

BREACH OF DUTY

- 1) Plaintiff must **identify a risk of harm** against which the plaintiff alleges the defendant would be negligent for failing to take precautions (*Benic v State of NSW*).

HARM includes 'harm of any kind ... including personal injury or death, damage to property and economic loss' (s 5 Civil Liability Act).

- a) "personal injury" includes pre-natal injury, impairment of a person's physical or mental condition, and disease (s 5 Civil Liability Act)

- 2) **Establish the breach of duty**

- a) State that the test to determine the standard of care owed by the defendant to the plaintiff is an objective one:

- i) *Glascow v Muir*.

Lord Macmillan "*The reasonable man of ordinary intelligence and experience.*"

- 3) **Does the standard of care change?**

- a) D is child = lower standard *Mchale v Watson*
- b) D has knowledge = may raise standard
- c) D's experience = no change *Imbree v McNeilly*
- d) P with known disability = may raise standard *Paris v Stepney BC*
- e) P is intoxicated = no change *March v Stramare*

- 4) **State that breach is a question of fact. Breach of duty is a two part enquiry.**

- a) What is a foreseeable risk?
- b) How would a reasonable person respond?

- 5) **Apply s5B(1) of the CLA (NSW)** 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)

- i) *Tame v NSW*

- ii) *Chapman v Hearse*

- iii) *Wyong Council v Shirt*

Mason J – A risk of injury which is quite unlikely to occur, such as that which happened in *Bolton v Stone* may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of the occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful.