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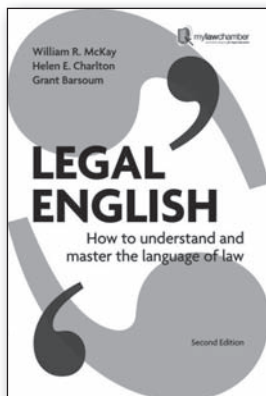
**MICHELLE ROBSON, KRISTINA SWIFT,  
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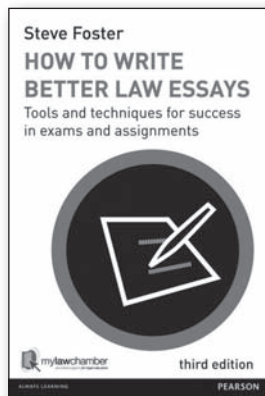
Question&Answer

# **MEDICAL LAW**

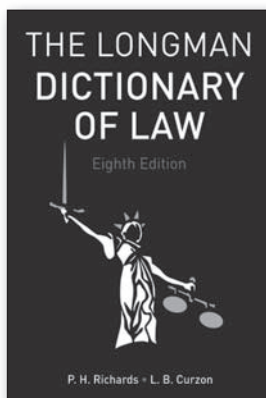
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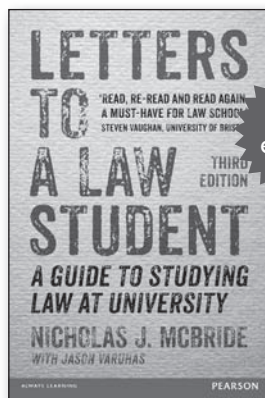
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Question & Answer

# MEDICAL LAW

Michelle Robson  
Kristina Swift  
Helen Kingston  
Carolyn Fyall

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# Supporting resources

Visit the **Law Express Question&Answer** series companion website at [www.pearsoned.co.uk/lawexpressqa](http://www.pearsoned.co.uk/lawexpressqa) to find valuable learning material including:

- **Additional essay and problem questions** arranged by topic for each chapter give you more opportunity to practise and hone your exam skills.
- **Diagram plans** for all additional questions assist you in structuring and writing your answers.
- **You be the marker** questions allow you to see through the eyes of the examiner by marking essay and problem questions on topics covered in the book.
- Download and print all **Before you begin** diagrams and **Diagram plans** from the book.

**Also:** The companion website provides the following features:

- Search tool to help locate specific items of content.
- Online help and support to assist with website usage and troubleshooting.

For more information please contact your local Pearson sales representative or visit [www.pearsoned.co.uk/lawexpressqa](http://www.pearsoned.co.uk/lawexpressqa)

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# What you need to do for every question in Medical Law

## HOW TO USE THIS BOOK

Books in the *Question and Answer* series focus on the *why* of a good answer alongside the *what*, thereby helping you to build your question answering skills and technique.

This guide should not be used as a substitute for learning the material thoroughly, your lecture notes or your textbook. It *will* help you to make the most out of what you have already learned when answering an exam or coursework question. Remember that the answers given here are not the only correct way of answering the question but serve to show you some good examples of how you could approach the question set.

Make sure that you regularly refer to your course syllabus, check which issues are covered (as well as to what extent they are covered) and whether they are usually examined with other topics. Remember that what is required in a good answer could change significantly with only a slight change in the wording of a question. Therefore, do not try to memorise the answers given here, instead use the answers and the other features to understand what goes into a good answer and why.

Medical law is a patchwork of many things: law, ethics, morality and science. It continues to evolve, reacting to (ponderously so a lot of the time) scientific advancements and public concern, as well as managing on occasions not medical but social issues. Students of medical law struggle in an exam situation with this fragmented picture. While an understanding of legal principles is often evident, the application of these is frequently patchy with little regard for the ethical principles which have moulded the subject into its present form. With this in mind we have the following advice.

When answering a problem question in a medical law exam consider:

- 1 Are you required to advise a party or simply to discuss the issues in the scenario?
- 2 Are you asked to identify only the legal issues, or both legal and ethical issues?
- 3 What information do you have and what information is missing or ambiguous?

