Answer Guidance

# Chapter 6: Law

## 1. Activity answer guidance

### Activity 6.1

What strategies could you use to enhance Joe’s understanding of why he was not being allowed to go home?

#### Answer guidance:

*The first step must be to attempt to establish a rapport with Joe so that he develops trust in you. The nurse should therefore talk to Joe in a calm reassuring manner, using simple straightforward language. It is also vitally important that Joe is listened to whenever he speaks, for this will give some clues to what is distressing him and what he would like to do. The expert on communicating with Joe, of course, is going to be his mother, and she will be in the best position to tell you what works, what does not work, and what certain behavioural patterns exhibited by Joe might mean.*

*Beyond this, there are several communication aids that are available to assist with this process. Perhaps the best known of these is Makaton, which is internationally recognised and uses speech, signs, and symbols. In addition, there are a variety of software applications that have a large library of photo symbols. Needless to say, these aids all require the training of staff before the latter can be considered competent to use them, but enhanced communication with Joe will go a long way to reducing his anxiety.*

### Activity 6.2

What forms of physical restraint do you think are acceptable (if any) when dealing with confused, restless, or aggressive patients?

#### Answer guidance:

*For those patients sectioned under the Mental Health Act 1983, legal protection against prosecution in the criminal courts or litigation in the civil courts is afforded to healthcare professionals who physically restrain them “unless the act is done in bad faith or without reasonable care” (s139). Similarly, the Mental Capacity Act 2005 acknowledges that restraint may be necessary for incompetent patients, provided that it is “a proportionate response” (s6). No definitions of “reasonable” or “proportionate” are provided and it would be unfair to expect that they would be, given that each situation will be unique. Nevertheless, we could perhaps say that the level of restraint to be applied should be the minimum necessary to achieve the desired objective.*

*The Royal College of Nursing (2008: Let’s talk about restraint: rights, risks, and responsibility) outlines a variety of measures that have been employed to restrain patients, including physical, mechanical, chemical, and psychological methods. The key point to remember here is that they should only be used as a last resort (i.e., when all other strategies have failed) and that they should not be allowed to develop into the norm. The Department of Health (2008: Code of Practice: Mental Health Act 1983) states that restraint “must never be used as punishment or in a punitive manner” (para. 15.8), and the best interests of the patient should always remain at the top priority for healthcare professionals. The RCN (2008) goes on to say that ‘... a combination of well-considered environmental features and a workforce that has developed person-centred care reduces the need for inappropriate restraint’ (p4), and this should be the ultimate goal for nurses.*

### Activity 6.3

If a patient had severe learning disabilities and no relatives, would a breach of his or her confidentiality cause him any harm?

#### Answer guidance:

*A patient with severe learning disabilities lacks autonomy and is therefore unable to independently enter into a relationship of confidence. Similarly, it is extremely unlikely that any harm (psychological or otherwise) will be experienced by this patient if their medical details are divulged to others, although this depends upon the patient’s individual circumstances and abilities. Nevertheless, every patient has general privacy rights, including the right to confidentiality. Such rights extend to children, the unconscious, and the dead. In consequence, if the information is to be divulged, it will be justifiable only if:*

*a. It is in the patient’s best interests.*

*b. The information is limited only to those who have a need to know and who are therefore in a position to serve those interests.*

*c. It is the minimum necessary to serve the patient’s interests.*

*d. Or, there is a public interest reason for its disclosure*

*There are legal penalties for breach of this patient’s confidentiality and also disciplinary measures from employers, universities, and professional regulators are possible, and healthcare professionals should be mindful of this.*

### Activity 6.4

Do you think patient confidentiality is more a myth than reality? What can be done to ensure that patients’ medical details are kept safe while ensuring there is good communication between the individual careers involved. How will this promote holistic care for your patient?

#### Answer guidance:

*Given that healthcare today is a multi-disciplinary team effort, it is inevitable that patients’ medical details will be seen and shared with a large number of people. This is necessary to ensure that appropriate and optimum care and treatment are given, but it puts the concept of confidentiality into perspective. The fact that all healthcare workers (whether qualified or unqualified) are bound by a contractual duty of confidentiality may not be sufficient to allay patient fears or anxieties. Nevertheless, not only is there an individual responsibility to uphold confidentiality but also every NHS organisation has a corporate responsibility in this regard. The Caldicott Report (1997) clarified this responsibility by enjoining NHS organisations to uphold the following principles:*

*1. If confidential information is required, there should always be a justification for this purpose.*

*2. Patient-identifiable information should only be used when it is absolutely necessary.*

*3. When patient-identifiable information is required, only the minimum necessary to achieve the desired purpose should be used.*

*4. Access to patient-identifiable information should be on a strict need-to-know basis.*

