**GENERAL EXAM TIPS**

(1) Read question quickly 🡪 What is it asking for?

(2) Read fact pattern carefully

(3) INTRO “you have asked me…” Identify the possible actions and defenses > type these out

(4) set out elements of each tort & tie in facts // discuss difficulty in proving some elements // match to cases – distinguish and analogize

(5) set out elements of each defense & tie in facts // applicable damages? (if asked)

(6) Give an opinion!

(7) *talk about policy, if there is time*

*Why Torts? Compensation, deterrence, punishment, appeasement and vindication, justice, market deterrence*

**Primary and Secondary Rights in torts:**

Primary right is the right to something "renovations, bodily integrity, etc…"

Secondary right is the right to have the first right remedied.

Burden of proof: which party is required to make out their case

Evidentiary standard: the standard to which that case must be made out.

What is required for a **tort**?

* Volition: Smith v Stone. The act must be done voluntarily.
* Intention: proof of intent to cause injury, can be made out to be imputed (harassing a man and his friend suffers psychological harm) and transferred (accidentally punching a bodyguard instead of main person)

**Trespass to Land**

**Elements:**

**A direct and intentional physical intrusion onto the land in the possession of another. (Turner v Thorne)**

* Direct (direct force) and Intentional conduct (motive is irrelevant)
* Physical intrusion (excludes smoke, light, smog, noise, odors, etc.)
* Onto the land in possession of another

**🡪 “every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground with my license, but he is liable to an action, though the damage can be nothing.”**

Errick v Carrington: D broke into P’s house and took papers

**Types:**

* Entering land IN PERSON or FAILING TO LEAVE after permission to enter is revoked
  + Forced entry = increase of damages
* Propelling AN OBJECT or FAILING TO REMOVE IT

**Available Defenses:**

1. License – consent, either express or implied
2. Necessity – emergency situation or preventing danger
   1. Harm to public – save lives, protect from nature (Surocco v Geary: necessity must be clearly shown)
   2. Harm to trespasser
   3. Harm to possessor of land
   4. Harm to 3rd party
3. Legal Authorization (Police Officer)

**🡪 an innocent mistake is not a defence to trespass and its consequences; motive is irrelevant; liable for all foreseeable and unforeseeable consequences of a trespass**

Turner v Thorne: Delivery person leaves boxes in garage, P trips over them due to no lighting

**🡪 Trespass is limited to DIRECT intrusions on the land in possession of another**

Hoffman v Monsanto Canada: GMO seeds landed on neighbour’s organic farm

**🡪 Public land has implied license for entry, but trespass can occur after permission to enter has been revoked, and that the common law protects property rights unconditionally unless there is an overriding statute**

Harrison v Carswell

**Dissent**: Trespass is “unjustified invasion of another’s possession; privilege only withdrawn for unlawful behavior, need to balance property rights with other rights and interests

**🡪 The potential of irreparable harm to the public or public interest may protect individuals from injunctions or trespass locations (BC Trespass Act S4)**

Vancouver (City) v Wallstam: activists occupying a city-owned lot that has been vacant for 20 years

**🡪 Even if the person has a reason to be at a certain location, it may not give right to Trespass in another person’s yard that has been made clear is private property (Criminal Code S177: Trespass At Night)**

R v. Priestap: Man stalks and follows woman at night and convicted for prowling

**🡪 Doctrine of Continuing Trespass applies when object is not removed from property; new cause of action every day it remains**

Williams v Mulgrave: drain across property caused flooding, damages for 6 years

**🡪 trespass requires P *to be in possession* of land at the time of intrusion**

Townsview Properties v Sun Construction: wrongful excavation prior to acquiring possession

**🡪 substantial punitive damages if D acts in high-standard or arrogant fashion**

Nantel v Parisien: employee broke into business to demolish building, no warning given

|  |
| --- |
| **BC *TRESSPASS ACT*** |
| **Trespass prohibited**  **(1)** Subject to section 4.1, a person commits an offence if the person does any of the following:  **(a)** enters premises that are enclosed land;  **(b)** enters premises after the person has had notice from an occupier of the premises or an authorized person that the entry is prohibited;  **(c)** engages in activity on or in premises after the person has had notice from an occupier of the premises or an authorized person that the activity is prohibited.  **(2)** A person found on or in premises that are enclosed land is presumed not to have the consent of an occupier or an authorized person to be there.  **(3)** Subject to section 4.1, a person who has been directed, either orally or in writing, by an occupier of premises or an authorized person to  **(a)** leave the premises, or  **(b)** stop engaging in an activity on or in the premises,  commits an offence if the person  **(c)** does not leave the premises or stop the activity, as applicable, as soon as practicable after receiving the direction, or  (**d)** re-enters the premises or resumes the activity on or in the premises  **4.1**  A person may not be convicted of an offence under section 4 in relation to premises if the person's action or inaction, as applicable to the offence, was with  (a) the consent of an occupier of the premises or an authorized person,  (b) other lawful authority, or  (c) colour of right. |

|  |
| --- |
| **CRIMINAL CODE, RSC 1985, C C-46, SS177** |
| **Trespassing at night**  **177**Every one who, without lawful excuse, the proof of which lies on him, loiters or prowls at night on the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction |

**Private Nuisance**

**Elements**: Interference is…

* **substantial** – alters the nature of property or significantly interferes with actual use of the property
* **unreasonable** – look to surrounding circumstances: character of the harm, neighborhood, intensity of interference, time of day, day of week, zoning delegation, nature and utility of conduct

**Available Defenses:**

1. Statutory Authority
2. Statutory Immunity – designated by legislature
3. Consent – strong evidence of approval
4. Prescription – “nuisance” has continued uninterrupted for lengthy period of time with P’s knowledge

**Trespass v Nuisance**

1. actionable per se (proof of loss NOT required)?
   1. YES **v** NO
2. protects?
   1. possessions **v** quality of possessions
3. concerned with?
   1. nature of conduct **v** effect of conduct on use and enjoyment of land
4. requires intent?
   1. YES **v** No

🡪 **Distinguishes torts of trespass to land & private nuisance**

Kerr v Revelstoke Bldg Materials: ash, smoke, dust (trespass) // objectionable sounds (private nuisance)

**Trespass to Airspace**

Any direct and intentional intrusion into the airspace with P’s zone of use

**🡪 overhead flight at ANY altitude is trespass BUT it’s privileged when: a legitimate purpose, in a reasonable manner, at a height that doesn’t unreasonably interfere with use of land**

Atlantic Aviation v NS Light and Power: aviators wanted to prevent landowner from erecting building/transmission wires

**🡪 an owner’s airspace rights are restricited to height necessary for the ordinary use and enjoyment of the land and structures upon it**

Bernstein v Skyviews & General Ltd.: aerial photos of house = trespass?