In your answer, adopt the following approach:

- 1 Ordinarily, work through the problem chronologically, following the order of the facts in the question. There will be some situations, however, where an alternative approach may work more effectively, e.g. to group related issues together.
- 2 Focus on the issues in the problem; do not discuss other matters peripheral to the subject area, e.g. if asked to discuss causation then don't discuss duty or damages.
- 3 Always define the area of law to be discussed at the outset, e.g. 'Surrogacy is . . .'. This serves as an introduction and reminds you (and the examiner) of the focus of the question.
- 4 Discuss the legal and then the ethical issues, referring to professional guidelines, e.g. GMC/BMA Guidance, if appropriate.
- 5 Identify what information is missing.
- 6 Conclude with your advice or opinion. If a firm conclusion cannot be reached say so and why.

In an essay question remember that you are not being asked to state all that you know on a point – you are being asked to focus on a particular question and discuss specifically the identified issue arising from that question. You must adopt a clearly defined structure; if the question is charting a development in the law then a chronological approach always works best. You must refer to the issue in the question, constantly weaving this into your essay, but then you must go further and critically analyse the law, discussing areas of controversy or that have been the subject of reform. To do this, you must be knowledgeable of current legal developments, mindful of ethical guidance and always have an eye on the news.

# Guided tour

## What you need to do for every question in Medical Law

### HOW TO USE THIS BOOK

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**What to do for every question** – Identify the key things you should look for and do in any question and answer on the subject, ensuring you give every one of your answers a great chance from the start.

## Judicial review

### How this topic may come up in exams

Claims challenging the allocation of healthcare resources have increased in popularity. This may be attributed to the public's changing awareness of what it means to be in good health and increased knowledge of available treatments, as well as the underlying perception that there is a right to health care. Problem and essay questions focus on challenges to rationing decisions and the decision-making process. This chapter considers both the claims for judicial review and for breach of a Convention Right under the Human Rights Act 1998, two actions available to claimants challenging funding allocation decisions.

**How this topic may come up in exams** – Understand how to tackle any question on this topic by using the handy tips and advice relevant to both essay and problem questions. In-text symbols clearly identify each question type as they occur.



**Essay question**



**Problem question**

**Before you begin** – Use these diagrams as a step-by-step guide to help you confidently identify the main points covered in any question asked. Download these from the companion website to add to your revision notes.

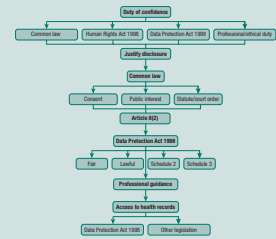
**Answer plans and Diagram plans** – A clear and concise plan is the key to a good answer and these answer and diagram plans support the structuring of your answers, whatever your preferred learning style.

### Answer plan

- Explain that there are two pieces of legislation currently dealing with this area.
- Explain the limits of common/statute law to impose treatment.
- Consider why compulsory detention and treatment might be necessary.
- Concentrate on the Mental Health Act in its current form.
- Consider briefly the ethical issues – autonomy versus paternalism; public and individual safety in light of impaired judgement; patient's right to treatment.

### Before you begin

It's a good idea to consider the following key themes of medical confidentiality before tackling a question on this topic.



A printable version of this diagram is available from [www.paramed.co.uk/learning](http://www.paramed.co.uk/learning)

### Diagram plan



A printable version of this diagram plan is available from [www.paramed.co.uk/learning](http://www.paramed.co.uk/learning)

**Answer with accompanying guidance –** Make the most out of every question by using the guidance to recognise what makes a good answer and why. Answers are the length you could realistically hope to produce in an exam to show you how to gain marks quickly when under pressure.

<sup>1</sup> The examiner would expect you to introduce what is meant by surrogacy.

## Answer

<sup>1</sup> The examiner would expect you to introduce what is meant by surrogacy.

<sup>2</sup> This is a relevant issue as Angela and Bob seek advice regarding their legal position. Exact coverage here will vary. This would require your attention if there is a case (e.g. if it appears likely that the surrogate mother will refuse to hand the child over).

