant's conduct does not meet the standard of the reasonable person. - Objective test = reasonable person in the circumstances. - Unless some special category. 	<ul style="list-style-type: none"> - In some special circumstances the attributes of the defendant can alter the test. <ul style="list-style-type: none"> - Children = reduced STD based on age of child (<i>McHale</i>). - Learners = NO (<i>Imbree</i>). - Mental illness = NO (<i>Carrier</i>). - Professionals = Higher STD; “that of an ordinary skilled person exercising and professing to have that special skill” (<i>Rogers</i>).
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Professional STD of care; Bolam principle / s 50 & 5P CLA

Can the defendant rely on ss 50 or 5P? <ul style="list-style-type: none"> - Is the defendant a Professional? - Is the defendant providing a service? - Is the service widely accepted? - Is the opinion rational? 	Bolam Principle <ul style="list-style-type: none"> - Usurped by CLA 2002. - Only applicable to medical professionals. - Doesn't apply to warnings given (or failure to give) by medical professionals (<i>Rodgers</i>).
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50 Standard of care for professionals

- (1) A person practising a profession (“a professional”) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
- (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

5P Division does not apply to duty to warn of risk

This Division **does not** apply to liability arising in connection with the giving of (or the **failure to give**) a **warning**, advice or other information in respect of the risk of death or injury to a person associated with the provision by a professional of a professional service.

Reasonable foreseeability of risk of injury

5B General principles

- (1) A person is **not negligent** in failing to take precautions against a risk of harm **unless**:
- (a) the risk was **foreseeable** (that is, it is a risk of which the person **knew** or **ought to have known**), and
 - (b) the **risk was not insignificant**, and
 - (c) in the circumstances, a **reasonable person in the person's position** would have taken those precautions.

Common-law tests

Wyong Council v Shirt <ul style="list-style-type: none"> - Would a Reasonable Person in the position of the defendant have foreseen a risk that was not far-fetched or fanciful? 	Doubleday v Kelly <ul style="list-style-type: none"> - The defendant need not have foreseen the actual events, the inquiry is more general.
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Calculus of Negligence

5B General principles

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

- (a) the **probability** that the harm would occur if care were not taken,
- (b) the **likely 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.

Consider all 4 factors to determine whether the response to the foreseeable risk of injury was reasonable in the circumstances?

Probability

- Even risk of injury is foreseeable possibility is so remote that no measures need to be taken (**cricket ball case**) (*Bolton*).
- Must look prospectively, i.e. what was a reasonable response to the foreseeable risk of injury NOT what could have been done to prevent when looking back (**Bridge case**) (*Dederer*).
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Likely seriousness

- The gravity or likely seriousness of the injury will affect the standard of care owed, the more grave the risk the more that will be required to discharge the duty (*Paris v Stepney*).
- A plaintiff with a special vulnerability will require a higher standard, i.e. where injury to one eye would result in 100% loss of vision (*Paris*).

Burden

- Also consider the burden of taking precautions!
- Building fences to prevent every accident not possible; especially when the defendant is a public authority (*Dederer; Romeo*).
- May not be reasonable for a defendant to take action in the circumstances (**Indoor Cricket**) (*Woods*).
- The risk was so obvious it did not require a special warning (*Woods*).
- Not all risks even though foreseeable require a response, may mean doing nothing is reasonable (**injury at garage sale**) (*Neindorf v Junkovic*).

Social utility

- Risk can be justified if it serves some more important social purpose (*E v Red Cross*).
- Saving life and limb justifies a considerable risk (*Watt*).
- Supply blood that may be infected was okay because of the risk to good blood being thrown away and blood supply not meeting demand (*E v Red Cross*).