

Q&A

LAW REVISION

**RESULT
FOCUSED**

MEDICAL LAW

JONATHAN HERRING

UNDERSTAND THE
LAW AND REMEMBER
THE DETAILS

AVOID COMMON
MISTAKES

GET THE MOST
FROM YOUR
REVISION

Q&A

Medical Law

Routledge Questions & Answers Series

Each Routledge Q&A contains questions on topics commonly found on exam papers, with comprehensive suggested answers. The titles are written by lecturers who are also examiners, so the student gains an important insight into exactly what examiners are looking for in an answer. This makes them excellent revision and practice guides.

Titles in the series:

Q&A Company Law
Q&A Commercial Law
Q&A Contract Law
Q&A Criminal Law
Q&A Employment Law
Q&A English Legal System
Q&A Equity and Trusts
Q&A European Union Law
Q&A Evidence
Q&A Family Law
Q&A Intellectual Property Law
Q&A Jurisprudence
Q&A Land Law
Q&A Medical Law
Q&A Public Law
Q&A Torts

For a full listing, visit www.routledge.com/cw/revision

Q&A

Medical Law

Jonathan Herring

 **Routledge**
Taylor & Francis Group
LONDON AND NEW YORK

Third edition published 2016
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2016 Jonathan Herring

The right of Jonathan Herring to be identified as author of this work has been asserted by him in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

Trademark notice: Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

First edition published by Routledge 2011
Second edition published by Routledge 2013

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
Herring, Jonathan, author.

Medical law / Jonathan Herring. – 3rd ed.
pages cm – (Q&A, Routledge questions & answers series)
1. Medical laws and legislation—England—Examinations, questions, etc. I. Title.
KD3395.H473 2015
344.4204'1—dc23

2015023169

ISBN: 978-1-138-83101-8 (pbk)
ISBN: 978-1-315-73683-9 (ebk)

Typeset in TheSans
by Werset Ltd, Boldon, Tyne and Wear

Additional materials are available on the companion website at www.routledge.com/cw/revision

Contents

Table of Cases	vii
Table of Legislation	xi
Guide to the Companion Website	xiii
Introduction	1
1 Medical Negligence	3
2 Rationing	19
3 Consent and Capacity	33
4 Confidentiality	51
5 Abortion and Pregnancy	65
6 Assisted Reproduction	81
7 Ownership of Bodies	97
8 End of Life	113
9 Mental Health	129
10 Medical Research	137
11 General Questions	145
Index	159

This page intentionally left blank

Table of Cases

UNITED KINGDOM

- A (A Child), Re [2015] EWHC 443 (Fam) **115**
- A (Conjoined Twins), Re [2000] EWCA Civ 254; [2001] Fam **147 119**
- A (Medical Treatment: Male Sterilisation), Re [2000] 1 FCR 193; (2000) **53 BMLR 66 78, 79**
- AB v Leeds Teaching Hospital NHS Trust [2004] 3 FCR 324 **98, 99**
- Ahsan v University Hospitals Leicester [2006] EWHC 2624 (QB) **40**
- Aintree University Hospitals v James [2013] UKSC **67 124**
- Airedale NHS Trust v Bland [1992] UKHL **5**; [1993] AC 789 **74, 115, 118, 119, 120, 122, 123, 124**
- Attorney General v Guardian Newspapers Ltd (No 2) [1988] UKHL **6**; [1990] 1 AC **109 54**
- Attorney General's Reference (No 3 of 1994) [1998] AC 245 **66, 67, 75**
- B (A Minor) (Wardship: Sterilisation), Re [1987] 2 All ER 206 **78**
- Barnet v Chelsea and Kensington Hospital Management Committee [1968] 1 All ER 1068 **11**
- Birch v University College London Hospital NHS Foundation Trust [2008] EWCA 2237 (QB) **11**
- Bolam v Friern Hospital Management Committee [1957] 2 All ER **118 3-7, 8-12, 14, 17, 30, 53, 77, 124, 142**
- Bolitho v City and Hackney Health Authority [1997] 4 All ER 771 **4, 5, 7, 9, 10**
- Bolton Hospitals NHS Trust v O [2002] EWHC 2871 (Fam); [2003] 1 FLR 824 **36**
- Burton v Islington Health Authority [1993] QB 204 **67**
- C (Adult: Refusal of Treatment), Re [1994] 1 WLR 290 **35-36**
- C v S [1988] QB **135 71**
- Campbell v MGN Ltd [2004] UKHL **22**; [2004] 2 AC 457 **53-54, 57**
- Chatterton v Gerson [1981] QB 432; [1981] 1 All ER 257 **13, 35**
- Chester v Afshar [2004] UKHL **41**; [2005] 1 AC **134 12, 14, 123**
- Davis v Barking, Havering and Brentwood Health Authority [1993] 4 Med LR **85 108**
- Defreitas v O'Brien [1996] 6 Med LR **108 10**
- Director of Public Prosecutions v Smith [2006] EWHC **94 (Admin) 108**
- DL v A Local Authority [2012] EWCA Civ 253 **37**
- Dobson v North Tyneside Health Authority [1996] EWCA Civ 1301; [1996] 4 All ER 474 **99**
- Douglas v Hello! Ltd [2007] UKHL **21**; [2008] 1 AC **1 53**
- E, Re [1993] 1 FLR 386 **47, 147**
- Evans v Amicus Healthcare Ltd [2004] EWCA Civ 727; [2004] 3 All ER 1025 **68**

