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¹¹ Try always to be specific about who said what you are about to advance from the case, as it shows greater knowledge.

¹² Even if you think that the illegality defence would certainly apply, you should still discuss this, as there is a possibility the other defence would not be applied. Further, by doing so you show that you know not only about this issue, but also how it relates to the other defences.

¹³ While you will always have a conclusion in negligence problem questions, as there are several issues, sum up events by recapping what you have discussed throughout.

question is whether the criminal act caused the injury, or simply provided the opportunity for it to occur with the tortious act being the immediate cause. This seems more of a case of the former and this is supported by **Ashton v Turner** [1981] QB 137, which also concerned an injury suffered by the passenger in a getaway vehicle. As Lord Hoffmann noted in **Gray**,¹¹ allowing recovery in such circumstances would offend public notions of the fair distribution of resources. Even though Alf lost control and was at fault for the injury, it would be permissible to deny recovery by Bert. If a court were to hold that the claim was not substantially based on the crime, Alf should be advised that he may be successful in pleading contributory negligence on the part of Bert.¹² In terms of what reduction would be made, Alf should be advised that under the Act damages cannot be reduced by 100 per cent, even if it was Bert's idea to take the car and drive in that way (**Pitts v Hunt** [1991] 1 QB 24).

In conclusion,¹³ Alf should be advised that he owed both Reg and Bert a duty of care which was clearly breached. As those breaches caused the injuries, he would be liable notwithstanding that the extent of Reg's injuries were worse than could have been foreseen. However, owing to the illegality of the situation, Alf will have a defence against Bert.



Make your answer stand out

- Read *Langley v Dray* [1998] PIQR P314 and draw on the judgment of Stuart-Smith LJ to support your discussion of the nature of the duty owed by motorists and the reasons for it.
- Consider the validity of the 'eggshell skull' rule.
- Explain the policy factors which justify defences to an action for negligence when liability has been made out.
- Mention how Alf could also face a claim from Eddie for trespass.



Don't be tempted to . . .

- Show your wider knowledge of the tort by raising aspects which are not applicable to the scenario. For example, there is no need in relation to causation to discuss anything more than the 'but for' test.
- Repeat things you have already discussed by taking each claim independently of the other from the outset and, therefore, having two paragraphs on duty and breach.
- Explain in detail why there is illegality at the heart of the issue.



Question 3

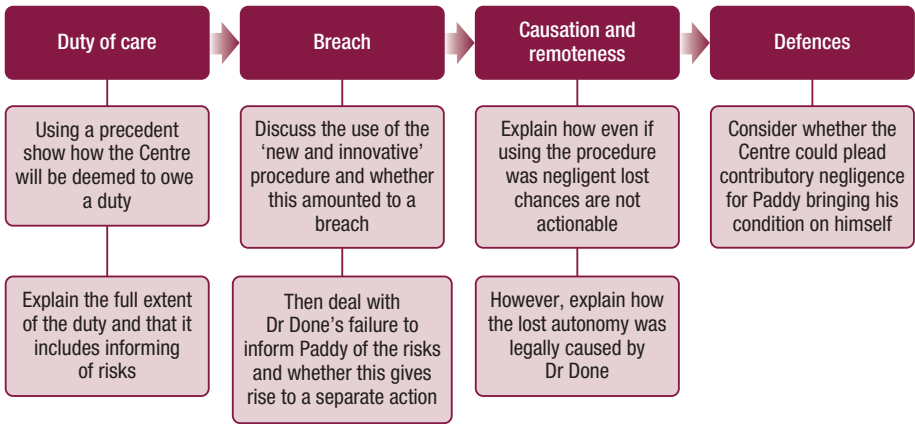
Paddy Chandler was a long-term alcoholic and was recently told that, owing to his lifestyle, he only had about a 45 per cent chance of living more than three years. After an unexpected bet came off, he decided to check himself into the Ladbroke Hills Private Medical Centre for a liver transplant in order to prolong his life expectancy. Prior to the operation he had spoken to Dr Done, an employed doctor at the Centre, who talked him through the procedure that would be used. Reflecting the seriousness of the situation, a new and innovative procedure was to be used which, while not having wide-scale endorsement, has been supported by a leading expert in the field in a national medical journal.

However, because he believed that Paddy really ought to have the operation, Dr Done chose not to inform Paddy that the operation carried with it a 5 per cent risk that the new liver may not be accepted by his body, which could result in death.

Following the operation, it became apparent that the new liver had not been accepted and Paddy was informed that with some medication the condition could be managed, but he would only have a 20 per cent chance of living longer than three years. Paddy has indicated that, if he had been informed, he might not have gone ahead with the operation.