The issues arising from this proposed surrogacy arrangement will be discussed. Surrogacy involves one woman carrying a child where she intends to hand the child over after birth.<sup>1</sup> Carla will carry a child, and then hand the child to the intended parents, Angela and Bob. Surrogacy arrangements are not enforceable (Surrogacy Arrangements Act 1985, section 1B).<sup>2</sup> At this stage there is no reason to suspect that either Carla would refuse to hand the child over or that Angela and Bob would refuse to pay the money.

The issues regarding parentage will be complicated.<sup>3</sup> We must consider the parenthood provisions contained in the Human Fertilisation and Embryology Act 2008 (HFE Act 2008) which apply to determine parentage where a woman is treated using donated gametes. Here an embryo will be created using Angela's egg and donor sperm. The Human Fertilisation and Embryology Authority (HFEA) Code of Practice (8th edn) is also relevant.

Note the immediate reference to the question.

<sup>2</sup> One of the more significant issues with a less of chance claim is that clinical negligence cases are dealt with on a different basis from tort and contract cases.

Generally, in both tort and contract claims, the courts have awarded damages for loss of a chance – see, for example, *Chaplin v Hicks* [1911] 2 KB 786 and *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 which awarded damages for the loss of a 'real or substantial chance'. Yet, long before the decision in *Gregg v Scott* the courts had ruled that the loss of chance claim was not sustainable in a clinical negligence claim.<sup>2</sup>

In *Hotson v East Berks AHA* [1987] 2 All ER 909, a boy alleged that a four-day delay in diagnosis deprived him of a 25 per cent chance of

**Case names clearly highlighted –** Easy-to-spot bold text makes those all important case names stand out from the rest of the answer, ensuring they are much easier to remember in revision and an exam.

**Make your answer stand out –** Really impress your examiners by going the extra mile and including these additional points and further reading to illustrate your deeper knowledge of the subject, fully maximising your marks.

### ✓ Make your answer stand out

- Adopt a structure such as the one suggested here. You are asked to consider the situation and discuss – this is pointing you in the direction of identifying the legal options and making a comparison.
- Discuss whether section 2 or section 3 of the Mental Health Act would be most appropriate in the circumstances of this case. Don't forget this is a problem question and you need to apply the law to the facts you have been provided with.
- When discussing informal admission, point out that this is the case for every admission to hospital for a physical health problem; the Mental Health Act is an exception to the usual rules in medical law.
- Consider the implications of Annie being deprived of her liberty in hospital – and refer to Article 5 ECHR.

**Don't be tempted to –** Points out common mistakes ensuring you avoid losing easy marks by understanding where students most often trip up in exams.

### ! Don't be tempted to . . .

- Just explain the ethical concerns – remember this is a medical law question!
- Forget about a structure – this model answer has no subheadings, but answers the question in the first paragraph and ties the general discussion in the subsequent paragraphs neatly together in a strong conclusion.
- Ignore the European Convention – it is usually relevant to any discussion of mental health law.
- Focus on one case (i.e. *DL-H v Devon*) which you think answers the question. Poorer students will do this, setting out at length the facts of a particular case. Your examiner is asking you here for a more general discussion, and if (like in the suggested answer here) you do mention the case, explain the *ratio*, not the facts.

**Bibliography –** Use this list of further reading to really delve into the subject and explore areas in more depth, enabling you to excel in exams.

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# Guided tour of the companion website



Book resources are available to download. Print your own **Before you begin** and **Diagram plans** to pin to your wall or add to your own revision notes.



**Additional Essay and Problem questions** with **Diagram plans** arranged by topic for each chapter give you more opportunity to practise and hone your exam skills. Print and email your answers.



**You be the marker** gives you a chance to evaluate sample exam answers for different question types and understand how and why an examiner awards marks. Use the accompanying guidance to get the most out of every question and recognise what makes a good answer.

All of this and more can be found when you visit [www.pearsoned.co.uk/lawexpressqa](http://www.pearsoned.co.uk/lawexpressqa)

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# Themes in medical law



## How this topic may come up in exams

Throughout your studies of medical law you will have appreciated that particular themes and issues emerge across the topics you have covered. You may be asked a question (most likely an essay question) which focuses on a particular theme or issue.

