

The Doctor Problem

Walter is a general practitioner working for the NHS. Consider what, if any, liabilities in tort he will incur in the following situations:

(a) Sabrina, a prostitute, saw Walter every month to be tested for whether she was HIV+. One month, Walter carelessly mixed up the results of Sabrina's test (which were negative) with someone else's results and informed Sabrina that she was indeed HIV+. Sabrina immediately stopped working as a prostitute so as to ensure that she did not infect her clients. She informed one of her regular clients, Alonso, that she had tested HIV+ and advised him that he should have himself tested. He was so distracted and worried by the news that he crossed the road without looking and was run down and killed by a (carefully driven) car. Sabrina subsequently had a second test and discovered that she was not HIV+. She has now gone back to work as a prostitute.

(b) Eric, a friend of Walter's, was applying for a job at Harry's firm and needed two professional acquaintances to say on his application form that he was of good character and had no criminal convictions. Eric rang Walter up and asked him if Walter would serve as one of his referees on the application form. Walter said he would be delighted to do so; as he was very busy, he told Eric to drop the form off with his receptionist and that he would deal with it later. Unfortunately, when Walter did get around to filling in the form, he carelessly spilled a cup of coffee all over it. Eric had to apply for a new form and by the time he had filled in and submitted the new application form, the job he was applying for had already gone.

(c) Ian, a young boy, was in Walter's waiting room with his mother, Hilda, when he started choking on a gobstopper that he had been sucking. Unable to extract the gobstopper, Walter decided that he should perform a tracheotomy on Ian (an operation whereby a hole is made in the patient's windpipe below the area where it is blocked, thus allowing the patient to breathe). Hilda objected, saying "If it is the will of God that Ian die in this way, he should be allowed to do so". Walter pushed her out of the way and made an incision in Ian's neck. Unfortunately, he failed to perform the tracheotomy successfully and Ian died of suffocation. It was found that Walter failed, in performing the tracheotomy, to perform the operation with the degree of care and skill that a surgeon would have exercised in performing the operation and that had he done so, Ian's life would probably have been saved.

Model answer

Taking each possible claimant in turn –

(a)

Sabrina

Sabrina will want to sue Walter in negligence for damages to compensate her for the loss of income that she suffered when she stopped working as a prostitute.

While Walter did commit the tort of negligence in relation to Sabrina when he misinformed her that she was HIV+ (he owed her a duty under the extended principle in *Hedley Byrne* to test her with a reasonable degree of care and skill and he breached that duty in mixing up her test results with someone else), it is unlikely that she can

recover damages for (1). This is for two reasons. First, the purpose of Walter's testing Sabrina was to find out whether she was HIV+ so that if she were HIV+ she would receive swift and effective medical treatment. So the duty Walter owed Sabrina to test her with reasonable skill and care was imposed on him in order to help ensure that if Sabrina were HIV+, she would receive swift and effective treatment. Walter's negligence here has not prevented Sabrina receiving adequate medical treatment for her (fictional) condition of being HIV+. Walter's negligence has resulted in Sabrina suffering a quite different kind of loss – an interruption in her earnings as a prostitute. Given this, the decision of the House of Lords in the *South Australia* case may apply to prevent Sabrina suing for damages in respect of this loss – it is non-actionable because it is the wrong kind of loss; not the kind of loss which the duty breached by Walter was imposed on him in order to avoid. The second reason why the loss of earnings suffered by Sabrina as a result of Walter's negligence is likely to be non-actionable is that it would be contrary to public policy for the courts to award her compensation for this loss.

Alonso's dependants

It is very unlikely that Alonso's dependants will be entitled to bring an action for loss of support against Walter. They will find it very difficult to show that Walter committed a tort *in relation to Alonso* when he mixed up Sabrina's test results. It was hardly reasonably foreseeable that mixing up Sabrina's test results would expose Alonso to an unreasonable risk of being injured so as to warrant a finding that Walter owed Alonso a duty to take care not to mix up those results under the principle in *Donoghue v. Stevenson*. Moreover, there was no 'assumption of responsibility' by Walter to Alonso which would justify us in finding that Walter owed Alonso a duty to test Sabrina with reasonable skill and care under the principle in *Donoghue v. Stevenson*.

(b)

Eric

Eric will probably be able to sue Walter in negligence for damages to compensate him for the fact that, as a result of Walter's carelessness, he did not get a chance to apply for the job at Harry's firm. Walter owed Eric a duty under the extended principle in *Hedley Byrne* to fill out the form with reasonable skill and care – he indicated to Eric that he could be safely relied on to fill out the form with reasonable skill and care and Eric so relied on him by asking Walter, rather than someone else, to fill out the form. Walter breached this duty by carelessly spilling coffee all over the form and as a result Eric was deprived of the chance of applying for the job at Harry's firm. The damages payable to Eric should take into account the probability that he would have obtained the job for which he was applying; so if it is the case that had he applied for the job, he would have had little chance of obtaining it, the damages payable to him to compensate him for that loss of a chance should be very small. There is no reason why Eric cannot sue Walter in negligence for damages to compensate him for the fact that Walter's negligence resulted in him losing a chance of obtaining a job at Harry's firm, particularly as this is a *Hedley Byrne* situation where damages for pure economic loss are routinely awarded; the loss of a chance suffered by Eric here is, of course, a form of pure economic loss.

