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1. Standard of care: the measures that a reasonable person in the circumstances of the defendant would take to reduce the risk of harm. This considers the foreseeability of the risk of injury.

### CLA s5B

- (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)

### *Wyong Council Shire v Shirt*

**Catchwords:** breach of duty, reasonable foreseeability far-fetched/ fanciful, water-skier

**Material Facts:** water-skier, ambiguous sign about shallow water, became quadriplegic

**Legal issue:** Whether the risk of injury resulting from confusion from the sign was foreseeable?

**Ratio:** Reasonable foreseeability in terms of breach of duty means the risk is not far-fetched nor fanciful.

The court does not consider its probability or improbability at this stage. In this case, the risk was that the ambiguity of the sign might induce people to believe that water was deep and therefore safe for water skiing, which was foreseeable.

### *Doubleday v Kelly*

**Catchwords:** Breach of duty, reasonable foreseeability, trampoline, roller blades

**Material Facts:** Girl stayed at friend's house, put on roller skates and jumped on trampoline, injuring herself, early hour of morning, children were unsupervised, warning was given to children the night before not to use the trampoline

**Legal issue:**

**Ratio:** Alleged risk was that if the child was unsupervised, she would use the trampoline in a hazardous way and might injure herself. Risk is considered in foresight and in general terms of inquiry – even if the actual events as they happened are very unlikely, they are not what is considered in terms of foreseeability of risk.

2. While the standard of care is determined using an objective test of a 'reasonable person', it may still be affected by the status of the defendant

- a. Children - yes

### *McHale v Watson*

**Catchwords:** negligence, standard of care, children, dart

**Material Facts:** 12-year-old boy threw a metal dart at a post but the dart glanced off the post and hit a nine-year-old girl in the eye.

**Legal Issue:**

**Ratio:** The boy was found not to be negligent because a boy of 12 years could not be expected to foresee that the dart might not stick into the post and could go off at a tangent and hit someone. 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. This is because childhood is a normal stage of humanity that everyone undergoes. It would be unfair to require a child to have the response of an experienced adult.

This does not break the idea of an objective test - it is consistent with it because it measures objectively with reference to other children.

- b. Mentally Disabled - no

### *Carrier v Bonham*

**Catchwords:** negligence, standard of care, mentally disabled, bus

**Material Facts:** A man suffering from Schizophrenia walked in front of a bus, hurting himself. As a result, the bus driver suffered great mental harm, and sued the pedestrian.

**Legal Issue:**

**Ratio:** Unsoundness of mind is not a normal condition...and it is not a stage of development through which all humanity is destined to pass. There is no such thing as a 'normal' condition of unsound mind...For that reason it would be impossible to devise a standard by which tortious liability of such persons could be judged as a class. Thus, the mental disability did not diminish or reduce his liability in negligence to the plaintiff.

c. Learners - no

*Imbree v McNeilley; McNeilley v Imbree*

**Catchwords:** negligence, standard of care, learners

**Material Facts:**

**Legal Issue:**

**Ratio:** Learners (as in learner car drivers or beginners in a profession) will be held to the same standard of care as anyone else. That standard of care is not to be further qualified, whether by reference to the holding of a licence to drive or by reference to the level of experience of the driver. A learner driver owes all other road users a duty of care that requires the learner to meet the same standard of care as any other driver on the road. Being authorised by the applicable law to drive unsupervised on a public road is neither a necessary nor a sufficient characteristic of the reasonable driver. Holding or not holding the relevant license is irrelevant to the description or application of the relevant standard of care.

d. Professionals - yes

**CLA s50**

- (1) A person practicing a profession does not incur a liability in negligence arising from the provision of 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 peer professional opinion as competent professional practice.
- (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational
- (3) The fact that there are different peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

**S5P**

This division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death or injury to a person associated with the provision by a professional of a professional service.

*Rogers v Whitaker*

**Catchwords:** professionals, eye surgery, breach of duty of care.

**Material Facts:** The Plaintiff had cosmetic surgery over a defective eye. In the process of the surgery, the Defendant injured the Plaintiff's good eye, thereby blinding her completely.

**Legal Issue:**

**Ratio:** Where a defendant is considered a professional (that is, a man possessing expert skill in an area), he will be held to a higher standard of care in his field of expertise.

Originally, the courts followed the **Bolam Principle**, which said that a professional cannot be found negligent if he acted in accordance to a widely accepted practice (recognised by some professional body). Rejection of the Bolam principle. Rather, the standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill. Also, there is a duty to warn of a material risk (because that is what a reasonable doctor would do) regardless of any 'widely accepted practice'. Risk is material if the patient would attach significance to it or if he expresses concern.