

Torts JURD 7161		
Breach of Duty		
Breach definition	<i>Blyth v Birmingham Waterworks Co</i> (1856)	To establish breach of duty, the plaintiff must prove that the defendant's conduct fell short of the standard of reasonable care by adducing evidence showing on the balance of probabilities that the defendant failed to take the precautions that a reasonable person in the defendant's position would take in the circumstances at the time in response to a reasonably foreseeable and not insignificant risk of harm. (<i>Blyth v Birmingham Waterworks Co</i>)
Standard of Care		
Children		
Reasonable child	<i>McHale v Watsons</i>	Because the defendant is a child, the fact that a child does not have same knowledge and experience as an adult should be taken into account; the standard of care for a child is lowered. But the same allowance is not applied to those of advanced age. In the present case, the kid is ...old; he is not held to the standard of an ordinary 'person' but to the standard of an ordinary reasonable child of similar age, with ordinary experience and intelligence.
Mental Illness and disability		
Reasonable person	<i>Carrier v Bonham</i> [2002]	The standard of care of a mentally ill defendant is of no difference to a normal adult.
Learners: the knowledge that the plaintiff has of the defendant's level of experience		
Reasonable person	<i>Imbree v McNeilly; McNeilly v Imbree</i> (2008)	Beginners who undertake ordinary activities will generally be held to the standard of the reasonable person with ordinary care and skill Although knowledge of inexperience may be relevant to the issue of contributory negligence on the part of the plaintiff ..., it does not alter the standard of care required of the driver.
Professionals: the defendant have held themselves out as possessing special skills and experience, or they are members of a profession, or are specialists within a profession		
Reasonable professional	<i>Civil Liability Act NSW 2002</i> s 5O – 5P	5O Standard of care for professionals Section 5O(1) <ul style="list-style-type: none"> • The defendant is a 'professional' • The defendant is 'providing services' • The service is 'widely accepted' in Australia by peer professional opinion as competent professional practice Section 5O(2) <ul style="list-style-type: none"> • The peer professional opinion must not be irrational Section 5O(4) – Doesn't have to be universally accepted to be 'widely accepted'. 5P Division does not apply to duty to warn of risk This Division does not apply failure to give warning.
	<i>Rogers v Whitaker</i> (1992)	A doctor has a duty to warn a patient of any material risk of the proposed treatment if a patient may have acted differently to it, even when the probability is very small
Establishing Breach		
Legislation	<i>Civil Liability Act NSW 2002</i>	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 (more stringent than <i>Wyong Shire Council v Shirt</i>)
Reasonable foreseeability	<i>Doubleday v Kelly</i> [2005]	Foreseeability need not apply to the specific events but what is to be considered is foresight in more general terms.
Unlikely Risk	<i>Wyong Shire Council v Shirt</i> (1980)	An unlikely risk can still be a foreseeable risk.

Not insignificant	<i>Drinkwater v Howarth</i> [2006]	It is not as stringent as 'significant' (Ipp Report) ;it is treated as little difference from not 'farfetched and fanciful'.
Calculus of Negligence		
Legislation	<i>Civil Liability Act NSW 2002</i>	Division 2 – Duty of care 5B General principles (c) in the circumstances, a reasonable person in the person's position would have taken those precautions. (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) (Calculus of negligence): (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. Subjective test of facts.
Prospective judgment	<i>RTA v Dederer</i> (2007)	Prospective judgment - Precaution is adjudged prospectively based on the information available to the reasonable defendant at the time
Probability	<i>RTA v Dederer</i> (2007)	Probability of harm - the risk of harm eventuating, not risk of people doing risky activities.
	<i>Romeo; Bolton v Stone</i>	Low probability despite high seriousness still means there is no need to take precautions.
The gravity/seriousness of the harm	<i>Paris v Stepney Borough Council</i> [1951]	When knowledge of the seriousness of potential harm is high, this increases the standard of care required of the defendant.
Burden of taking precautions	<i>Woods v Multi-Sport Holdings</i> (2002)	A reasonable response is determined by a balance of the probability and seriousness of harm with the cost of prevention. Warning – not required when risks are obvious.
Social utility of the risk creating activity	<i>E v Australian Red Cross Society</i> (1991)	The social utility for not taking precautions should be considered.
Causation: legislation and common law closely identical		
Factual Causation		
General Principles	<i>Civil Liability Act 2002 (NSW) s 5D</i>	(1) A determination that negligence caused particular harm comprises the following elements: a) that the negligence was a necessary condition of the occurrence of the harm (" factual causation ") <i>But for Test</i> <ul style="list-style-type: none"> Section 5D is the 'but for' test (<i>March v Stramare</i> (1991)) considered in all tests for causation except s5D(2) (<i>Adeels Palace v Moubarak</i> (2009)). Satisfied if chain of causation is not broken. <i>Necessary condition</i> (<i>Strong v Woolworths Ltd</i> [2012]) <ul style="list-style-type: none"> A condition that must be present for the occurrence of a harm Any single act or omission that materially contributes to the occurrence of harm will meet the test of factual causation. The act or omission does not need to be the sole necessary condition. and (2) In determining in an exceptional case , in accordance with established principles, whether negligence that <u>cannot</u> be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party. <ul style="list-style-type: none"> Common Sense Test based on policy