Advise Paddy as to whether he has a successful negligence action against the medical centre.

Diagram plan



A printable version of this diagram plan is available from www.pearsoned.co.uk/lawexpressqa

Answer plan

- ➔ Explain quickly how a duty of care is owed by the Centre in this situation and set out the full scope of the duty.
- ➔ Identify the two potential breaches and deal with each, assessing whether they were breached.
- ➔ Explain how, even if the duty with regard to the operation procedure was breached, it is non-actionable.
- ➔ Apply the causation rules to the personal autonomy breach and explain how the approach is taken by the courts.
- ➔ Address any appropriate defences that the Centre may have.

Answer

¹ It is important to highlight early that you have spotted that this is not simply a loss of chance problem scenario and that in fact it is arguably more to do with *Chester v Afshar* [2004] UKHL 41. To avoid your answer getting messy, clearly separate out the two issues and then explain to the reader this is what you are doing so they know and thus do not lose track of what you are saying by trying to work out why you are saying it.

² By inserting this word, and after citing *Cassidy*, you show that you are aware of the applicability of the doctrine of vicarious liability to this situation, without getting sidetracked by a fuller explanation of it.

In advising Paddy on whether he has a claim against the Centre in negligence, the full extent of the duty owed by the Centre will be established and then the two possible ways any action may be taken will be considered. It will be argued that while it would appear that he has not suffered any actionable injury, merely a lost chance of living more than three years, the presence of the issue of personal autonomy in the matter means that he should have some basis for succeeding in any action.¹

The first point to establish is that authorities such as ***Cassidy v Ministry of Health*** [1951] 2 KB 343 clearly show that through the doctor–patient relationship the Centre will vicariously² owe a duty of care to Paddy when treating and operating on him. It is also important to advise Paddy that there is an additional aspect to the duty, which is to warn Paddy of any significant risks involved (***Montgomery v Lanarkshire Health Board*** [2015] UKSC 11). This duty has long been recognised as important (***Sidaway v Board of Governors of***

5 NEGLIGENCE: COMBINED ISSUE QUESTIONS

³By including this part of the sentence you can show your knowledge of the principle and how long it has been recognised, while also demonstrating that you are aware that there has been a departure from the reasoning in *Sidaway*; you can then explain that in more detail in the more appropriate place later on in your answer.

the Bethlehem Royal Hospital [1985] AC 871) even though the view of how it operates has altered over time.³

The next issue, therefore, is whether the duty owed to Paddy was breached by the Centre. In taking the duty covering the actual performance of the operation, the standard must be that of the level of skill and competency expected of a person undertaking that activity and with the level of skill that the defendant professes to have (***Bolam v Friern Hospital Management Committee*** [1957] 1 WLR 582). While Paddy may argue that the new procedure is not widely endorsed, this is not necessary. Provided the Centre can show that Dr Done acted in accordance with a respectable body of medical opinion, which can withstand logical scrutiny (***Bolitho v City and Hackney Health Authority*** [1997] 3 WLR 1151), this standard will be deemed to have been reached. The fact that a leading expert has supported the procedure in a national journal would suggest that the procedure was in line with a respectable body of opinion.

⁴Even if you strongly conclude that the use of the procedure was non-negligent, it is worth adding an additional paragraph on this point – to show that you have recognised that there is a similarity here to *Gregg*, but that you understand the legal position and, therefore, that an action by Paddy on this basis would not work.

Paddy would have a problem though in that, even if it is accepted the use of this new procedure was negligent, he has suffered no actionable injury. Prior to the operation, he only had a 45 per cent chance of living over three years. After the operation he had a 20 per cent chance. Therefore, this makes his position nearly identical to that in ***Gregg v Scott*** [2005] 2 AC 176 where the House of Lords held that the claimant in fact lost nothing as, on the balance of probabilities, the outcome in question would not have happened, there was no chance to lose. Further, it was held that a reduction in the chance itself should not be an actionable head of injury.⁴

⁵As you discuss how the law has moved on and changed in relation to what needs to be shown, it is beneficial to explain why the change arose. You can then comment on its justification.

However, as explained, the scope of the Centre's duty was wider than merely carrying out the operation in a non-negligent manner. It extended to warning Paddy of the risks which the operation entailed. It was noted in ***Montgomery*** that the importance of personal autonomy has increased in line with patients no longer being seen as passive recipients of medical care and more as consumers with greater levels of medical knowledge themselves.⁵ Therefore, to discharge the duty, a doctor must take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternatives. Paddy should be advised that whether a 5 per cent risk is material is dependent on whether a reasonable

person in his position would attach significance to it and Dr Done could justify non-disclosure of the risk if it would have been seriously detrimental to Paddy's health to inform him of the risk. Therefore, more information about why the decision was made and what Paddy may have done with the information is needed. Ultimately though, while the facts suggest that Dr Done was acting to ensure a needed operation occurred, reflecting the emphasis on patients' rights and informed consent, it is likely that the failure to inform Paddy will be deemed a breach.

