

Legal Profession Admission Board

Examiner's Comments

27 Health Law Examination – March 2025

The exam comprised of two questions.
Candidates were required to answer two questions.
All questions were of equal value (50 marks each).

Question 1

What issues or areas of knowledge was question 1 seeking to test?

Generally speaking, this question was built around consent, children and capacity, undue influence, abortion, voluntary assisted dying, refusal of treatment and palliative care.

(a) The first part required a discussion of Gillick capacity and undue influence in relation to the decision to refuse an abortion. There was also an issue as to whether competent children can consent to abortions or whether they are non-therapeutic treatments under *Marion's case*. The courts role as *parens patriae* and its power to force treatments on children should as have been discussion. There were quite a few cases that could have been discussed including *Re Patient Fay* and *X's case*. Several pieces of legislation were relevant including the Children and Young Persons (Care and Protection) Act and the Guardianship Act. The boyfriend has no rights in relation to the treatment. There were many cases that could have been cited for this proposition.

(b) This part involved a discussion of the legislation on later term abortions and the requirements of the Abortion Law Reform Act such as the need for informed consent, two specialists and the abortion being performed in a public hospital (or approved clinic).

(c) The likely result is that the court would order that the treatment be performed, following cases like *Patient Fay* and *X's case*. Again, a good answer went through these cases and applied them to the facts.

(d) Discussion of the legislative requirements was necessary here. Its clear that Hamish is not going to die within 6 months as required by the Act.

(e) The laws regarding withdrawal of treatment should also have been discussed and the cases such as *Rossiter's case*, *J's case*, *Bland's case* and *Re Baby D (No2)*. The treatment should be withdrawn and the law is likely to accept that the double effect doctrine provides a defence.

Question 2

What issues or areas of knowledge was question 2 seeking to test?

This question was based around issues of assisted reproductive technology and medical negligence.

(a) This part invited students to discuss the rules of negligence in relation to the birth of an extra child. Good answers discussed the Civil Liability Act provisions and the question of standards of care in relation to cases like *G v Armellin*. Damages for personal injury and related expenses are recoverable by the birth partner.

(b) The problem with recovering damages for wrongful birth of the child in NSW relates to s 71, that limits recovery to damages relating to the child's disability (essentially legislating the UK position and overturing *Cattanach*).

(c) This question relates to whether the "disappointment" style damages would be recoverable in Australia. In other jurisdictions there have been mixed results. Good answers looked at the policy reasoning of cases like *Harriton* to argue either for or against recovery.

(d) This was a fairly simple question of negligence. If PGD testing is the standard of care, then a failure to advise/offer would be considered a breach and the negligence would give rise to a claim for wrongful birth. The main case to look at was the NSWCA decision in *Waller v James*.

(e) This question was based around the tort of wrongful life and whether it is available in Australia (its not).

Characteristics of poor or average responses

What characterised very poor or average responses to the examination paper?

There were very few poor responses but the ones that did exist were not able to demonstrate recognition of the relevant issues.

Characteristics of very good or excellent responses

What characterised very good or excellent responses to the examination paper?

Overall, most students did very well because they recognised the issues and presented cogent arguments based on the legislation and case law.

Common mistakes

Were there commonly encountered mistakes as to the law in student responses?

On Q2(d) a lot of students just discussed the NHMRC guidelines on PGD and did not look at the duty of care issues.

Areas for improvement

Were the identifiable areas for improvement in the students' legal knowledge tested by the examination paper?

Overall, the students performed very well. There were very few areas for improvement, but one would be better issue recognition.