*5. Everyone who has access to this information is under a duty of confidence.*

*6. Everyone should understand and comply with the law.*

*Assessments of compliance with this process are made on an annual basis and Trusts are expected to show year-on-year improvements. This alone should demonstrate the seriousness with which the NHS approaches patient confidentiality and how complacency is to be avoided.*

*Upholding the five principles above should ensure that those who need access to the patient’s information can do so in order to provide their care and treatment, whilst protecting the patient’s information from those who do not have a justified reason to access it.*

*This in turn allows communication to occur between the various members of the multidisciplinary team, with all being able to access the patient’s medical records. When a patient has confidence that their personal information will be kept confidential they are more likely to share that information and thus allow a more individualised and holistic approach to be taken in that patient’s care and treatment.*

### Activity 6.5

Would Roshan’s liability be increased if she was a third-year student nurse, only a few weeks from qualifying?

#### Answer guidance:

*1. It is reasonable to expect a higher level of knowledge and skill from a third-year student nurse than that of a first-year student. Although Roshan remains unqualified at this point she still has a duty of care and thus a professional standard she has to meet. The* *achievement of the professional standard is measured through the application of the Bolam test (Bolam v Friern Hospital Management Committee [1957] 2 All ER 118).*

*It should be emphasised that this standard applies to all healthcare practitioners, students, registered, inexperienced or experienced, and no allowances are made for inexperience (see Wilsher v Essex AHA [1988] 1 All ER 871 [HL]). The reasons for this are that every patient is entitled to a reasonable standard of care from every healthcare practitioner regardless of their length of service.*

*However, although the professional standard applies to every healthcare practitioner, it does not mean that they are all expected to meet the same level of competence. The third-year student nurse whilst having to meet the Bolam test is not expected to reach the standard expected of a registered nurse. Rather, an individual healthcare practitioner is judged against the standard of those who normally undertake the role or task they have performed. So, Roshan would be judged against other third-year nursing students. More would be expected of a third-year student than a first-year student but less than a registered nurse. Thus, although everyone has to meet the required standard that standard is context-specific.*

*The moral of this story is that every nurse should ensure that s/he is competent before undertaking any task, and should be supervised by an appropriate senior colleague until this competence has been achieved.*

2. If the healthcare institution looked after small children, people with severe learning disabilities, patients with reading difficulties, or blind people, what purpose would be served by a wet floor warning sign? What other measures would one expect to be in place?

*The simple answer to this question is that a warning sign would only be of use if the people to whom it is addressed can read and understand it. Clearly, it would have no such value to the groups mentioned here, but the healthcare institution retains liability for their safety. Under the Occupiers Liability Act 1957, it is stated that an occupier (in this case, the healthcare institution) ‘must be prepared for children to be less careful than adults’ (s2 (3)). By logical extension, the same extra precautions are expected for other groups of people where the risk of harm is reasonably foreseeable.*

*The form that these precautions take may be context- and situation-specific. This may mean that the area where the floor is wet should be cordoned off so that it is difficult (if not impossible) to enter it. Ensuring that only small areas of the floor are made wet at any one time will go some way to reducing the risk. Similarly, if it is possible to dry the floor immediately (rather than merely allow the moisture to evaporate), this too will reduce the hazard. Perhaps most importantly, the area should be closely monitored by a member of staff while it remains a hazard so that patients or visitors can be given an appropriate warning whenever they approach it.*

### Activity 6.6

If you felt very strongly that the quality of care on a ward was unacceptably low, to whom should you report this?

#### Answer guidance:

*Questions of this nature reflect an overlap between the concepts of confidentiality and whistleblowing.*

*There is a duty to report concerns about the quality of care, and the individual who does nothing simply becomes implicated in the wrongdoing. Equally, however, it is important to report concerns only to those who have the means and ability to correct the situation. This does not, therefore, mean that the press or the public should be the first recipients of this information.*

*It is a matter of some debate as to who should be the first point of contact. You may want to approach your clinical mentor in the first instance, and although your clinical mentor should be involved, ideally, the manager of the ward should be informed. This is because they are the first line of management that may be able to correct the issue that is being raised and can escalate it if it is outside of their remit. However, the position of the whistleblower remains a perilous one and you can quickly be branded a trouble-maker if this situation is not handled with sensitivity (despite the fact that the Public Interest Disclosure Act 1998 gives protection to those who are victimised as a result of disclosing information in the public interest). In consequence, it may be preferable to involve your personal tutor. It is reasonable to assume that healthcare institutions should give more attention to such concerns following the publication of the Francis Report (2013) into the scandal at Mid-Staffordshire NHS Trust, but there are no guarantees of this. In consequence, it would be advisable to keep records of any correspondence that you have sent or received concerning this matter. In this way, you will be able to show that you have done all that you could reasonably be asked to do.*

## Case study answer guidance

### Case study 6.1: Joe

Joe is a 24-year-old man who has autism and a severe learning disability. He lives with his mother (aged 56) and requires a high level of care, support, and supervision. His mother receives quite a lot of this support from social services, but she has developed a chest infection and is clearly suffering from exhaustion. Joe is taken into a behavioural support unit (BSU) while his mother recuperates, but he exhibits challenging and aggressive behaviour while there. Even when his mother asks for his return, the BSU refuses to discharge him, arguing that his mental state is too unstable.