- F (A Mental Patient: Sterilisation), Re [1990] 2 AC 1 **77**
 F (In Utero), Re [1998] Fam 122 **68**
- G (TJ), Re [2010] EWHC 3005 (COP) **40**
 Garcia v St Mary's NHS Trust [2006] EWHC 2314 (QB) **11**
 Gillick v West Norfolk and Wisbech Area Health Authority [1985] UKHL 7; [1986] 1 AC 112 **46–48**
 Gregg v Scott [2005] UKHL 2 **8, 12**
- H (A Healthcare Worker) v Associated Newspapers Ltd [2002] Lloyd's Rep Med 210 **60**
 HE v A Hospital NHS Trust [2003] EWHC 1017 (Fam) **43**
 Horton v Evans [2006] EWHC 2808 (QB) **11**
- J, Re (2006) Unreported **67**
 Jepson v Chief Constable of Mercia Police Constabulary [2003] EWHC 3318 **71**
 Judge v Huntingdon Health Authority [1995] Med LR 223 **11**
- LC, Re [1997] 2 FLR 258 **78, 79**
 Leeds Teaching Hospital v A [2003] 1 FLR 1091 **86**
- MB, Re [1997] 2 FCR 541 **123, 151**
 MH v Secretary of State for the Department of Health [2005] UKHL 60; [2006] 1 AC 441 **131**
 MM, Re [2007] EWCA 2003 (Fam) **40**
 Marriott v West Midlands Health Authority [1998] LLR 223 **10**
 McKennit v Ash [2006] EWCA Civ 1714 **53**
 Meiklejohn v St George's Healthcare NHS Trust [2014] EWCA Civ 120 **11**
 Montgomery v Lanarkshire Health Board [2015] UKSC 11 **12, 14**
 Mr and Mrs A v A Local Authority [2009] EWHC 1982 (Fam); [2010] 3 FCR 503 **36**
- NHS Trust v A [2007] EWHC 1696 (Fam) **48**
- P, Re [1989] Crim LR 897 **79**
 P, Re [2009] EWHC 163 (Ch) **40**
 P, Re [2014] EWHC 1650 **126**
 Palmer v Tees HA [2000] PIQR 1 **59**
 Paton v Trustees of the British Pregnancy Advisory Service [1979] QB 276; [1978] 2 All ER 987 **67, 71**
 PC v City of York Council [2013] EWCA 478 **35**
 Pearce v United Bristol Healthcare NHS Trust [1996] EWCA Civ 878; (1998) 48 BMLR 1181 **14**
 Pretty v United Kingdom [2002] 35 EHRR 1; [2002] 2 FCR 97 **113**
- Q (A Minor) (Parental Order), Re [1996] 1 FLR 369 **83**
 Quintavalle (on behalf of Comment on Reproductive Ethics) v Human Fertilisation and Embryology Authority [2005] UKHL 28; [2005] 2 AC 561 **94**
- R (A Minor) (Wardship: Medical Treatment), Re [1991] 4 All ER 177 **47**
 R (on the application of Axon) v Secretary of State for Health [2006] EWHC 37 (Admin); [2006] QB 539 **47**
 R (on the application of Burke) v General Medical Council [2004] EWHC 1879 (Admin); [2005] 3 FCR 169 **43, 124, 147**
 R (on the application of C) v Berkshire Primary Care Trust (2011) Unreported **23**
 R (on the application of Condliff) v North Staffordshire Primary Care Trust [2011] EWCA Civ 910 **31**
 R (on the application of N) v Dr M, A Health Authority Trust [2002] EWCA Civ 1789; [2003] Lloyd's Rep Med 81 **36**
 R (on the application of Nicklinson) v Ministry of Justice [2014] UKSC 38 **123, 124–127**