(c)

Ian's estate

Ian estate may want to sue Walter for damages on the ground that he committed a battery in treating Ian. (Such damages are likely to be nominal as Ian did not actually suffer any loss as a result of Walter's treating him; had Walter not treated him, Ian would certainly have died of suffocation. It is unlikely that Ian's estate could claim any exemplary damages from Walter as he acted in good faith in treating Ian.) However, Walter probably did not commit a battery in treating Ian. While Ian did not expressly consent to being treated by Ian because he was not in a position to indicate his wishes, there can be little doubt that he did consent to being treated by Walter, given the emergency in which he found himself. Given this, the fact that Hilda did not consent to Ian's being treated is irrelevant. It might be different if Ian had been a two year-old child and in no position to form wishes as to whether or not he wanted to be treated; in such a case Walter might well have had to obtain Hilda's consent before treating Ian to make his treatment of Ian lawful.

Hilda

Hilda will want to bring two different kinds of claim against Walter: a claim for bereavement under the Fatal Accidents Act 1976; and a claim in battery.

Claim for bereavement

In order to bring a claim for bereavement against Walter, Hilda will have to show: (1) that Walter committed a tort in relation to Ian that caused Ian's death; and (2) had Ian survived Walter's treatment but suffered some lesser injury as a result of that treatment, he would have been entitled to sue Ian for damages in respect of that injury.

It is hard to say whether (1) can be made out. Walter may have committed the tort of battery in treating Ian (see above) – but even if he did, his committing that tort did not cause Ian to die; had he not treated Ian, Ian would have died anyway. As Ian was his patient, Walter owed Ian a duty to treat him with reasonable skill and care. Did he breach that duty? He failed to treat Ian in the way a surgeon would have – but, it is submitted, that is not determinative of the issue of whether Walter was negligent in treating Ian. The real question is whether Walter performed the tracheotomy on Ian with the skill and care that a *reasonable general practitioner* would have shown in performing a tracheotomy: see the *Wilsher* case in the Court of Appeal. We don't have any information on that issue. If Walter did fail to come up to the standards of a reasonable general practitioner in performing the tracheotomy, then he will have committed the tort of negligence in relation to Ian in treating him and his negligence will have caused Ian's death – assuming, of course, that Ian's life would have been saved had Walter operated on him with the skill and care that a reasonable general practitioner would have employed in performing the operation. (1) will therefore be made out.

If (1) is made out then there is little problem showing that (2) would also be made out – if Walter was negligent in performing the tracheotomy then Ian would have been entitled to sue Walter had he survived the operation but instead lost the use of his vocal chords as a result of Walter's bungling. So if (1) is made out, Hilda will

probably be entitled to bring a claim for bereavement against Walter; and this is so even though she was perfectly happy to see Ian die.

Claim in battery

Hilda may also want to sue Walter for committing the tort of battery in relation to her when he pushed her aside. Whether or not Walter committed the tort of battery in so acting will depend on whether it was lawful for him to operate on Ian. If it was lawful, then Walter – it is submitted – will be able to raise a defence of necessity to Hilda’s claim; he had to push her aside to save Ian’s life, as he was entitled to do. If it was not lawful for Walter to operate on Ian, then Walter will not be able to raise a defence of necessity to Hilda’s claim; he had no need to push Hilda aside as it was not lawful for him to operate on Ian. We have already submitted that it was lawful for Walter to operate on Ian. Given this, Hilda’s claim in battery against Walter should fail.

Comments on the model answer

(1) Always take into account the examiner’s possible prejudices in doing your problem answer. For instance, the examiner marking your answer to this question might share the popular misconception that there is some problem with actions being brought in negligence for the loss of a chance to obtain some benefit or avoid some detriment. (This misconception is based on a misreading of the House of Lords’ decision in *Hotson v. East Berkshire HA* [1987] AC 750.) So you should take that into account in doing your problem answer and say something to reassure the examiner that *here* there is no problem with Eric bringing a claim in negligence against Walter to be compensated for the fact that Walter’s negligence has resulted in him losing a chance to obtain employment in Harry’s firm. You don’t have to say much – but just enough to stop the examiner thinking, “But he/she’s overlooked the problems involved in bringing a claim in negligence so as to be compensated for the loss of a chance to obtain some benefit!” and marking you down.

(2) There’s no doubt that Walter owed Ian a duty to treat him with reasonable skill and care in the above problem. But if you think about it, it’s actually very difficult to explain just why Walter owed Ian such a duty of care. Ian didn’t rely on Walter to treat him with such skill and care – he didn’t choose to be treated by Walter in the expectation, encouraged by Walter, that he would be treated with reasonable skill and care. Walter didn’t deter anyone else from assisting Ian by rushing forward to treat him; there was no one else around to perform the tracheotomy on Ian. Walter didn’t make Ian ill and make it necessary for him to be treated. Maybe the finding that Walter owed Ian a duty to treat him with reasonable care and skill can be explained by reference to the principle that if A takes on a task, knowing that B’s future well-being is almost completely dependent on A’s performing that task properly, A will owe B a duty to perform that task with a reasonable degree of care and skill.