(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, vindication, (re)distributive justice, market deterrence*

**

**Battery**  **Trespass to the Person**

actual application of violence against the victim; violence doesn’t have to be substantial; P doesn’t have to be aware it is happening; ANY PHYSICAL ACT that goes beyond everyday behavior

**4 ELEMENTS**: **Bettel v Kim**:

1. directness – could be putting drugs in a drink (J(MI) v Grieve)
2. physical interference –
3. harm to dignity and integrity- burden of proof is on P
4. intent – burden of proof is on the D
	1. an result in bodily injury or violate integrity or offend P’s sense of dignity

**Defenses** – consent // self-defense // necessity // legal authority

**Bettel v Kim**: storeowner shakes kid to get confession re: 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**

**Assault** **Trespass to the Person**

intentional creation in the mind of another of a reasonable apprehension of immediate physical contact - no physical contact

**Two important features**:

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

**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**

**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

**False Imprisonment Trespass to the Person**

Direct, total, unlawful restraint of another’s freedom of movement;

needs to be short chain of events // regulation of movement is NOT FI

* Imprisonment needs to be wrong – lawfulness is a defense, burden on D to prove
* 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"**

**Wright v Wilson**: D not liable although escape made P trespass on third party’s property

**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*)

**\*\*R v Hill:** prisoner wrongfully placed in segregation (*see below*)

**False Imprisonment in a Prison Setting**

\*\*R v Hill (1997): D is prisoner, accused of inciting riot, placed in segregated custody w/o reasons, supposed to “review” w/in 7 days, D appeals, actual review completed, P released (✔)

🡪 **Prisoners retain residual rights of liberty**: order wasn’t reasonable under the warden’s discretion

🡪 **no statutory immunity** (s. 23 of Corrections Act)

🡪 **reasons need to be given for imprisonment**

🡪 **false imprisonment applies in prov. prisons**

\*\*St Jacques v Canada [1991]: prisoner transferred from prison with TB outbreak, refused test bc of allergies, placed in segregation, told his medical quarantined by prov. health authorities (w/o foundation), held for 80 days (✔)

🡪 **onus on imprisoning authority to justify its actions** 🡪 Health Act did not permit it bc only isolate those KNOWN to have disease; also needed to serve notice 🡪 ***damages***: $800 wage loss, $500 punitive

**False Arrest** **Trespass to the Person** (subset of False Imprisonment)

Total restraint of movement is brought about by an implicit or explicit assertion of “legal authority”; psychologically feel you cannot leave

**\*\*Campbell v SS Kresge Co:** P suspected of shoplifting, security guard/off-duty officer follows P outside store and shows badge, asks P to come back into the store, P was let go shortly thereafter;

🡪 **2 factors: assertion and assessment of authority (2-sided) and key element of embarrassment**

**Smart v Simpson Sears Ltd:** If P willingly goes wih security, can still be liable for subsequent detention

**Lebrun v High-Low Foods Ltd**: D can be held liable for ordering another to restrain P

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

Directly affected plaintiff by acting in a manner that caused P to suffer shock, which produced physical consequences

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

**TEST 🡪 3 elements: 1. Act of statement 2. Calculated to produce harm, and 3. Does actual harm**

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

**🡪 only extreme mental suffering is actionable**

**🡪 causing more harm than intended is NOT a viable defence**

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

*Canadian Courts have broadened the liability of IINS,* ***examples****:* Rahemtulla v Vanfed Credit Union (1984): P accused of theft and fired by D, $5k awarded (✔) *//* Tran v Financial Debt Recovery (2000): P called repeatedly at work to repay student loans, $25k for emotional harm (✔) *//* 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) (✔)

**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**

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

\*\*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**

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

🡪 **4 ELEMENTS FOR INTRUSION UPON SECLUSION:**

intrusion was unauthorized,

was highly offensive to a reasonable person,

matter was private,

caused anguish and suffering.