- R (on the application of Otley) v Barking and Dagenham NHS Primary Care Trust [2007] EWHC 1927 (Admin) **22**
- R (on the application of Pretty) v DPP [2002] **1** AC 800 **113**
- R (on the application of Purdy) v DPP [2009] UKHL **45** **113, 124–128**
- R (on the application of Ross) v West Sussex Primary Care Trust [2008] EWHC 2252 (Admin) **21, 22, 29**
- R v Adams [1957] Crim LR 365 **120**
- R v Adomako [1995] **1** AC 171 **124**
- R v Bow Street Metropolitan Stipendiary Magistrates, *ex parte* Government of the USA [2000] **2** AC 216 **55**
- R v Brown [1994] **1** AC 212 **139**
- R v Cambridgeshire Health Authority, *ex parte* B [1995] **2** All ER **129** **21, 22, 29, 30**
- R v Cox (1992) **12** BMLR **38** **120**
- R v Crozier (1990) **12** Cr App R 206 **60**
- R v Department of Health, *ex parte* Source Informatics Ltd [2001] QB 424; [2000] **1** All ER 786 **54, 58, 60**
- R v Ethical Committee of St Mary's Hospital, *ex parte* Harriott [1988] **1** FLR 512 **22**
- R v Herbert (1961) **25** JCL 163 **99, 108**
- R v Inglis [2010] EWCA Crim 2637; [2010] All ER (D) **140** (Nov) **126**
- R v Kelly [1998] **3** All ER 714 **99**
- R v Mental Health Review Tribunal, *ex parte* Smith (1998) **47** BMLR **104** **131**
- R v Moor (Newcastle Crown Court, **11** May 1999) **120**
- R v North and East Devon Health Authority, *ex parte* Coughlan [1999] EWCA Civ 1871; [2000] **3** All ER 850 **21**
- R v North Derbyshire Health Authority, *ex parte* Fisher [1997] EWHC Admin 675; [1997] **8** Med LR 2252 **21**
- R v North West Lancashire Health Authority, *ex parte* A, D and G [1999] EWCA Civ 2022; [2000] **2** FCR 525 **21, 29, 31**
- R v Rothery [1976] RTR 478 **99**
- R v Central Birmingham HA *ex p* Walker (1987) **3** BLMR **32** **22**
- R v Secretary of State for Social Services, *ex parte* Hincks (1980) **1** BMLR **93** **21**
- R v Sheffield Area Health Authority, *ex parte* Seale (1994) **25** BMLR **1** **91**
- R v Tabassum [2000] Lloyd's Rep Med 404 **35**
- R v Tait [1989] **3** All ER 682 **67**
- R v Wacker [2002] EWCA Crim 1944; [2003] **2** WLR 347 **139**
- R v Welsh (1975) Unreported **99**
- R v Woollin [1993] AC 789 **119–120, 121, 123**
- S v St George's NHS Trust [1998] **3** All ER 673 **34, 39, 126, 130, 147, 154**
- S (A Minor) (Medical Treatment), Re [1993] **1** FLR 376 **47**
- S and S, Re (Cases 11475121 and 11475138, **25** November 2008, COP) **40**
- Sidaway v Board of Governors of the Bethlem Royal Hospital [1985] AC 871; [1985] **1** All ER 643 **14**
- Simms v Simms [2002] EWHC 2734 (Fam); [2003] **1** All ER 669 **141, 142–144**
- Stockdale v Nicholls [1993] **4** Med LR 190 **11**
- Swinney v Chief Constable of Northumbria Police [1996] **3** All ER 449 **53, 60**
- T, Re [1992] **4** All ER 649 **36**
- W, Re [1992] **4** All ER 627 **47**
- W v Edgell [1990] **1** All ER 835 **59**
- Wisniewski v Central Manchester Health Authority [1998] Lloyd's Rep Med 223 **10**
- Wyatt (A Child) (Medical Treatment: Continuation of Order), Re [2005] EWCA Civ 1181 **74**
- X v Y [1988] **2** All ER 649 **60**
- Y (Mental Patient: Bone Marrow Donation), Re [1997] **2** FCR 172 **41**
- Yearworth v North Bristol NHS Trust [2009] EWCA Civ **37**; [2010] QB **1** **97–101, 106, 108**
- Z (Medical Treatment: Hysterectomy), Re [2000] **1** FCR 274 **79**

