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6.4 Breach of Duty

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Once a DoC is established, the court then turns to determine whether the D breached their DoC. The breach allegedly committed by the D was their failure to [careless behaviour] when performing their role as [P's role/job]. The breach in question is in relation to the P, who the D owes a DoC to.

**identify the specific act and omission*

CHECKLIST

- Particularise the breach
- What was the standard of care?
- Did the D of the standard of care?
 1. RF (hurdle)
 2. More than insignificant risk (hurdle)
 3. Negligence calculus
 - If applicable:
 - Contravention of legislative standards
 - Common practice
 - Failure to warn tests
- Conclude
- Alternative = Res Ipsa Loquitur

6.4.1 PRELIMINARY MATTERS

No degrees of breach

- In the Australian law of negligence, there are no degrees of breach.
- It is irrelevant to the breach whether the D being a little careless by the reference standard by the court or whether he is being grossly careless, as long as he acted less carefully than would the RP in the circumstances.

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- It does matter for the purposes of breach whether the D's conduct just failed to make the relevant standard or whether he failed to make the relevant standard massively. In either case, the D will breach the DoC to the P.

Significance of past factual decisions

- The mere finding by one court that conduct engaged in by a D in a particular case breached a duty of care, will not bind another court deciding another case, even if the circumstances of the two cases are virtually the same (*Qualcast (Wolverhampton) Ltd v Haynes*)

6.4.2 STANDARD OF CARE

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D is not negligent in failing to take precautions against a risk of harm, unless in the circumstances, a RP in D's position would have taken those precautions (s 48(1)(c) WA).

E.g. the risk of harm: the harm of falling from significant height

How the court apply the RP standard?

Does the D have any characteristic which may alter the standard of care that they owe?

Minority	<ul style="list-style-type: none"> ▪ A child will be held to the standard of any ordinary child of a comparable age. The child would not be held to the same standard of care as an adult (<i>McHale v Watson</i>). ▪ There is a divergence of judicial opinion as to what other characteristics of a child may be taken into account in determining the standard of care (<i>McHale v Watson</i>).
Physical disability	<ul style="list-style-type: none"> ▪ Even if the standard of care was adjusted for people with physical disabilities, in many cases the disabled D would be negligent for having allowed themselves to be in the situation that gave rise to the harm in the first place (<i>Balkin and Davis</i>) <p>E.g. a blind person who crashed his car will be found negligence in driving since a reasonable blind person would not try to drive the car.</p>
Psychiatric illness	The D's mental illness will not be taken into account in determining the standard of care to which the D should be held (<i>Carrier v Bonham</i>)
Inexperience/Consensual relationship	The D's lack of experience in a certain area of endeavour cannot be taken into account in determining the relevant standard of care (<i>Imbree v McNeilly</i>) E.g. Inexperience car driver will be held to the same standard as experience car driver.
The D's special knowledge, skill and expertise	<p>If the D has special skills, the relevant standard will be that of a RP with those special skills regard to ___ (<i>Phillips v Williams Whitely</i>)</p> <ul style="list-style-type: none"> ▪ If the D do not have special skills, they will normally be assessed at the level of skill possessed by a normal person (<i>Phillips v Williams Whitely</i>).

	<ul style="list-style-type: none"> ▪ If D holds themselves out as possessing a particular skill, they will be judged to the standard of a person possessing that skill (s 58(a); <i>Phillips v Whitely</i>). – Did the D say/do something points towards that he/she has that special skill?
Time when the D's conduct is judged	The standard of the RP is assessed according to knowledge at the date of the alleged negligence and not at the date of judgement (<i>Roe v Minister of Health</i>)
<u>Template</u> The D would be held a reasonable person standard with [apply the facts].	