**Removing a Trespasser**

**🡪 trespasser cannot be forcibly removed until they’re (1) requested to leave; and (2) given an opportunity to do so**

**🡪 force must be reasonable**

MacDonald v Hees: ejected from hotel room, claims assault

🡪 **An occupier may be required to tolerate presence of a trespasser if ejecting them would pose a foreseeable risk of physical injury**

Dunn v Dominion Atlantic Railway: liable for negligence bc ejected individuals who were obviously in vulnerable situations

**Battery**  (**Trespass to the Person)**

**3 ELEMENTS**: **Bettel v Kim**:

**Direct and intentional bringing about of a physical harmful or socially offensive contact with the person of another. (Burden of proof on P)**

1. Direct and intentional bringing about – (could be putting drugs in a drink J(MI) v Grieve)
2. Physical interference or socially offensive conduct (see Malette v Shulman)
3. With the person of another (includes any reasonable extensions of body such as backpack, clothing, horse)
   1. an result in bodily injury or violate integrity or offend P’s sense of dignity

**General rule:** If battery is proven, the outset of the damage caused by the battery even if it was unforeseen, will be held liable by the perpetrator of the battery. However, this is not strict liability, only the foreseeable elements will be upheld. (Eg. Heart attacks or seizures)

**Defenses (burden of proof on D to prove partial or complete defenses)** – consent (complete defense) // self-defense // necessity // legal authority (complete defense) // provocation // mistake

**Bettel v Kim**: storeowner shakes kid by the collar to get confession re: throwing matches, accidentally hits nose.

🡪 **Once a plaintiff has proven intentional interference with a person, liability of (un)intended consequences are within the scope of damages sufficient, severity of harm is irrelevant**

**🡪 thin-skulled man rule – take the victim as you find them**

**Malette v Shulman**: lifesaving action by doctor to donate blood who refused it on religious grounds

**🡪 action deemed socially offensive despite position motive and can be actionable**

**Assault** (**Trespass to the Person)**

**The intentional creation in the mind of another of a reasonable apprehension of immediate physical contact. (Holcombe v Whitetaker)**

1. The intentional creation in the mind of another…
2. Reasonable apprehension
3. Immediate physical contact

**Holcombe v Whitaker**: husband threatens to kill wife and bangs on door when she wants marriage annulled;

**🡪 sufficient to arouse the apprehension of harm or offensive conduct**

1. only takes place when victim knows it’s happening
2. threat of violence must be such that a reasonable person of ordinary courage would be in fear of an attack

**Police v Greaves**: D came to door drunk with knife in hand, threatened to stab P if they moved; assault when P has reasonable grounds that D has present ability to effect D’s purpose

**Battery VERSUS Assault**

* + Can be a combination – first a threat and then an attack
  + B w/o A – strike victim from behind
  + A w/o B – threatens harm but doesn’t carry out the threat

**Sexual Battery and Role of Consent:**

**no individual tort of sexual battery, but consent requirement is modified**

Norberg v Wynrib: drug addict and asshole pharmacist

**🡪 Defense of consent is VITIATED or non-existent if there is a fundamental inequality between the parties and if this inequality is exploited:** Majority – La Forest

* **proof of fundamental inequality between the parties (age, nature, gender, occupation)**
* **proof of exploitation (look to community standard, what others would say)**

Scalera v Non-Marine Underwriters: D is bus driver, P is insurance company, accused of sexual assault of young girl, insurance hinges on who has to prove consent (compensatory damages bc of bodily injury EXCEPT for intentional acts)

**🡪 Consent must be proven by the D, not an element established by the P (Scalera)**

**🡪 P has to prove non-consent, bc sex is often consensual** Dissent Iacobucci

**🡪 sex involved singling out another person’s body in a DELIBERATE, TARGETED act**

**🡪 it is NOT: an ordinary casual contact that must be accepted into everyday life, sort of contact where consent can be implied**

**Obvious Policy Reasons**: victim blaming, shifts focus onto the Plaintiff, only one side of the story if only Plaintiff testifies, D is in best position to say what is on his mind, sexual offences are underreported

**Defenses to Trespass to the Person**

**Consent:**

D to prove, may be given implicitly or explicitly, chooses to engage in the activity, fact-specific!

VITIATED BY: Fraud, Mistake, Duress, Public Policy (see next page)

**Implied consent:** assumes rick inherent in the act

**\*Wright v McLean (1956**):

“combatants consent to take the ordinary risks of the sport in which they engage… if tacit conditions of fair play and good temper are not kept, the consent is at an end” = kids throwing mud and one gets hit with rock; no ill will = no liability;

**🡪 “Harm suffered by consent is, within limits to be mentioned, not a cause of civil action”**

**Elliot and Elliot v Amphitheatre Ltd. [1934]**:

spectators implicitly consent to injuries incidental to attendance at sporting events. P was an amateur hockey player, knew it was possible \*\***foreseeability is vital**\*\*

**Exceeding Consent:**

**\*\*Agar v Canning (1965**):

D struck P in face with hockey stick during game, in retaliation for another blo**w //** limits must be placed on a player’s immunity from liability; in circumstances that show a definitive resolve to cause serious injury to another, consent is not implied //

🡪 **excessive harm can exceed assumed consent**

**R v McSorley (2000):**

hockey players consent to permitted physical contact, and a little more, but some forms are “too dangerous” to consent to

**🡪 cannot consent to serious bodily harm**

**Teolis v Moscatelli (1923):** bringing a knife to a consensual fistfight exceeds consent

**Competency to Consent: (also under Medical Settings)**

* + person giving consent needs to be capable of appreciating nature and consequences of act
  + cannot be mentally or physically ill, intoxicated, too young or senile

**Factors that Vitiate Consent**

**Fraud**

1. D is responsible of the plaintiff’s misapprehension
2. The fraud relates to the nature and quality of the act

**Traditionally, fraud causing harm to a person didn't negate consent (changed in** Mabior**)**

\*\*R. v. Mabior, 2012 SCC 47   **\*\*\*KEY\*\*\*** D charged with 9 counts of aggravated SA bc failed to disclose HIV+ status to 9 women before having sex with them; convicted on 6 because wore a condom with 3

🡪 **fraud negates consent if fraud physically harmed the complainant or exposed him/her to a significant risk of serious bodily harm (low transmission and condom)**

R. v. Ssenyonga (1992): D had unprotected consensual sexual intercourse with 3 women, when he know that he was infected with HIV, judges decided he could not be charged

R v Cuerrier [1998] **rejected the above principle** 🡪 knowingly exposing a sexual partner to HIV constitutes a prosecutable crime under Canadian law

R v Hutchinson: Consented to intercourse, D poked holes in condom, P became pregnant

🡪 **No consent bc deception/deprivation of women’s choice ot be pregnant; significant risk of harm by being with child**

**Mistake**

1. D is aware of the plaintiff’s misapprehension
2. The mistake relates to the nature, and potentially extent of the act.

