

NEGLIGENCE: BREACH OF DUTY

STEP 1. PARTICULARISE THE BREACH

- Begin by stating what exactly the D has/has not done which constitutes a breach to P, whom the D owes a duty of care to
- There are no 'degrees' in breach; as long as the person has acted less carefully, there will be breach.
- 'Negligence means failure to exercise reasonable care' (s 43 Wrongs Act)
- Past findings of a breach are only guiding and not binding on later cases (Qualcast)

STEP. 2 WAS THE RISK OF HARM FORESEEABLE?

S 48(1)

- A person is not negligent in failing to take precautions against a risk of harm unless:
 - (a) The risk [of harm] was foreseeable

Duty (e.g. lifeguard)

- It must have been reasonably foreseeable that carelessness on the part of the defendant in undertaking a general activity would harm the plaintiff.

Breach (e.g. L failing to put flags out)

- It must have been reasonably foreseeable that the specific act or omission in respect of which breach was alleged might harm the plaintiff. (Wyong Shire Council)

STEP. 3 WAS THE RISK OF HARM NOT INSIGNIFICANT?

S 48(1)

- A person is not negligent in failing to take precautions against a risk of harm unless:
 - (b) The risk of harm was not insignificant
- 'Not insignificant' means not 'far-fetched or fanciful' (s 48(3)(a))

STEP 4. WHAT CHARACTERISTICS OF THE D WILL BE ATTRIBUTED TO A REASONABLE PERSON?

S 48(1)

- A person is not negligent in failing to take precautions against a risk of harm unless:
 - (c) In the circumstances;
 - a reasonable person in [D's] position
 - would have taken those precautions against the risk
- The standard of negligence is an objective one (Vaughan v Menlove)

Situation	Principal	Relevant Case/s
Minors	A child should not be held to the same standard of care as an adult	(McHale v Watson)
Inexperience/consensual relationships	An inexperienced driver owes the same standard of care as any other person driving a motor vehicle – to take reasonable care to avoid injury to others.	(Imbree v McNeilly)
Disability (Physical)	Even if the standard of care was adjusted for people with physical disabilities, in many cases the disabled defendant would be negligent for having allowed himself to be in the situation that gave rise to the harm in the first place.	(Balkin v Davis)
Disability (Mental)	A D with a mental impairment - which may reduce their cognitive and foresight capacities - will still be held to the standard of a reasonable mentally competent person	(Carrier v Bonham)
D's special knowledge, skill and expertise	If the D holds himself out as possessing a particular skill, he will be judged to the standard of a person possessing that skill If d does not have special skills, d will normally be assessed at the level of skill possessed by a normal person	(s 58(a) Wrongs Act) (Phillips v Whitely) (Rogers v Whitaker)

STEP 5. DID THE D FALL SHORT OF THE STANDARD OF CARE? (NEGLIGENCE CALCULUS)

- D is not negligent unless, in the circumstances, a reasonable person would have taken precautions (s 48(1)(c) Wrongs Act)
- In determining whether a reasonable person would have taken precautions (Wyong), the following factors will be considered by a court (s 48(2) Wrongs Act):
 - Probability of risk occurring - (s 48(2)(a))
 - The greater the probability of harm occurring, the greater degree of care a reasonable person would take (Bolton v Stone) (Romeo v Conservation)
 - Gravity of consequences – (s 48(2)(b))
 - The greater the seriousness of harm if the risk eventuates, the greater degree of care a reasonable person would take
 - The defendant's knowledge of the plaintiff's susceptibility will be relevant to ascertaining the relevant standard. (Paris v Stepney Borough Council)
 - Practicality of avoiding the risk – (s 48(2)(c))
 - The greater the burden involved in taking the relevant precautions, the less likely it is that the reasonable person would have taken such precautions (Graham Barclay Oysters v Ryan) (Romeo v Conservation)
 - Importance of social utility – (s 48(2)(d))
 - The greater the public benefit flowing from the defendant's general activity, the less likely that a reasonable person would have taken precautions that would undermine that public benefit (Roman v Hadba)

STEP 6. APPLY FURTHER BREACH/ES AS NECESSARY

Contravention of Legislative Standards

- Breach of legislative standards may point towards a breach of duty of care, but is **not of itself conclusive** (Tucker v McCann)

Common practice

- **Professionals:**
 - A 'professional' means an individual practicing a profession (s 57 Wrongs Act)
 - A professional is not negligent in providing 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 a significant number of respected practitioners in the field as competent professional practice in the circumstances. (s 59(1) Wrongs Act)
 - **NOTE: s 59 does not apply to failure to warn scenarios (s 60 Wrongs Act)**
- **Non-professionals:**
 - Conformity of peer pressure will be a strong indication that a person has not acted negligently.
 - Such conformity to common practice is nonetheless not necessarily decisive, as such common practice can be negligent (Mercer)

Duty to (Adequately) Warn

- If D owes a DOC to P to give a warning or other information, D must take reasonable care in giving that warning (s 50 Wrongs Act)
- The law should recognise that a doctor has a duty to warn a patient of a **material risk** inherent in the proposed treatment;
 - A risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, **would be likely to attach significance** to it or if 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. (Rogers v Whitaker)

Information Disclosure Test:

In determining whether information should be disclosed, the following list is set out (F v R per King CJ):

1. The nature of the matter to be disclosed
2. Nature of the treatment
3. Patient's desire for information
4. Temperament and health of the patient
5. General surrounding circumstances

As of at What Time is The Standard To be Determined

- The standard of the reasonable person is assessed according to knowledge at the date of the alleged negligence and not at the date of judgement. (s 58(b) Wrongs Act) (Roe v Minister of Health)