6.4.3 REQUIREMENTS OF BREACH	
Hurdle requirement	
<ul style="list-style-type: none"> ▪ A person is not negligent in failing to take precautions against a risk of harm unless (s 48(1)) <ul style="list-style-type: none"> (a) the risk was foreseeable (b) the risk was not insignificant (c) in the circumstances, a RP in the person's position would have taken those precautions (see above) 	
A person will only be negligent that breach the DoC if the risk of harm that was RF, and was something more than insignificant	
Reasonable foreseeability	<ul style="list-style-type: none"> ▪ Was it RF that the P (either as an individual or group/class of persons) might be harmed by the specific act or omission in respect of the breach which is alleged? ▪ <i>Was it RF that D's act may have resulted in harm to P, or class of persons that P belong?</i> <p><u>Template</u> The P will argue that it was RF (that is, it is a risk of which the person knew or ought to have known) that the P might be harmed by the specific act or omission in respect of the breach which the D is alleged (s 48(1)(a) WA; <i>Wyong Shire Council</i>). <i>*mention the standard of care that the D owed</i></p>
More than insignificant risk	<ul style="list-style-type: none"> ▪ The risk of harm must be 'not insignificant' (s 48(1)(b)). ▪ 'Not insignificant' means 'not far-fetched or fanciful' (<i>Wyong Shire Council</i>; s 48(3)(a)) ▪ However, simply because the risk is more than far-fetched or fanciful, it will not have the result necessarily that it is more than insignificant – Does it happen in the past? Then it is enough to make the threshold <p><u>Template</u> It is very likely that the risk of the P being harm as a result of the P's failing to __ was more than insignificant (s 48(1)(b)), in the sense that no far-fetched or fanciful (48(3)(a)). It is because __</p>

6.4.4 THE NEGLIGENCE CALCULUS

- The D is not negligent in failing to take precautions against a risk of harm, unless in the circumstances, a RP in the D's position would have taken those precautions (s 48(1)(c) WA).
- What would a RP (with the standard above) have done?

Primary factors

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The D is not negligent in failing to take precautions against a risk of harm, unless in the circumstances, a RP in D's position would have taken those precautions (s 48(1)(c) WA). In determining whether a RP would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) (s.48(2))

- (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; and
- (d) the social utility of the activity that creates the risk of harm.

<p>Probability of harm (s.48(2)(a))</p>	<ul style="list-style-type: none"> ▪ The greater the probability of harm occurring, the greater degree of care that is necessary for a RP standard to be satisfied (<i>Bolton v Stone</i>) ▪ The greater the probability of harm occurring, this points towards a RP would take precautions against the risk eventuating (<i>Bolton v Stone</i>). It then points towards that the D breached a DoC if he/she did not take those precautions ▪ <i>E.g the risk of harm: the harm of falling from significant height</i> ▪ Argument: though these facts will point away from breach somewhat, they are distinguished from <i>Bolton</i> where the circumstances were 'altogether exceptional' <p>But the risk of harm cannot be viewed in isolation in determining what a RP would do in particular circumstances. (<i>Romeo v Conservation Commission of the NT</i>)</p>
<p>Gravity of Consequences (s.48(2)(b))</p>	<ul style="list-style-type: none"> ▪ The more serious the consequences if the risk eventuates, the greater the degree of care that is necessary for the RP standard to be satisfied (<i>Paris v Stepney Borough Council</i>) ▪ <i>E.g the risk: falling from significant height -> cause severe result</i> ▪ The D's knowledge of the P's susceptibility will be relevant to ascertaining the relevant standard (<i>Paris v Stepney Borough Council</i>)
<p>Practicality of avoiding risk (s.48(2)(c))</p>	<ul style="list-style-type: none"> ▪ <u><i>From the D's perspective</i></u> ▪ The higher the cost, or the greater the burden, of taking precautions, the less likely it is that a RP would have taken those precautions (<i>Graham Barclay Oyster v Ryan</i>) ▪ What happen if the P avoided the risk? -> to evaluate whether the burden is high or low ▪ Unlike the case of <i>Graham</i>, in which the Barclay companies did not breach their duty of care because they has no way of entirely eliminating the risk of contamination.
<p>Social utility (s.48(2)(d))</p>	<ul style="list-style-type: none"> ▪ The D may argue that his/action will create social utility ▪ The greater the benefit to other people of the activity, the less likely it will be that a RP would take precautions that would interfere with that activity, then the less likely it will be a breach (<i>Roman Catholic Trustees v Habda</i>)

