BREACH

As established in **Adeels Palace**, **ss 5B** and **5C** of the CLA are directed towards concerns of breach of duty.

First, identifying the risk of harm (**Dederer**);
The negligent wrong in this case is:

- E.g. Dr X's failure to warn Y of the possibility that she may become pregnant should she engage in sexual activity within a 4 week period after the surgery
- E.g. Dr X's failure to prescribe birth control

This created the risk that _____.

1. Standard of Care

In this case, [select from options below]

<[Defendant] is a child. As established in **McHale**, young children are 'expected to exercise the degree of care one would expect not of the average reasonable man, but of a child of the same age and experience'. Therefore, the standard should be lowered>

<Pursuant to **Carrier v Bonham**, the standard will not be modified if [defendant] has a [mental illness/disability]. Unsoundness of the mind is not a normal condition nor a stage of development which all humanity is destined to pass (**Carrier**)>

<The standard will not be modified if [Defendant] is a learner/or inexperienced (**Imbree**). It is irrelevant as regardless of actual technical expertise, since [defendant] proceeded to [act/identified risk] relying on their own judgment, the standard of care is that of the ordinary skilled [professional] (**Papantonakis v ATC**)>

- 'it is, and must be, accepted that a learner driver owes all other road users a DoC that requires the learner to meet the same standard of care as any other driver on the road'.

<[Defendant] is a medical practitioner. Hence, [defendant] will be held to a higher standard of care than the reasonable person, specifically the standard of care of the ordinary skilled medical practitioner, regardless of [defendant's] actual experience as a medical practitioner (**Rogers**)>

- For diagnose and treatment **cases**:
  - If it is accepted that [Defendant] acted in a manner that is **widely accepted** in Australia by peer professional opinion as **competent professional practice** (**s 5O(1)**) and such opinion is **not irrational** (**s 5O(2)**), [Defendant will not be liable for any harmed caused (**s 5O**). On the facts, _____.
  - It is important to note that by **s 5O(3)**: the existence of differing peer professional opinions does not prevent one or more of those opinions from being relied on by the court.
  - **s 5O(4)**: peer professional opinion does not have to be universally accepted to be considered widely accepted.
- For warning **cases**:
  - Wither reference to **s 5P**, **s 5O** will not apply in failure to warn cases. With reference to **Rogers**, there is a duty to warn of a material risk regardless of any widely accepted practice, because a person is entitled to make their own decisions about their life. In the present case, _____.

Therefore, for [relevant breach], [Defendant] will/will not be able to employ **s 5O**.

2. ss 5B(1)(a) and (b)

Consider factors outlined in **s 5B(1)** to determine whether [Defendant] has reached his/her established standard (**Adeels**).

a) Foreseeability of risk of injury (**s 5B(1)(a)**)

Foreseeability is adjudged prospectively (**Adeels**). Only the generally character of the risk of injury is required to be foreseeable (**Doubleday v Kelly**). As established in **Wyong Shire Council v Shirt**, 'a risk which is not far-fetched or fanciful is real and foreseeable'. In the present case, _____.
e.g.

- [the general risk that Y will become pregnant due to X's failure to notify her that she will fall pregnant should she engage in sexual activity within a 4 week period from her operation cannot be considered unfanciful because _____.

It is irrelevant that [identified risk] is unlikely as foreseeability is not a measure of likelihood (**Wyong**).

b) Not insignificant (**s 5B(1)(b)**)

It has been recognised in **Shaw**, that the CLA imposes a more stringent test than the common law test that the risk be 'not far-fetched or fanciful' (**Wyong Shirt Council v Shirt**).

With reference to Basten JA in **Drinkwater**, a risk cannot be considered insignificant if [plaintiff] was clearly at risk. Hence, _____[apply the facts].

Therefore, risk is foreseeable and not insignificant.

3. Calculus of Negligence

To determine whether a reasonable person in [defendant's] position would have taken precautions of _____, regard must be made to factors outlined in **s 5B(2)** of the CLA (**Adeels Palace**).

It is important to note that a duty of care only imposes an obligation to exercise reasonable care, not a duty to prevent potentially harmful conduct (**Dederer**).

a) Probability

It is/is not highly probable that _____. A high/low probability arguably indicates a high/low need for precautions.

i. **Bolton** – it is justifiable not to take steps to eliminate risk if the probability of it happening is so small, a reasonable person would not take the steps to eliminate it.

ii. **Romeo** – probability of risk was low because it was *obvious*.
iii. **RTA v Dederer** – risk was low since people jump off & rarely has someone been injured.

b) Likely seriousness of harm

_____ [harm] would likely be of high/low severity. This is because _____.

i. **Paris v Stepney** – if [Defendant] knows of some vulnerability of the [plaintiff] that would make [plaintiff] susceptible to graver injury, the level of seriousness of the potential consequences elevates the level of care required by [defendant], notwithstanding the probability of injury is the same for this individual as for others
ii. **Mackintosh** – Degree of care proportioned by degree of risk
iii. **Paris** – amount of harm varies not only with vulnerability of [plaintiff], but degree of danger arising out of the kind of agency with which the [defendant] is dealing.

c) Burden of Precautions

There is a minimal/high burden on [defendant] should he/she have taken the precaution of _____.

Especially when weighed against the likely probability and seriousness of the harm (**Romeo**), the burden of taking such a precaution is high/low/small/large. A reasonable person would have taken such precautions.

i. **Neindorf** – if risk was 'so obvious and ordinary', [defendant] would not be required to take action to prevent it
ii. **Refrigerated Roadways** – held that it would be too much of a burden given budgetary constraints
iii. **Woods** – impractical to carry out such precautions given no such precautionary equipment had been designed

d) Social Utility of Activity Creating Harm

There is widespread benefit of [activity]/ This activity only affects those in [plaintiff's] sphere of influence, not the general public. This is because _____.

On balance, given the high/low probability, the high/low gravity of the harm, the practicability of the solution and the existence/absence of a prevalent social utility, a reasonable in the [defendant's] position would have _____.

…