⁶By highlighting this you further distance this part of your answer from the previous discussion, as it shows that passing the *Bolam* test has no bearing on this aspect of Paddy's situation.

⁷Professor Honoré was cited by both Lord Steyn and Lord Hope in the majority in *Chester* in support of their opinions; therefore, a small reference such as this allows you to demonstrate your knowledge of their opinions and the wider academic thinking on this issue.

⁸In the latter part of this sentence, use the facts from the question to identify Paddy with the reasoning of Lord Hope to make your application stronger as well as, again, showing an in-depth knowledge of the judicial reasoning which impacts on this point.

⁹Refer to *Chester* to reinforce your argument that legally the breach should be seen as the cause of an actionable injury, i.e. the lost autonomy.

Paddy should then be advised that the breach of the duty to inform must then be deemed to have caused the injury suffered. As stated, his injury is simply a non-actionable reduction in his chance of survival. Even proceeding on the basis that the injury was the lost ability to make an informed choice, this presents some difficulties because on conventional principles it must be shown that, on the balance of probabilities, 'but for' the negligence, the injury would not have occurred. The issue here is that Paddy may well have proceeded and, therefore, the risk would still have materialised, and the breach would not be the factual cause of the injury. Even if he would not have proceeded, the risk here was not created by the breach but was present regardless and notwithstanding how the operation was performed.⁶ However, as Lord Steyn accepted in *Chester* after referring to the academic work of Professor Honoré,⁷ the situation which Paddy finds himself in cannot be fitted within normal causation principles, but policy and corrective justice support vindicating his personal autonomy. Otherwise, the duty owed would be stripped of its content and would, in Lord Hope's view in *Chester*, be particularly useless for a patient like Paddy who cannot say what they would have done if they had been properly advised.⁸

Therefore, while it could be argued that factually the injury was not caused by the breach of the duty to warn, as Lord Hope highlighted, the injury was caused in the legal sense. It is on this basis that there would not appear to be any issues regarding remoteness of damage, namely that the injury was a kind, type or class that was reasonably foreseeable (*Wagon Mound (No. 1)* [1961] AC 388). The injury suffered was the failure of the new liver to be accepted by Paddy's body, the risk of which, as in *Chester*,⁹ was exactly what he should have been informed of by Dr Done.

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¹⁰Your aim here is to just briefly raise the possibility, reflecting your awareness of the similar facts between Paddy's situation and that in *St. George*. This also shows that you understand the point by applying it in dismissal of the potential argument by the Centre.

¹¹Make sure that you reinforce that the success of any action brought by Paddy would be solely for this injury.

Finally, Paddy should be advised that there does not appear to be any defences which the Centre could rely on to counter any claim. The only possible argument¹⁰ would be that his alcoholism put him in a position whereby he needed treatment and, therefore, this behaviour makes him contributorily negligent. However, following ***St George v Home Office*** [2008] EWCA Civ 1068, as this was a lifestyle choice made prior to the creation of the duty of care, it cannot be considered for the purposes of reducing any compensation.

In conclusion, while there may be causation issues in Paddy's situation, there has been a clear breach of the Centre's duty to inform Paddy of the operation's risk. This denial of personal autonomy should, on the basis of cases such as ***Montgomery*** and ***Chester***,¹¹ mean that Paddy would have an action for this loss.



Make your answer stand out

- Explain in a bit more detail the issue of vicarious liability.
- Make sure that you clearly distinguish the two potential breaches by the Centre of their duty of care to Paddy.
- Ensure that you have read *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 so that you can discuss the change in judicial approach to assessing a breach of the duty to inform patients and the validity of the change.
- Make more reference to academic opinion on the issue of causation and informing patients of risks. A selection of academic articles can be found in the opinion of Lord Steyn in *Chester v Afshar* [2004] UKHL 41.
- Draw on the dissenting opinion of Lord Hoffman in *Chester v Afshar* [2004] UKHL 41 to give balance to your argument. He expands on this in Hoffman, L. (2005) Causation. *Law Quarterly Review*, 121: 592–603, which is also worth reading in relation to wider issues of causation.
- Add some of the reasons why loss of chance as in *Gregg v Scott* [2005] 2 AC 176 is held to be non-actionable.