	<ul style="list-style-type: none"> ▪ <i>One possible argument</i>: the risk to the community is not emergency, no one will be directly threatened by that. Any consideration which is given to social utility here should be limited
Other factors	
Contravention of legislative requirements	<ul style="list-style-type: none"> ▪ Contravention by the D of a legislative requirement is not determinative of breach. Contravention is just one factor to be considered (<i>Tucker v McCann</i>) ▪ Breach of legislative standards may point towards a breach of DoC, but it is not itself conclusive - whether D breached a DoC is determined in light of the circumstances (<i>Tucker v McCann</i>) <p>E.g. instances may arise where you may need to break a law in order to save your own life e.g. cross double solid lines on a road – maybe do with a good intention</p> <p><u>Template</u> Breach of legislative standards may point towards a breach of DoC, but it is not itself conclusive. A breach is determined in light of the circumstances (<i>Tucker v McCann</i>)</p>
Common Practice	<p>Professionals</p> <ul style="list-style-type: none"> ▪ A professional is not negligent in providing a professional service if it is established that that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by significant number of respected practitioners in the field as competent professional practice in those circumstances (s59 (1) WA) ▪ <i>Did they get a tertiary degree?</i> <p>What if there are differing professional views?</p> <ul style="list-style-type: none"> ▪ It does not matter if there are a range of opinions that are supported by a significant number of respected practitioners, each opinion may still be relied on for the purposes of this section (s 59 (3)) ▪ Peer professional opinion does not need to be universally accepted to be considered widely accepted (s 59 (4)). <p>Unreasonable peer professional views</p> <ul style="list-style-type: none"> ▪ Peer professional opinion cannot be relied upon for the purposes of this section if the court determines that the opinion is unreasonable (s59 (2)) <p>Warning</p> <ul style="list-style-type: none"> ▪ s 59 does not apply when negligent act is a failure to give a proper warning (s 60). ▪ Therefore, it is necessary to discuss the common law position with regard to common practice ▪ Conformity with common practice, does have the conclusive result that the D has not breached their DoC, it is only affected taken into account in determining what the RP would have done and therefore whether the D is in breach (<i>Mercer v commissioner for Road Transport & Tramways (NSW)</i>) ▪ Does the D conform with what other professionals would do? <p><u>Template</u> <i>Is Liz a professional?</i></p> <ul style="list-style-type: none"> ▪ The P can only rely on s 59 if she/ he is professional. ▪ Even the P is not a professional, if he/she has in fact acted in accordance with the peer professional opinion, that would probably weigh against that she breached a DoC