EUROPEAN COURT OF HUMAN RIGHTS

A, B and C v Ireland (Application No. 25579/05) [2010] ECHR 2032; (2010) 53 EHRR 429 **68, 72**

Glass v United Kingdom (Application No. 61827/00) [2004] ECHR 103; [2004] 1 FCR 553 **48**

Haas v Switzerland (Application No. 31322/07) [2011] ECHR 10 **127**

Vo v France (Application No. 53924/00) [2004] 2 FCR 577; (2005) 40 EHRR 12 **68**

Z v Finland (Application No. 22009/93) [1997] ECHR 10; (1997) 25 EHRR 371 **54**

CANADA

Eve, Re [1986] 2 SCR 388 **78**

UNITED STATES OF AMERICA

Moore v Regents of the University of California (1990) 793 P 2d 479 **102, 104**

Tarasoff v Regents of the University of California (1976) 17 Cal 3d 425 **59, 61**

Table of Legislation

■ Statutes

Abortion Act 1967 **67, 69–71, 73, 75**

§ 1(1)(1) **72**

§ 1(1)(a) **75**

§ 4 **71**

Adoption and Children Act 2002 **90**

Children Act 1989–

§ 8 **47–48**

Computer Misuse Act 1990 **55**

Congenital Disabilities (Civil Liability) Act
1976 **67, 75**

Coroners and Criminal Justice Act

2009 **122, 123**

Data Protection Act 1998 **55**

Family Law Reform Act 1969–

§ 1 **46**

§ 8 **47**

Human Fertilisation and Embryology Act

1990 **68, 85, 87, 90, 93, 100**

§ 13(5) **88, 89, 90**

Sch 2, para 1ZA **94**

Human Fertilisation and Embryology Act

2008 **83, 85, 87, 89, 92–94**

§ 33 **83, 86**

§ 35 **86**

§ 41 **86**

§ 42 **86**

§ 44 **87**

§ 54 **83**

Sch 3 **86**

Human Rights Act 1998 **22, 54, 55, 80,**

87, 129, 130

§ 6 **29**

§ 7 **55**

§ 8 **55**

Human Tissue Act 2004 **97, 105–108,**
110, 135

§ 1 **107**

§ 4 **110**

§ 5 **107, 108**

§ 5(1) **107**

§ 27(4) **110**

§ 53 **107**

Sch 1 **107**

Infant Life (Preservation) Act 1929 **67, 70**

Mental Capacity Act 2005 **33, 35–37,**
38–41, 42–45, 47, 73–75, 76–80, 82, 132,
135, 138–139, 147