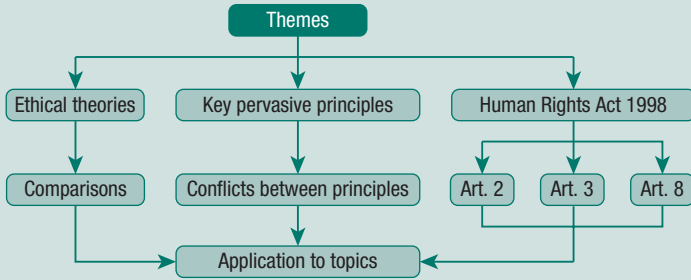
A question may require discussion of the extent to which different ethical principles (e.g. beneficence and non-maleficence) are reflected in medical law. You might have to compare different principles, for example, to consider the tension between patient autonomy and medical paternalism.

The impact of the Human Rights Act 1998 is also a key issue. A question could focus on the relevance of a particular article of the European Convention on Human Rights to medical law.

Such questions often require a broad knowledge across different topics. Time restraints mean you will need to be selective in your choice of material, but also be prepared to justify your approach to the examiner.

# Before you begin

It's a good idea to consider the following key themes in medical law before tackling a question on this topic.



A printable version of this diagram is available from [www.pearsoned.co.uk/lawexpressqa](http://www.pearsoned.co.uk/lawexpressqa)

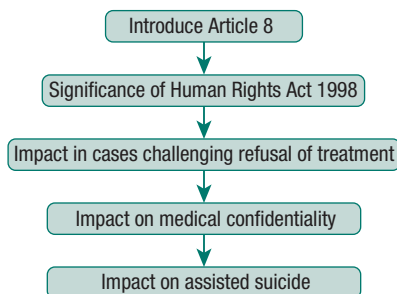
## Question 1

Critically evaluate the impact of Article 8 of the European Convention on Human Rights on medical law.

### Answer plan

- Introduce Article 8.
- Consider the impact of the Human Rights Act 1998.
- Discuss whether Article 8 has been used successfully in cases challenging refusal to fund treatment.
- Analyse the impact Article 8 has had in relation to medical confidentiality.
- Consider the role Article 8 has played in challenges to the law on assisted suicide.

### Diagram plan



A printable version of this diagram plan is available from [www.pearsoned.co.uk/lawexpressqa](http://www.pearsoned.co.uk/lawexpressqa)

## Answer

<sup>1</sup> It is worthwhile to confirm how Article 8 may be used following introduction of the Human Rights Act 1998.

The Human Rights Act 1998 has incorporated Articles of the European Convention on Human Rights into domestic law, including Article 8. Article 8 of the Convention may have effect in various ways. For instance, the courts may make a declaration of incompatibility where legislation is incompatible with Article 8 (s. 4) and it is unlawful for a public authority (such as NHS bodies) to act incompatibly with the Convention (s. 6).<sup>1</sup> Article 8(1) provides that ‘everyone has the right to respect for his private and family life’. This is not an absolute right.

# 1 THEMES IN MEDICAL LAW

<sup>2</sup> You should introduce Article 8. It is important to stress this does not establish an absolute right and the examiner will be pleased if you refer to the significance of Article 8(2).

<sup>3</sup> Introduce the areas you will focus on. The examiner will understand you will not have time to cover all areas, so you should highlight what will be tackled in your answer.

<sup>4</sup> As you are dealing with different areas of law, the use of headings may help to divide your commentary.

<sup>5</sup> Section 2 of the 1998 Act states that courts must take into account Strasbourg jurisprudence where relevant, so it is appropriate to refer to this decision.

<sup>6</sup> The examiner will be impressed if you try to identify the different types of argument that have been advanced using Article 8.

<sup>7</sup> This is a key point to make. You are asked to comment on whether Article 8 has had any impact, so it is apt to point out that there are alternative avenues of protection in any event.

It can be interfered with if the interference is in accordance with the law, necessary in a democratic society and for a legitimate aim (Art. 8(2)).<sup>2</sup> Article 8 will be relevant to many areas. I will consider its impact in challenges to treatment refusal decisions, medical confidentiality and assisted suicide.<sup>3</sup>

## 1. Resource allocation<sup>4</sup>

Has Article 8 helped patients challenge decisions refusing treatment?