**🡪D’s mistaken belief regarding consent of P does NOT constitute a defense; *mitigating factor in damages ONLY*. See:**

\*Guimond v Laberge plaintiffs teeth all removed when it was not neccssary, based on the reckless interpretation of consent given by the plaintiff -> in modern context, we characterize consent only to the teeth that were diseased and not others.

Turner v. Thorne (1959) delivery dropped off boxes in garage when P wasn't home, P tripped and was hurt

Schweizer v. Central Hospital (1974) patient consented to toe fusion surgery and had a spinal fusion instead

**Duress (Not fully set out)**

**🡪If someone is pressured into consenting what would otherwise be a prima facie tort, this consent is vitiated. See:**

R v Z **🡪 in urgent situations of clear and imminent peril where compliance with the law would be demonstrably impossible**

\*\*Latter v Braddell (1880) P was housemaid for D, P employers who hired Dr. to see if P was “in the family way”

**Public Policy**

Lane v Holloway [1968] – P was too old to be a match for young D in a fight

R v Paice – no consent if serious physical harm was intended and caused

M(M) v K(K) (1989) –father has sex with 15yo foster daughter // no consent if D exploited a position of trust

\*\*Norberg v Wynrib [1992] – doctor offers to supply addicted patient with prescription narcotics if she submitted to sexual advances // **See sexual battery section above for vitiation test**

**Defenses for Protection of Persons**

**Self-Defence: (MORE) Defences for Protection of Persons**

TEST … for indv to establish on BoP

1. honestly and reasonably believed they were about to be struck
2. amount of force used to protect themselves was reasonable in all of the circumstances

Wackett v Calder (1965): 2 dudes in a barfight, P was attacking D outside, D struck P ineffectively, then laid him out & broke his cheek //

**🡪 attacked person defending himself, confronted with a provoking situation cannot exactly measure the exactitude and weight of blows**

**🡪 must be reasonable and proportionate; onus on D to prove occasion warranted action and force wasn’t excessive (**Ellis v Fallios-Guiterrez)

**🡪 P doesn’t have to wait for other party to strike first** (R v Scopelli)

**🡪 injuries don’t matter, only nature of force and circumstances** (Brown v Wilson - bearhug)

**🡪 reasonable and bona fide mistake of fact in self-defence is still ok to use the defence** (R v Reilly)

**Defence of Third Parties: (MORE) Defences for Protection of Persons**

\*\*Gambriell v Campbell (1974): 2 men having altercation over fender bender in alley; mom sees commotion and whacks P with garden tool //

**🡪 where a person intervening to rescue another holds an honest, though mistaken, belief that the other person is in imminent danger of injury, he is justified in using (REASONABLE) force**

**🡪 excessive force is not okay** (Cachay v Nemeth – kissed wife, husband trained in karate)

**🡪 Defence of third parties is not limited to family** (R v Duffy)

**Provocation**: **(MORE) Defences for Protection of Persons**

🡪 **prior events not relevant, provocation needs immediacy**

🡪 **TEST: would conduct cause a reasonable person to lose self-control?**

\*\*Miska v Sivec (1959): D intentionally shot P, road rage and previous bad blood

**🡪 provocation may affect damages (\*\***Ellis v Fallios-Guiterrez**)**

**Discipline**: **(MORE) Defences for Protection of Persons**

\*\*R v Dupperon (1984): son caught smoking, bad language, ran away from home; dad straps butt with leather belt ~10 times, leaving bruises --- wasn’t reasonable here!

**🡪 force is allowed under s 43 of the CCC if it is within reason**

**🡪** s 43 is determined by Canadian social standards, not of the accused **(**R v Baptiste)

🡪 may use minimal force on teenagers for protection, rather than correction (R v Swan)

🡪 educators may be permitted to use force under s 43, if reasonable (R v Wetmore)

🡪 **TEST** **for discipline (**Cdn Foundation for Children, Youth and the Law v Canada (AG))

* used for a corrective purpose
* child must be capable of understanding why force is being used
* s 43 doesn’t apply if
  + force harms, or could be expected to harm, a child
  + is cruel or degrading
  + used on teenagers, bc shown to not work
  + teachers use force as punishment

🡪 ALSO… captains, pilots, etc. have common law right to use force to maintain order & discipline (King v Fanklin)

**Defence of Legal Authority (MORE) Defences for Protection of Persons**

**3 key questions:**

1. did D have legal authority to undertake act?
2. was D legally privileged, ie protected from civil/crim liability? – *pg 268*
3. did D meet all obligations imposed on him/him?

**CCC s 494 (1) 🡪 anyone** can make an arrest

🡪 suspicion isn’t sufficient, has to be a **strong and honest belief (**R v Storrey**)**

🡪 **law changed to “reasonable time”**

R v Chen*:* grocer finds repeat thief,=/= finds committing, used legal fiction to let Chen off

**🡪 “finds commiting” is interpreted broadly, means “apparently finds committing**”

R v Biron – constable arrests D and hands off to peace officer

**Charter s 24(1)** gives judges discretion to award “appropriate and just” remedy

🡪 **4 part TEST for awarding damages:** Vancouver v Ward [2010])

1. P establishes Charter right violated
2. Damage must advance Charter goals
3. state may attempt to establish a countervailing factor
4. the amount of the damage award should reflect its purpose (compensation, vindication, or deterrence)

**Charter s 52** establishes constitutional supremacy, therefore may eliminate basis for person’s defence of legal authority

**Rights & Obligations in the Arrest Process: Reasons for the Arrest**

🡪 **accused is always entitled to know reason for the arrest, need to have reasonable and probable grounds for arrest, shouldn’t be held incommunicado**

\*\*Koechlin v Waugh and Hamilton – P wearing tennis shoes, stopped by plainclothes police, P refuses to ID, scuffle ensues, arrested, P’s dad wasn’t allowed to see him in jail)

🡪 **can seek redress if not informed of reasons for arrest under** Charter s 24(1) \*\*see above\*\*

🡪 **suspects have to be given opportunity to submit peacefully before force is used** – general rule

**Common Law Power to Search Pursuant to Lawful Arrest**

\*\*R v Caslake [1998]: D arrested for marijuana possession, car searched for “inventory” 5 hours after arrest, found cash and cocaine.