§ 1 **77**

§ 1(2) **35, 39**

§ 1(4) **36, 39, 43**

§ 1(6) **41**

§ 2 **35**

§ 2(1) **35, 39**

§ 3 **40**

§ 3(1) **35**

§ 4 **40, 74, 75**

§ 4(3) **40**

§ 6 **41**

§ 24 **43**

§ 25(4) **44**

§ 25(5) **44**

§ 26(2) **45**

§§ 30–34 **139, 143**

Mental Health Act 1983 **129–130,**

132–133, 134–136

§ 1(2) **131, 134**

§ 1(3) **131**

§ 2 **129–131**

§ 2(2) **130**

§ 3 **129–132, 135**

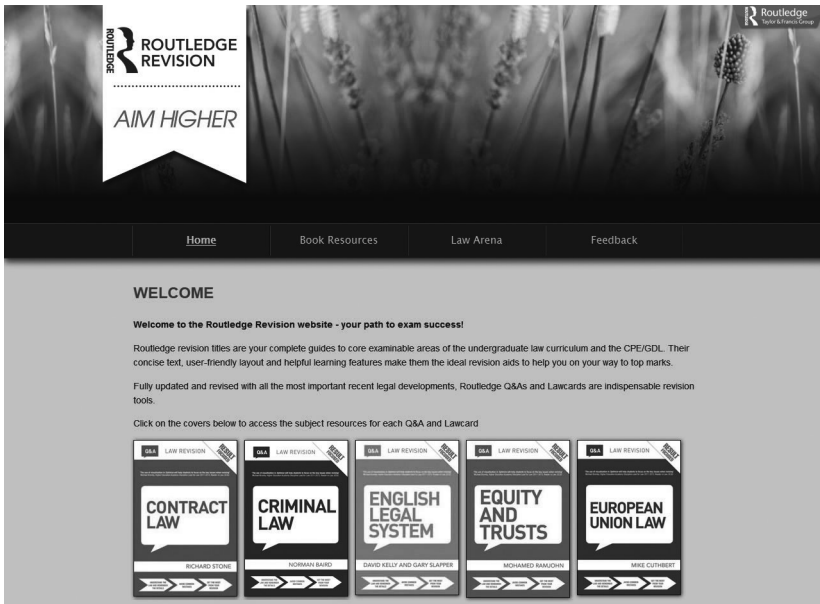
§ 4 **129–131**

- s 17A **136**
 s 145 **135**
 s 145(4) **132**
 Mental Health Act 2007 **133–136**
 National Health Service Act 1977 **21**
 National Health Service Act 2006 **21**
 s 1 **21**
 s 8 **30**
 NHS Redress Act 2006 **16**
 Offences Against the Person Act 1861 **67**
 s 47 **108**
 s 58 **67, 70**
 s 59 **67, 70**
 Road Traffic Act 1988–
 s 172 **59**
 Suicide Act 1961 **126**
 s 2 **123**
 s 2(4) **127**
 Surrogacy Arrangements Act 1985 **82**
 s 1A **83**
 Medicines for Human Use (Clinical
 Trials) Regulations 2004 (SI
 2004/1031) **143**
- European Convention on the Protection
 of Human Rights and Fundamental
 Freedoms 1950 **29, 56, 57, 60, 68,**
125–126
 Art 2 **22, 29, 68, 126**
 Art 3 **22, 59, 79, 156, 157**
 Art 5 **131**
 Art 8 **29, 54, 57, 59, 60, 68, 79, 127**
 Art 8(1) **54, 57, 59**
 Art 8(2) **54, 57, 59, 127**
 Art 10 **60**
 Art 14 **23, 29**
- Injury Prevention, Rehabilitation and
 Compensation Amendment Act
 (No. 2) 2005 (NZ) **18**
- World Medical Association Declaration
 of Helsinki – Ethical Principles for
 Medical Research Involving Human
 Subjects (1964–2008) **140**
 para 21 **139**
 para 26 **138**
 para 34 **138**

Guide to the Companion Website

www.routledge.com/cw/revision

Visit the Law Revision website to discover a comprehensive range of resources designed to enhance your learning experience.



The Good, The Fair, & The Ugly

Good essays are the gateway to top marks. This interactive tutorial provides sample essays together with voice-over commentary and tips for successful exam essays, written by our Q&A authors themselves.