	<p>Widely accepted (s 59 (1))?</p> <p>In order to determine her conduct was widely accepted by a significant number of respected practitioners (s 59 (3)). For Peer professional opinion be considered widely accepted, it does not need to be universally accepted to (s 59 (4)). OTF, _____.</p> <ul style="list-style-type: none"> – If it is unclear: we need to know more about the degree of support for the approach she adopted. <p>Is it unreasonable?</p> <p>The peer professional opinion cannot be relied upon if the court determines that the opinion is unreasonable (s 59 (2)). The statute does not give any guidance for determining whether the opinion will be unreasonable. However, one possibility is that the opinion would be unreasonable if the conduct will fall far short of the normal reasonable person standard accessed by the reference of negligence calculus. If there has been a breach, P’s behaviour in [the negligent act] would probably just fall short of the standard of RP, it is unlikely that the peer professional opinion here is unreasonable.</p>
<p>Failure (adequately) to warn</p>	<p>Doctor & patient</p> <ul style="list-style-type: none"> ▪ Doctors have a duty to warn patients about “material” risks inherent in proposed treatment (<i>Rogers v Whitaker</i>) ▪ A risk will be a “material” risk if: (<i>Rogers v Whitaker</i>) <ul style="list-style-type: none"> – a RP in the P’s position would be likely to attach significance to it; or – the doctor is aware, or should reasonably be aware, that the particular the P, if warned of the risk, would be likely to attach significance to it. ▪ The duty of disclosure is subject to “therapeutic privilege” (<i>Rogers v Whitaker</i>) <p><u>Template</u></p> <p>If the D owes the P a DoC to give a warning or other information in respect of a risk or other matter, the D must take reasonable care in giving that warning (s 50).</p> <ul style="list-style-type: none"> ▪ In determining whether information should be disclosed (and the amount of information), the following list is set out (<i>F v R</i> per King CJ) <ol style="list-style-type: none"> 1. The nature of the matter to be disclosed <ul style="list-style-type: none"> – A small risk of <u>great harm</u> might call for disclosure although a greater risk of slight harm would not (<i>F v R</i>) – E.g the seriousness of the harm if it eventuates 2. Nature of the treatment <ul style="list-style-type: none"> – The more drastic the proposed intervention in the patient’s physical make-up, the more necessary it is to keep him fully informed as to the risks and likely consequences of the intervention (<i>F v R</i>) – Complex? – Not serious or complicated > the less we told – E.g the degree of seriousness of the treatment 3. Patient’s desire for information <ul style="list-style-type: none"> – The greater of patient’s desire about the risk of procedure, the greater amount of information has to be given (<i>F v R</i>) 4. Temperament and health of the patient

	<ul style="list-style-type: none"> - Doctor is justified in withholding information, and in particular refraining from volunteering information, when he judges on reasonable grounds that the patient's health, physical or mental, might be seriously harmed by the information (<i>F v R</i>) <p>5. General surrounding circumstances</p> <ul style="list-style-type: none"> - The existence of emergency conditions that leaves no time for disclosure, the absence of opportunity for detached reflection or calm counselling and the existence of alternative sources of advice (<i>F v R</i>)p
<i>Res ipsa loquitur</i>	<ul style="list-style-type: none"> ▪ Meaning: "The thing speaks for itself" ▪ Applies in the situation that the P is unable to point out the specific act or omission that the D committed ▪ In the absence of direct evidence on how any the D behaved, this legal doctrine infers negligence from the very nature of the accident or injury. ▪ E.g. glass in the D's milkshake <p>Pre-conditions for <i>res ipsa loquitur</i> (<i>Schellenberg v Tunnel Holdings</i>)</p> <ol style="list-style-type: none"> I. The cause of the occurrence in question must be unexplained. <ul style="list-style-type: none"> • In circumstance where the P cannot point out the specific negligent act (<i>Schellenberg v Tunnel Holdings</i>) II. The occurrence in question must be the kind of thing that would not normally happen if reasonable care were taken. <ul style="list-style-type: none"> • It must be possible for an <i>ordinary person without expert knowledge</i> to determine whether the accident would not normally occur without negligence (<i>Schellenberg v Tunnel Holdings</i>) • NOTE it is not Res Ipsa Loquitur if expert knowledge is required (<i>Schellenberg v Tunnel Holdings</i>) III. The situation in which the occurrence occurred must be in the D's exclusive control. <ul style="list-style-type: none"> • Normally sufficient if people of whom Dis responsible are in control. But possible exception if employee is P and employer is D (<i>Schellenberg v Tunnel Holdings</i>) • Court will not draw the inference that the D had been negligent if other people other that D might have been responsible (<i>Shellenberg; Murray v Irvings</i>) <p><i>The effect of res ipsa Loquitur</i></p> <ul style="list-style-type: none"> ▪ Satisfaction of conditions does not require court to find breach. Rather, the court may <i>infer</i> breach from fulfilment of conditions. The P still has burden of showing that the D has been negligent. ▪ If the D can prove how the incident occurred, this cannot be relied upon and P has to determine breach in the normal way.
<p><u>Template</u> On balance, it is likely that the court will find that the D breached the duty to the P by [careless conduct].</p>	