**🡪 search only justifiable if the purpose of the search is related to purpose of the arrest**

**🡪 3 limits:**

**power doesn’t impose a duty;**

**search must be part of valid objective in pursuit of ends of crim justice;**

**must be within reasonable time**

\*\*Eccles v Bourque [1975]: P has known dealings with “Cheese”, police enter P’s apartment to search for “Cheese”, sues for trespass.

🡪 **reasonable and probable belief // police announced presence before entrance**

**Battery & Consent in a Medical Setting:**

BoP on Plaintiff for 1st three elements of BATTERY (direct, interference, harm)

BoP on Defendant for 4th element (intent)

CONSENT **PRIOR** TO EXAMS, TESTS, PROCEDURES, SURGERY OR COUNSELLING

MUST BE SPECIFIC (ID PROCEDURE AND RISKS)

VOLUNTARY, WITH TIME TO READ

CANNOT BE TOO TECHNICAL OR PRESENTED AS MERE FORMALITY

🡪 Doctors have BoP on BoP for Consent

🡪 statutes specify how consent is given 🡪 signed consent is only “evidence” not consent itself

**COMPETENCY?** --- FOR MINORS LOOK AT NEXT PAGE

**\*\*TEST\*\*Ability to understand nature of treatment and risks**, not make reasoned judgment // can be intoxicated or on drugs // broad <def> bc safeguards autonomy of the individual

**Vitiate Consent:** exceeding, mistake, duress, public policy

🡪 **implied consent, not opposed to being touched in order to get to hospital**

Battrum v British Columbia: P falls off horse, D is rough ambulance worker

**🡪 consent doesn’t matter in emergency situations**

**🡪 person’s body is held inviolate**

**🡪 doctor acts within duty to save the life and health of the patient “in that honest execution he should not be exposed to legal liability”**

Marshall v Curry: P is patient with hernia surgery, Dr. (D) removes damaged and diseased testicle

**🡪 doctors can only treat within limitations of valid, informed consent**

**🡪 doctors aren’t liable for patient’s refusal for medical care**

**🡪 right of refusal isn’t premised on understanding risk**

Malette v Shulman: P is Jehovah in car accident, Dr. (D) gave blood transfusions after card and sister said not to, stopped only when stabilized.

**🡪 if surgery is NOT a medical emergency, doctors must leave decision to patient**

Murray v McMurchy: tied fallopian tubes during C-section bc of tumours on uterine wall

**🡪Withdrawing life support constitutes treatment, and therefore requires consent from a patient or substitute decision maker – under the HCCA**

Cuthbertson v Rassouli: D on life support, wife wants to keep him there, Drs (P) want to take P off

***Dissent***: patient’s don’t have right to treatment, only right of refusal

**False Imprisonment (Trespass to the Person)**

**Intentional, total restraint of a person (Bird v Jones)**

1. Intentional
2. Total restraint of a person
   * No requirement of physical contact
   * No requirement of particular duration
   * No requirement of consciousness/awareness

* Lawfulness is a complete defense (Beatty and Mackie v Kozak), burden on D to prove
* **Can v Calgary Police Service:** Peace officer does not inherently preclude liability, official role or title does not provide inherent lawful justification
* an honest mistake can still = guilty

**\*\*Bird v Jones**: P driving on public highway, redirected by hired policeman;

🡪 **"imprisonment is something more than the mere loss of this power; it include the notion of restraint within some limits defined by a will or power exterior to our own"**

🡪 **Ability to use alternate destination, albeit inconvenient, did not constitute total restraint**

**J(MI) v Grieve:** P doesn’t have to be conscious of imprisonment at the time it occurred

**\*\*Saint-Jacques v Canada**: prisoner awarded damages for wrongful placement in solitary confinement (*see below*)

**Intentional Infliction of Nervous Shock Trespass to the Person**

**TEST (Prinzo v Baycrest, adapted from Wilkinson below)**

1. Flagrant and outrageous conduct (see Boothman, Clark, LAvinska, And Rinaldo)
2. Calculated to produce harm (See Rahemtulla and Pinesfierra)
3. Resulting in a visible and provable illness
   1. Must be a recognized illness
   2. Absense of clinical diagnosis not fatal, but would be due diligence to obtain one

\*\*Wilkinson v. Downton (1897) – D told P her husband was at pub with broken legs, P suffered IINS (✔)

**🡪 “Person who makes false statement intended to be acted on, must make good the damage resulting from its being acted on**”

Prinzo v Baycrest: P missed work at beauty shop bc of mental illness, accused of exaggerating symptoms, mental health further deteriorated, $15k in damages, relied on Rahemtulla (D’s conduct as flagrant and outrageous, calculated to produce harm, resulting in visible, provable injury) (✔)

Purdy v Woznesenky: D punched P’s husband in the head, D should have foreseen nervous shock to P (✔)

* Boothman v Canada (threats of bodily harm to a vulnerable and fragile employee);
* Clark v Canada (persistent sexual harassment of a RCMP officer) for examples of behavior that *was* flagrant
* Lavinskas v Jacques Whitford (reprimand letter, negative & unprofessional behaviour in an employment context) and
* Rinaldo v Royal Ontario Museum (dislike & marginalization of employee) example of behaviour that was *not* flagrant
* Rahemtulla v Vanfed Credit Union (1984): P accused of theft and fired by D, $5k awarded (✔)
* Pinesfierra v Ayotte: “Calculated to produce harm means: clearly foreseeable that it would cause harm to the victim: extent of harm need not be anticipated, but this kind of harm must have been intended or know to be substantially certain to follow.