Multiple Choice Questions

Knowledge is the foundation of every good essay. Focusing on key examination themes, these MCQs have been written to test your knowledge and understanding of each subject in the book.

Bonus Q&As

Having studied our exam advice, put your revision into practice and test your essay writing skills with our additional online questions and answers.

This page intentionally left blank

Introduction

Exams in medical law usually involve two kinds of questions: essay questions and problem questions. This book has examples of both kinds of question. You should check with your lecturers and past exam papers to see whether your university uses problem questions and/or essay questions.

To do really well in a medical law exam you need to show a good understanding of the law (of course!), but also a good knowledge of the ethical principles. This can worry students: should I be spending more time writing about ethics or more time writing about law? Your lecturer may have given you specific guidance on this. For most courses it is important to make sure you include both. An essay that is full of cases but fails to mention a single ethical argument is unlikely to do well. But neither would an essay that cited many great ethicists, but neglected to refer to a single case.

Your examiner is likely to give you some leeway: so, as long as there is a reasonable mixture of law and ethics, she or he will not mind if you have slightly more ethics or slightly more law. The best answers will integrate both law and ethics, showing how the legal principles reflect (or do not reflect) ethical principles, or discuss how a particular case reveals a clash between different ethical approaches.

When discussing ethical issues, try where possible to refer to particular commentators. So, saying 'John Harris argues...' is preferable to 'It might be argued...'. It is not always possible to cite an author for a particular view, but where you can, do so. This will show the examiner that you have read the material set and you are aware of the academic debates.

One final point. Medical law is great fun and part of the reason for that is that it raises controversial issues. Understandably, students get worked up over some issues and have strong views. So they should. But do not let this affect your exam performance. First, make sure that you keep your discussion located in the legal and ethical writings. Do not go off on a rant of your own! Second, refer to the arguments on both sides of the debate. A good argument will always explain not only the reasons in favour of its view, but also why the arguments against it are bad. But always be respectful. Don't dismiss particular views in contemptuous terms. After all, you don't know what the examiner's views are. Anyway, rudeness and lack of respect are inappropriate for a lawyer. So treat others' views in a serious and polite way. That said, don't be afraid of stating your convictions. A wishy-washy essay that expresses no opinion is not going to excite the examiner!

Common Pitfalls

The most common mistake made when using Questions & Answers books for revision is to memorise the model answers provided and try to reproduce them in exams. This approach is a sure-fire pitfall, likely to result in a poor overall mark because your answer will not be specific enough to the particular question on your exam paper, and there is also a danger that reproducing an answer in this way would be treated as plagiarism. You must instead be sure to read the question carefully, to identify the issues and problems it is asking you to address and to answer it directly in your exam. If you take our examiners' advice and use your Q&A to focus on your question-answering skills and understanding of the law applied, you will be ready for whatever your exam paper has to offer!

1

Medical Negligence

Checklist

You need to be aware of:

- when a doctor owes a patient a duty of care;
- how the law decides if a doctor is negligent;
- how the courts determine if a doctor's negligence has caused the patient loss;
- what the courts do if the doctor's negligence only creates a risk of harm;
- the method used by a court to assess the amount of money payable to an injured patient;
- the arguments over whether it would be better to have a no-fault system for medical negligence cases.

QUESTION 1

Assess the *Bolam* test.

How to Read this Question

The examiner has gone for a short and to the point question here. Remember to look carefully at the wording of the question. Notice that we are asked to assess the test. So it is not just a question of defining it – candidates are required to discuss and analyse it. Notice too that we are asked to assess the *Bolam* test and not the whole of the law of medical negligence. So keep focused on the question asked.

How to Answer this Question

The structure of the essay will be straightforward. The *Bolam* test will be defined. This could take up the whole essay, and given that you are primarily asked to assess the test it is better to keep this discussion brief. Then we will look at some of the criticisms of the test, before looking at some of the alleged advantages. It will then be necessary to consider whether any of the alternatives are preferable. Finally, a conclusion will be drawn.

One general point in essays of this kind is that it is easy to lambast a particular legal rule and point out all its flaws; however, unless you can find a better alternative the objections to it will be weaker. Remember, often in difficult legal issues there are competing