It is difficult to demonstrate a positive obligation owed to a particular individual. In **Sentges v Netherlands** (App. No. 27677/02) the applicant unsuccessfully challenged the refusal to provide a robotic arm. It was held that 'the fair balance that has to be struck between the competing interests of the individual and the community as a whole' must be considered.<sup>5</sup> It was stressed that states had a wide margin of appreciation, particularly regarding the allocation of limited funds.

Article 8 was used to frame a different type of challenge<sup>6</sup> in **R (Condliff) v North Staffordshire Primary Care Trust** [2011] EWCA Civ 910. The applicant had been refused bariatric surgery as he failed to satisfy Body Mass Index (BMI) criteria. The Primary Care Trust's (PCT) policy to determine eligibility for treatment considered only clinical criteria, not social factors. He argued the policy breached Article 8 which imposed a positive obligation on the PCT to consider his private and family life and by excluding social factors the PCT had fettered its discretion. The Court of Appeal disagreed and held that the policy did not show a lack of respect for his private and family life. In any event, there were 'legitimate equality reasons' to use the policy and this fell within the 'margin of appreciation'.

## 2. Medical confidentiality

Has Article 8(1) helped to protect patient information? It has been used to protect 'private' information. Article 8 is relevant when 'there is a reasonable expectation that the information in question will be kept confidential' (**Campbell v MGN Ltd** [2004] 2 All ER 995). Medical information is, however, protected in any event under the common law of confidentiality and the Data Protection Act 1998.<sup>7</sup>

The common law duty of confidence and Article 8(1) do not provide absolute rights, so comparisons should be made between the justifications for disclosure at common law and under Article 8(2). For instance, at common law disclosure is justified where serious crime has been committed or a third party is at risk of serious harm (*W v Egdell* [1990] Ch 359). Article 8(2) permits disclosure where there is a 'legitimate aim' and it is 'necessary in a democratic society'. In *Z v Finland* (1997) 45 BMLR 107 the medical records of an HIV-positive patient (Z) were used during the investigation and prosecution of Z's husband for attempted manslaughter and sexual offences. Z argued that her rights under Article 8 were violated. It was held there was a legitimate aim (the prevention of crime) and this was proportionate to the legitimate aim pursued. Parallels exist between the common law justifications and the Article 8(2) position.<sup>8</sup>

<sup>8</sup> The comparison is developed further to assess the 'impact' or 'added value' of Article 8 by exploring the justifications for disclosure.

There may be 'extra' procedural safeguards under Article 8(2). *Re General Dental Council's Application* [2011] EWHC 3011 (Admin) decided the General Dental Council could use dental records without patients' permission to investigate a dentist's conduct. The court addressed whether the GDC was obliged to tell patients what it proposed to do with the records under Article 8(2). At common law it would be good practice to inform the person in advance if information was going to be disclosed. *Re GDC's Application* went one step further and held prior notification may be 'required' under Article 8(2) as 'procedural obligations' may arise so individuals are involved before Article 8 rights are interfered with.<sup>9</sup>

<sup>9</sup> This develops coverage of the 'impact' of Article 8 even further, and shows the examiner you have considered a range of issues by also evaluating the procedural safeguards that Article 8(2) may establish.

### 3. Assisted suicide

It is an offence to intentionally encourage or assist the suicide of another (Suicide Act 1961, s. 2). The consent of the Director of Public Prosecutions is required before prosecution (s. 2(4)).

Diane Pretty sought assurance from the DPP that her husband would not be prosecuted if he helped her commit suicide. As this was refused, she commenced legal action arguing that the 1961 Act and the DPP's action were incompatible with her Convention rights. I will focus on the arguments raised regarding Article 8.<sup>10</sup> The House of Lords (*R v Director of Public Prosecutions* [2001] UKHL 61) held that Article 8(1) was not engaged as it protected the way individuals lived their lives, not the way they died. Anyway

<sup>10</sup> *Pretty* is a complex case which deals with various Articles of the Convention. It is important to ensure you focus on the Article 8 issues in light of the question set.