**Invasion of Privacy**

law is unclear, protected in piecemeal fashion; not clear in Canada // US outlines 4 categories // autonomy rights // not in Charter but underlies many guarantees // **broad court discretion in remedy**

\*\*Jones v Tsiege (2012): D accessed P’s bank records 174 times over 4 years, D in CL relations with P’s ex (✔)

🡪 **ELEMENTS FOR INTRUSION UPON SECLUSION:**

1. One who intentionally intrudes (physically or otherwise)
2. Upon the seclusion of another (or his private affairs or concerns)
3. Is subject to liability to the other for invasion of his privacy if the invasion would be highly offensive to the reasonable person

* Motherwell v Motherwell (1976 ABSC): D mentally unstable and harasses family by telephone (✔)

🡪 **if statute hasn’t created privacy, may be actionable under nuisance// available to landowners**

Privacy Act in BC (see attached) requires willfulness // CL NOT RECOGNISED IN BC

**Violation of privacy actionable**

**(1)** It is a tort, actionable without proof of damage, for a person, willfully and without a

claim of right, to violate the privacy of another.

**(2)** The nature and degree of privacy to which a person is entitled in a situation or in

relation to a matter is that which is reasonable in the circumstances, giving due

regard to the lawful interests of others.

**(3)** In determining whether the act or conduct of a person is a violation of another's

privacy, regard must be given to the nature, incidence and occasion of the act or

conduct and to any domestic or other relationship between the parties.

**(4)** Without limiting subsections **(1)** to **(3),** privacy may be violated by eavesdropping or

surveillance, whether or not accomplished by trespass.

* (1)(3)You must look to the the parties’ relationship and the whole context (see, for example, **Milner**)

\*\*Hollinsworth v BCTV (1999): P was bald, hair surgery at LIE, consented to film for instructional purpose, cameraman later hired by BCTV and assured them no concern re: confidentiality BCTV (✗) others (✔)

**Following the Statutory Test:**

* **"Willfully"** applies narrowly to an intention to do an act which the person doing the act knew or should have known would violate the privacy of another person. This was not established in this case.
* **“Without a claim of right”:** As per David v McArthur (1969): an honest belief in a state of facts which, if it existed, would be a legal justification
* **In this case:** Belief was both reasonable and honest. Therefore, there was no violation of Privacy Act

**Breach of Confidence:** used to protect privacy of sensitive business and personal information

LAC Minerals v Intl. Corona Resources [1998]:

(onus on P to prove): info was confidential in nature, disclosed in circumstances creating an obligation of confidentiality,

\*\*\*Ari v ICBC (2013): P alleges D’s employees violated breach of confidence

🡪 **heightened burden on public bodies to protect personal info (FIPPA)**

------------------NOT YET A TORT------------

**Discrimination**(✗)

\*\*\*Seneca College of Applied Arts & Tech v Bhaduria (1979): D highly-educated E.Indian woman, PhD philosophy, 10 times applied for opening, not even an interview (✗) HR Code covers it

**🡪 No private tort of discrimination, HR legislation covers remedies and breaches**

**Stalking** (✗)

when a person knowingly or recklessly harasses a person in such a manner that leads the other person to fear for their safety 🡪 **not in CL, but conduct is prohibited by 264(1) of CCC, mostly statutes**

**Harassment**(✗…✔)

seriously annoying, distressing, pestering conduct / abusive, racist language, bullying, harassment by creditors or the govt, etc.

**🡪 no formal tort, BUT courts will fashion a remedy for outrageous or completely unacceptable behavior re: acceptable standards of discourse**

**If Harassment were a tort, the TEST would follow: (Mainland Sawmills v. IVVA)**

1. **Outrageous conduct by the defendant**
2. **Intention of causing or reckless disregard of causing emotional distress**
3. **Plaintiff’s suffering of severe or extreme emotional distress**
4. **Actual and proximate causation of the emotional distress by the defendant’s outrageous conduct**

**🡪 varied approach to sexual harassment**

\*\*\*Savino v. Sheletowsky:

Girard v Ball: Emotional distress of such substantial quality… that no reasonable person in a civilized society would be expected to endure it

Garrett v Mikalachki: The categorization of wrongs in this area is in flux

Fowler v Canada (Attorney General) (2012): P is prisoner at federal penitentiary, D represents corrections, etc.; P alleges harassment with comments in reports, delay for day release, psychological harm, etc. (✗)

Clark v Canada [1994]: P is female RCMP officers, harassed by male co-workers, supervisors didn’t help (✔)

🡪 cites LOTS of IINS cases:

Wilkinson (spite or malice not required) Rahemtulla (IINS 3 reqs) Purdy (intention imputed to D)

**🡪 serious and prolonged suffering, lots of people involved, actions and inactions**

**Defamation - Elements**

**Elements: (Grant v Torstar)**

1. The impugned words were defamatory (Lawson v Baines)
   1. Plain and ordinary meaning (he is corrupt)
   2. True/legal at innuendo (“lovely partner” in case of married man)
   3. False/popular innuendo (photo of man walking to brothel due to angle of shot)
2. The words reference the Plaintiff (Knapper v London TEST)
3. The words were published, and communicated to at least one person other than the plaintiff

**ELEMENT 1 🡪 TEST: “Would the words tend to lower the P in the estimation of right-thinking members of society generally?” // Not just bad manners or discourtesy (STING** OF THE REMARK would lower the plaintiff in the eyes of a reasonable person?)

Sim v Stretch: housemaid sends telegram asking for “money owed”

**ELEMENT 2 🡪 TEST: Need to answer YES to both! (Knupper v London Test)**

1. **Referencing Individual:** 
   * Does the statement in fact lead reasonable people to the conclusion that it refers to the plaintiff?
2. **Referencing Group:**
   * Size of group (Bou Malhab)
   * Nature of group (Heterogeniety)
3. **Connection to group**
4. **Real target of the defamatory statement**
5. **Plausibility of Statement**

Knupper v London: newspaper publishes re: group, P not named specially, but leader of the group

**ELEMENT 3 🡪 TEST: Statement is communicated in any way, to a 3rd party who understands the statement //**

**🡪 Hyperlink isn’t a publication**

\*\*Crookes v Newton: D owns website, P is Green Party politician

**Majority**: to prove publication, P must establish D’s act conveyed defamatory material to 3rd party

* An act that makes the defamatory information readily available to a third party in a comprehensible form”
* The receipt of the information by a third party in such a way that it is understood
* If communicated to at least one person other than the plaintiff then it is satisfied