What legal authority does the behavioural support unit have to detain Joe against his will?

#### Answer guidance:

As Joe is an adult, his mother does not have legal rights to demand he is discharged. Autism remains on the list of conditions covered by the Mental Capacity Act. Therefore the BSU can argue they are acting in Joe’s best interests and detain him legally with regular reviews by a mental health tribunal. An independent mental capacity advocate would be assigned to Joe to provide support, ensure his best interests are met, and communicate a plan of treatment to him. Family and friends would be welcome to provide ongoing support also.

### Case study 6.2: Enthusiastic students

Two nursing students have just completed a shift on a ward for older people with mental infirmity and are traveling home on the bus. They have had a particularly good day, in which they have observed a variety of new therapeutic interventions and feel that they are learning a lot from this placement. They begin to share their experiences with each other and talk about some of the patients they have cared for. Unfortunately, the wife of one of these patients is sitting immediately behind them and hears every word of their conversation. She makes an official complaint to the hospital.

Have these students committed a disciplinary offence and does the patient’s wife have a cause of action?

#### Answer guidance:

Yes, these students have sadly breached legal guidelines as the patient did not consent for their information to be shared, there was no court order in place to authorise sharing of information and it was not in the public interest. The students have also breached their professional code of conduct. The hospital would refer this matter to the higher education institute that these students attend and a disciplinary process would be initiated.

### Case study 6.3: Roshan

Roshan is a nursing student on placement in a residential nursing home and is escorting an elderly female resident (Mrs. Howe) to the toilet one afternoon. A carpet runs along the floor leading to the toilet and this has become heavily stained. In an effort to clean it, the domestic staff have poured buckets of water onto it, but have not placed any “wet floor” signs nearby. As Roshan walks with Mrs. Howe, she slips and falls to the floor, fracturing her left wrist. In the process, she drags Mrs. Howe down with her, and Mrs. Howe sustains a fractured left hip.

• Was a duty of care owed by the nursing home to the resident and the nursing student?

• Has the nursing home breached a reasonable standard of care?

#### Answer guidance:

Yes, the nursing home had a duty of care to their student nurse, Roshan, and their patient. They have a duty to provide a safe system of work for all employees.

### Case Study 6.4: Amelie

Amelie is 14 years old and attends the Walk-in-Centre alone. She states that she had unprotected intercourse with her boyfriend last night at a party and is worried about getting pregnant. She, therefore, asks if she could be given emergency contraception, but does not want her parents to be informed of her visit.

1. What legal issues does this scenario encompass?

2. Does Amelie’s age change how the nurse should respond to her care?

#### Answer guidance:

*This scenario encompasses issues of Consent and Confidentiality, but there are specific differences when children are concerned. In Scenario 2 in the chapter, there was a presumption that Joe was competent to make decisions concerning his treatment, but that the onus fell upon the healthcare professionals to overturn this presumption. For children below the age of 16, there is a presumption in law that they are not competent to make such decisions and that somebody should make them on their behalf (usually a parent or legal guardian). This presumption can also be overturned, however, but once again the healthcare professionals must be able to justify why they have done so.*

*The leading case dealing with this issue was that of Gillick v West Norfolk and Wisbech Health Authority [1985] 3 All ER 402 [HL], in which it was stated that “the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.” This principle has been given statutory authority in Scotland by means of The Age of Legal Capacity (Scotland) Act 1991 but remains a common law principle in England and Wales.*

*How healthcare professionals make an assessment of competence in a child is not entirely clear, although Lord Fraser (in the Gillick case) laid down some guidelines relating to issues of contraception:*

*The healthcare professional must be satisfied that:*

*1. She understands the advice given to her.*

*2. She cannot be persuaded to tell her parents (or allow the healthcare professional to tell them).*

*3. It is likely that she will have sexual intercourse whether or not she receives contraception.*

*4. Her physical and/or mental health might suffer if she is refused contraception.*

*5. It is in her best interests to receive contraceptive treatment and advice, and this should be given without informing her parents.*

*In addition, the healthcare professional must satisfy him/herself that the child has fully understood the information and their needs, therefore, be two-way communication to ensure that this has taken place.*

*Some have argued that the threshold of competence for children is much higher than that of adults, but a competent child is able to enter into a relationship of confidentiality and is entitled to expect the same rights as anybody else. A breach of confidentiality in this instance (i.e., by telling Amelie’s parents) would fundamentally destroy her trust in healthcare professionals and she would therefore be less likely to seek medical attention in the future.*