**Repeating a statement is also liable (**Lambert v Thomson**), original publisher not liable unless meeting ONE of the following:**

* The original defendant provided the re-publisher express or implied authority to republish the defamatory remark
* The original defamatory remark made to someone who had a duty to disclose the remark
* Republication natural and probable consequence of the original publication

**🡪 Private messages are okay as means to serve a notice of claim, but also has to publish in newspaper**

Burke v John Doe: P alleges 7 Ds from online message board published defamatory comments

Personal service is impractical // no effective means of identifying users // likely will receive messages

**Defamation - Defenses**

1. **Justification**

**🡪 The whole of the defamatory matter is substantially true** (\*\*Meier v Klotz)

🡪 **If statement is general in character, may be supported by multiple instances, but not just a single one**

Williams v Reason: rugby player accused of “shamateurism”

1. **Absolute Privilege** COMPLETE IMMUNITY (promotes honest and public speech in the public interest)
   1. **Executive Officers**

**🡪 TEST: 3 conditions (1)statement must have been made by officer of state to another officer of state (2) must relate to state matters (3) must be made by officer of state in the course of their official duty**

\*\*Dowson v The Queen: RCMP told Deputy AG of Ontario stuff about another politician/journalist investigated re: matters of national interest

* 1. **Parliamentary Privilege**

**🡪 immunity for statements made during parliamentary proceedings, no protection outside the assembly** (Canada v Vaid)

* 1. **Judicial Proceedings**

**🡪 TEST: ask whether the body to which the complaint was sent is quasi-judicial or merely administrative in nature (Sussman v Eales)**

\*\*Hung v Gardiner: supervisor informed Law Society and CGA association of BC re: investigation and reprimand of employee – held to be quasi-judicial

1. **Qualified Privilege \*\*\*doesn’t apply if malicious** (Botiuk v Toronto Free Press Publications)

-- generally applies when speaker has an interest or duty (legal, social, moral) to make the statement

**and** the recipient has a reciprocal interest to receive the statement --

* 1. **in protection of own interests**
  2. **in protection of interests of another person**
  3. **in furtherance of a common interest** 
     1. McLoughlin v Kutsay: Dr says D is psychopathic personality for examination on worksite)
        1. Needs reciprocity
  4. **in protection of public interest** 
     1. Campbell v Jones: P stripsearched 3 female students in view of window, their lawyer gave press conference saying wouldn’t have happened if students not poor and black
  5. **Fair and Accurate Reporting** 
     1. Hill v Church of Scientology: D’s lawyer read out motion at press conference before it was filed
        1. Comments found to have exceeded any legitimate purpose
        2. Didn’t take steps to confirm allegations against P
        3. **Exceeded QP defense**

**🡪 Defense may be lost with “over-publication”, but interested parties has broad interpretation**

McGarrigle v Dalhousie: basketball coach sent letter re: ineligible player

**Defamation – Defenses (continued)**

1. **Fair Comment**

**🡪 TEST**: Chenersky: newspaper publishes letter from university students alleging alderman is a racist

**(1) statement is shown to be comment or opinion, not allegation of fact**

**(2) which any person could honestly express**

**\*\*ASK: Could any person have honestly held the belief based on given facts?**

**Was subjective (**Chernesky**) but now objective (\*\***WIC Radio v Simpson**)**

**(3) based on true facts**

**(4) pertaining to a matter of public interest**

**(5) cannot be made maliciously (onus for malice requirement returns to plaintiff)**

* **(\*\***WIC Radio v Simpson**):** Defendant keeps making controversial statements, P gave speech at public school to speak about LGBT rights. D was a known figure in community

🡪 **Burden on P to prove commentary TEST: would an ordinary, reasonable person recognize the statement as a comment upon true facts, not a bare statement of facts?**

Vander Zalm v Times Publishers

**🡪 Defence only applies if CLEAR statements were comments, not facts** (Jones v Bennett)

**🡪 D must prove the facts underlying opinion were true, not unproven or misstated** (Holt v Sun Publishing)

🡪 **D doesn’t have to prove inference (based on the facts) are also true (**Leech v Leader Publishing**)**

1. **Responsible Communication on Matters of Public Interest**

🡪 **TEST**: (Grant v Torstar – established whole new defense to bring CL in line with Charter values // Expression > Indv)

1. Was actually in the public interest
   * 1. invite public attention OR draw substantial concern from the public
2. Communication was responsible
   * 1. Excludes malice by definition
     2. Stipulations for Responsibility:

More serious allegation = more diligence req’d // More public importance = less diligence req’d // Urgency // Status and reliability of source // more reliability = less responsibility // was “target” given opportunity to respond? // necessary to include defamatory statements? // Repetition Rule =/= apply IF report … attributes statement to someone else, indicates statement not verified, outlines both sides of story, provides context in which statement was made (need all of them?)

1. **Consent**

**🡪 P’s consent to publication is an absolute immunity or absolute privilege upon the D, also if instigated by P (or someone on P’s behalf)**

Jones v Brooks: P hired private detectives to secretly record D’s defamatory statements, but was goaded

**Defamation - Remedies**

1. **INJUNCTIONS**

Awarded pre-trial to enjoin further publication of the statements

REQUIRES:

* Clearly defamatory statement
* No Justification Plead OR impossible for defense of justification to proceed

1. **DAMAGES**

Hill v Church of Scientology: context and fact specific to award damages,

**General**: presumed from the very publication of the false statement; awarded at large

**Consider**: the effect of statement on reputation? Is it significant and lasting?

**Aggravated**: awarded if malicious

**Consider**: additional harm caused? Eg. Humiliation, anxiety, mental distress // withdrawal of statement or apology? // repetition?

**Punitive**: so malicious it offends court’s sense of decency, aim =/= compensation, but punishment

**Consider**: need for **deterrent**? Is general and aggravated insufficient? Was conduct so outrageous additional damages are rational?

**DAMAGES:** *\*only if tort is proven and defense fails, s 24 Charter\**

**4 Types of Judicial Remedies**: Damages (grants P a legal right to a specific sum) Injunction (court order that directs party to do, or not do, something) Declaration (formal statement of court to resolve a dispute) Order of Specific Restitution (directs a party to restore pre-existing condition)

**Classification of Damages:** Pecuniary (monetary, no maximum amount ie. lost wages, medical bills, etc.) Non-Pecuniary (pain, humiliation, disfigurement, harder to quantify, maximum amount $350k)

**4 types of Damages:**

**1. Nominal**🡪**Awarded in a small sum** to redress violation of a legal right that law deems worthy of protection, **even in absence of actual harm** // Based on purpose, not amount // rare this is the only damage sought // **Nominal =/= small** … Mediana uses example of chair in the study

**2. Compensatory** 🡪 $$$ // To obtain financial redress for actual loss // **ALL ITEMS to place injured party in the same position if the injury had never occurred (\*\*\*Dodd Properties v Canterbury City Council, 1980)**🡪 difficult to ascertain in some circumstances

Pecuniary (no max)

speculative factors, invaluable losses, idle property & includes past/future earnings, past/future expenditures

Non-pecuniary (max. $350k)

Andrews v Grand & Toy Alberta (1978): Dickson J 🡪 **“There is no medium of exchange for happiness. There is no market for expectation of life … The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary and conventional.”**

Hawkins v McGee (1929): skin graft from chest to burnt hand – grew a hairy palm (expectation damages)

**3. Aggravated** 🡪 **focus on the victim** // a form of compensatory damages awarded to compensate P for additional injuries to dignity and similar feelings arising from conduct of D // **2 requirements: P must establish suffered additional injuries to their feelings and D’s conduct was highly offensive, repugnant, outrageous**

Rookes v Barnard [1964]: injuries to P’s proper feelings of pride and dignity arising from D’s malice or manner of committing the wrong

**4. Punitive 🡪** **focus on the perpetrator** // dual function of punishment (backwards looking) and deterrence (discouraging others in the future) // **ONLY CONSIDERED IF compensatory and aggravated damages are insufficient to properly punish D, denounce the conduct, deter repetition**

Rookes v Barnard [1964]: 🡪 court limited punitive damages to oppressive, arbitrary, or unconstitutional conduct by government officials; conduct calculated to make a profit in excess of the likely compensatory damage award; and situations expressly authorized by statute

**Examples of Punitive Damages as Deterrence: Hill v Church of Scientology & Norberg v Wynrib**

B(P) v B(W) (1992): P was sexually assaulted by D (father) from ages 5-17 & raped at age 20; Dr. said most traumatized SA victim ever seen (emotionally and socially dysfunctional)

🡪 $100k in non-pecuniary general damages / $75k aggravated damages / $50k in punitive damages

🡪 repugnant, reprehensible conduct 🡪 severe pysch damage

**🡪 provocation may affect damages (\*\***Ellis v Fallios-Guiterrez**)**

|  |  |
| --- | --- |
| **BC *Privacy Act*** | |
| **1** | **Violation of privacy actionable**  **(1)** It is a tort, actionable without proof of damage, for a person, willfully and without a  claim of right, to violate the privacy of another.  **(2)** The nature and degree of privacy to which a person is entitled in a situation or in  relation to a matter is that which is reasonable in the circumstances, giving due  regard to the lawful interests of others.  **(3)** In determining whether the act or conduct of a person is a violation of another's  privacy, regard must be given to the nature, incidence and occasion of the act or  conduct and to any domestic or other relationship between the parties.  **(4)** Without limiting subsections **(1)** to **(3),** privacy may be violated by eavesdropping or  surveillance, whether or not accomplished by trespass. |
| **2** | **Exceptions**  **(2)** An act or conduct is not a violation of privacy if any of the following applies:  **(a)** it is consented to by some person entitled to consent;  **(b)** the act or conduct was incidental to the exercise of a lawful right of defence of  person or property;  **(c)** the act or conduct was authorized or required under a law in force in British  Columbia, by a court or by any process of a court;  **(d)** the act or conduct was that of  **(i)** a peace officer acting in the course of his or her duty to prevent,  discover or investigate crime or to discover or apprehend the  perpetrators of a crime, or  **(ii)** a public officer engaged in an investigation in the course of his or her  duty under a law in force in British Columbia, and was neither  disproportionate to the gravity of the crime or matter subject to  investigation nor committed in the course of atrespass.  **(3)** A publication of a matter is not a violation of privacy if  **(a)** the matter published was of public interest or was fair comment on a matter of  public interest, or  **(b)** the publication was privileged in accordance with the rules of law relating to  defamation.  **(4)** Subsection **(3**) does not extend to any other act or conduct by which the matter published was obtained if that other act or conduct was itself a violation of privacy. |
| **3** | **Unauthorized use of name or portrait of another**  **(1)** In this section, **"portrait"** means a likeness, still or moving, and includes  **(a)** a likeness of another deliberately disguised to resemble the plaintiff, and  **(b)** a caricature.  **(2)** It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.  **(3)** A person is not liable to another for the use for the purposes stated in subsection (2) of a name identical with, or so similar as to be capable of being mistaken for, that of the other, unless the court is satisfied that  **(a)** the defendant specifically intended to refer to the plaintiff or to exploit his or  her name or reputation, or  **(b)** either on the same occasion or on some other occasion in the course of a  program of advertisement or promotion, the name was connected, expressly or  impliedly, with other material or details sufficient to distinguish the plaintiff, to  the public at large or to the members of the community in which he or she lives  or works, from others of the same name.  **(4)** A person is not liable to another for the use, for the purposes stated in subsection **(2),** of his or her portrait in a picture of a group or gathering, unless the plaintiff is  **(a)** identified by name or description, or his or her presence is emphasized,  whether by the composition of the picture or otherwise, or  **(b)** recognizable, and the defendant, by using the picture, intended to exploit the  plaintiff's name or reputation.  **(5)** Without prejudice to the requirements of any other case, in order to render another liable for using his or her name or portrait for the purposes of advertising or promoting the sale of  **(a)** a newspaper or other publication, or the services of a broadcasting  undertaking, the plaintiff must establish that his or her name or portrait was  used specifically in connection with material relating to the readership,  circulation or other qualities of the newspaper or other publication, or to the  audience, services or other qualities of the broadcasting undertaking, as the  case may be, and  **(b)** goods or services on account of the use of the name or portrait of the other in a  radio or television program relating to current or historical events or affairs, or  other matters of public interest, that is sponsored or promoted by or on behalf  of the makers, distributors, vendors or suppliers of the goods or services, the  plaintiff must establish that his or her name or portrait was used specifically in  connection with material relating to the goods or services, or to their  manufacturers, distributors, vendors or suppliers. |
| **5** | **Action does not survive death**  An action or right of action for a violation of privacy or for the unauthorized use of the name or portrait of another for the purposes stated in this Act is extinguished by the death of the person whose privacy is alleged to have been violated or whose name or portrait is alleged to have been used without authority |

|  |  |
| --- | --- |
| **BC *INFANTS ACT*** | |
| **17** | **Consent of infant to medical treatment**  **(1)** In this section:  **"health care"** means anything that is done for a therapeutic, preventive, palliative,  diagnostic, cosmetic or other health related purpose, and includes a course of health  care;  **"health care provider"** includes a person licensed, certified or registered in British  Columbia to provide health care.  **(2)** Subject to subsection (3), an infant may consent to health care whether or not that  health care would, in the absence of consent, constitute a trespass to the infant's  person, and if an infant provides that consent, the consent is effective and it is not  necessary to obtain a consent to the health care from the infant's parent or guardian.  **(3)** A request for or consent, agreement or acquiescence to health care by an infant does  not constitute consent to the health care for the purposes of subsection (2) unless the  health care provider providing the health care   1. has explained to the infant and has been satisfied that the infant understands 2. the nature and consequences and the reasonably foreseeable benefits and risks of the health care, and   **(c)** has made reasonable efforts to determine and has concluded that the health  care is in the infant's best interests. |

|  |  |  |  |
| --- | --- | --- | --- |
|  | | | |
| **4** |  | | |
| **BC *CHILD, FAMILY AND COMMUNITY SERVICE ACT*** | | |
| **29** | | **Child who needs necessary health care**  **(1)** If a child or a parent of a child refuses to give consent to health care that, in the opinion of 2 medical practitioners, is necessary to preserve the child's life or to prevent serious or permanent impairment of the child's health, a director may apply to the court for an order under this section.  **(2)** At least 2 days before the date set for hearing the application, notice of the time, date and place of the hearing must be served on  **(a)** each parent,  **(b)** the child, if capable of consenting to health care, and  **(c)** any other person the court directs.  **(3)** If satisfied that the health care is necessary to preserve the child's life or to prevent serious or permanent impairment of the child's health, the court may make an order  **(a)** authorizing the health care,  **(b)** prohibiting any person from obstructing the provision of the health care,  **(c)** requiring a parent or another person to deliver the child to the place where  the health care will be provided, and  **(d)** including any other terms, including the duration of the order, that the court  considers necessary.  **(4)** In this section, **"child"** includes a child in care.  **(5)** This section does not limit a director's power to remove the child under section 30 or to take any other steps authorized by this Act to protect the child. |

**Health Care Consent**

|  |  |
| --- | --- |
| **BC *HEALTH CARE (CONSENT) AND CARE FACILITY (ADMISSION) ACT*** | |
| **4** | **Consent rights**  Every adult who is capable of giving or refusing consent to health care has  **(a)** the right to give consent or to refuse consent on any grounds, including moral or religious grounds, even if the refusal will result in death,  **(b)** the right to select a particular form of available health care on any grounds, including moral or religious grounds,  **(c)** the right to revoke consent,  **(d)** the right to expect that a decision to give, refuse or revoke consent will be respected,  **(e)** the right to be involved to the greatest degree possible in all case planning and decision making. |
| **5** | **General rule — consent needed**  **(1)** A health care provider must not provide any health care to an adult without the adult's consent except under sections 11 to 15.  **(2)** A health care provider must not seek a decision about whether to give or refuse substitute consent to health care under section 11, 14 or 15 unless he or she has made every reasonable effort to obtain a decision from the adult. |
| **6** | **Elements of consent**  An adult consents to health care if  **(a)** the consent relates to the proposed health care,  **(b)** the consent is given voluntarily,  **(c)** the consent is not obtained by fraud or misrepresentation,  **(d)** the adult is capable of making a decision about whether to give or refuse consent to the proposed health care,  **(e)** the health care provider gives the adult the information a reasonable person would require to understand the proposed health care and to make a decision, including information about  **(i)** the condition for which the health care is proposed,  **(ii)** the nature of the proposed health care,  **(iii)** the risks and benefits of the proposed health care that a reasonable person  would expect to be told about, and  **(iv)** alternative courses of health care, and  **(f)** the adult has an opportunity to ask questions and receive answers about the proposed health care. |
| **7** | **How incapability is determined**  When deciding whether an adult is incapable of giving, refusing or revoking consent to health care, a health care provider must base the decision on whether or not the adult demonstrates that he or she understands  **(a)** the information given by the health care provider under section 6 (e), and  **(b)** that the information applies to the situation of the adult for whom the health care is proposed |
| **10** | **Same rules apply to substitute consent**  Sections **6, 7, 8 (a)** and **9** apply when a decision about whether to give or refuse substitute consent is sought or made under section **11, 14 or 15.** |
| **11** | **Exception — if a substitute decision maker, guardian or representative consents**  A health care provider may provide health care to an adult without the adult's consent if  **(a)** the health care provider is of the opinion that the adult needs the health care and is incapable of giving or refusing consent, and  **(b)** the adult's personal guardian or representative  **(i)** has authority to consent to the health care,  **(ii)** is capable of giving consent, and  **(iii)** gives substitute consent. |
| **12** | **Exception — urgent or emergency health care**  **(1)** A health care provider may provide health care to an adult without the adult's consent if  **(a)** it is necessary to provide the health care without delay in order to preserve the  adult's life, to prevent serious physical or mental harm or to alleviate severe  pain,  **(b)** the adult is apparently impaired by drugs or alcohol or is unconscious or semi  conscious for any reason or is, in the health care provider's opinion, otherwise  incapable of giving or refusing consent,  **(c)** the adult does not have a personal guardian or representative who is  authorized to consent to the health care, is capable of doing so and is available,  **(d)** where practicable, a second health care provider confirms the first health care  provider's opinion about the need for the health care and the incapability.  **(2)** For the purpose of this section, a personal guardian or representative is available if it is possible for the health care provider, within a time that is reasonable in the circumstances,  **(a)** to determine whether the adult has a personal guardian or representative,  **(b)** to communicate with the adult's personal guardian or representative.  **(3)** If a personal guardian or representative becomes available or a person is chosen under section **16** after a health care provider provides health care to an adult under this section, the personal guardian, representative or person chosen under section 16 may refuse consent for continued health care, and, if consent is refused, the health care must be withdrawn. |
| **33.1** | **Collection of personal information**  A health care provider is authorized to collect personal information about an adult from any person if this is necessary for the purposes of exercising a power or carrying out a duty or function under this Act |