\*\*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 (✔)

🡪 no defamation bc truth 🡪 **s 1.1 of Privacy Act “wifully and without a claim of right”** (be aware they were violating privacy and honest belief in facts, if existed, would be legal justification)🡪 **P has to establish intent or knowledge of D**

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

LAC Minerals v Intl. Corona Resources [1998]:

\*\*\*TEST\*\*\* (onus on P to prove):

info was confidential in nature,

disclosed in circumstances creating an obligation of confidentiality,

unauthorized use was detrimental to the confider

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

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

**Malicious Prosecution** Abuse of Legal Procedure, not trespass to the person

When a false charge is brought against P, setting in motion the criminal process and leading to P’s being subject, or to the risk of, a trial

**TEST: 4 Elements: (Nelles v Ontario)**

**(1) Initiation of legal proceedings by D**

Ex. Issues a warrant

**(2) Proceedings terminated in P’s favour**

Acquittal only, NOT discharged or arrangement

**(3) Absence of reasonable and/or probable cause (P to prove)**

“an honest belief in the guilt of the accused … the person was probably guilty of the crime imputed”

* + - **TEST**: objective (belief reasonable in the circumstances) **and** subjective (actual belief on D’s behalf**) … BUT**
		- **Miazga v Kvello Estate:** objective only bc of duty to act in public interest, regardless of own beliefs

**(4) Bringing of the prosecution by D acting out of malice or for purpose other than enforcement of the law (P to prove)**

Improper purpose – fraud, abuse of office, etc.

**Oniel v Metropolitan Toronto Police Force**: malice can be inferred from lack of R&P cause, but not due to inexperience, incompetence, (gross) negligence, or recklessness //D held liable for wrongful continuation if becomes aware that P could not have committed crimes accused thereof

**Proof P suffered loss or harm (DAMAGES)**

3 types: damage to fame (similar to defamation); damage to the person (physical or emotional harm); damage to property (incurring financial loss in order to defend oneself)

 **If elements met, no other defense**

**Martin v Watson [1996]:** individuals can be charged with MP if give police info and offer to testify and if facts are only available to them, so police can’t exercise judgement

**Casey v Automobiles Renault Canada Ltd**: . Cannot be held liable just for testifying and withdrawing charges is same as finding in favour of P

**M(A) v Matthews (2003):** can’t start MP proceedings until proceedings based on them are done

**\*\*\*IMPORTANT TO REMEMBER \*\*\***

***DAMAGES*: need to prove suffered actual loss 🡪no nominal damages**

------------------NOT A TORT PAGE------------

**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** (✗) *\*element of fear\**

**<def>** 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**(✗…✔) *\*covered by HR, look at IINS too!\**

<**def**> 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**

**🡪 varied approach to sexual harassment**

\*\*\*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. (✗)

 **IF harassment were a tort, it would include 3 Elements: (modified objective test)**

**(1) intent to cause, or reckless disregard causing, emotional distress,**

**(2) actual suffering of severe or extreme emotional distress,**

**(3) actual and proximate causation of emotional distress by conduct.**

\*\*\*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**

**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**):

kids throwing mud and one gets hit with rock; no ill will = no liability; “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”

**🡪 “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

**\*\*Ellis v Fallios-Guiterrez:** P and D were friends, falling out over a woman, fight at D’s house, D bites P’s lip … disfigured 🡪 emotional, physical and psychological injuries //

**🡪 no legal permit to intentional serious bodily harm**

**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

**Fraud (Deceit) Factors to Vitiate Consent**

1. D knowingly makes a false statement
2. Makes a statement in total disregard of the truth
3. Knowingly creastes a misleading impression by omitting relevant information

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

Hegarty v. Shine (1878): D had gonorehhea and had sex with P, but didn't constitute an offence

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. 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 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 Factors to Vitiate Consent**

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

Parmley v. Parmley [1945] dentist removed teeth with consent from the patient's doctor

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

Toews v. Weisner (2001) school nurse thinks she got verbal consent from mother to vaccinate 11y.o. girl from Hep B

**Duress (Coercion) Factors to Vitiate Consent**

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

**🡪 not consent under duress bc “no evidence of force or violence” or threat thereof**

**🡪 had power not to comply, nothing improper or illegal was threatened if she didn’t comply**

**Public Policy Factors to Vitiate Consent**

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 // **TEST for vitiating consent**:

1. Proof of inequality bt the parties (age, gender, position of power, etc.)

2. Proof of Exploitation – determined by community standards

 uses doctrine of unconsciousability from K law

Concurring Judgement: Dr had fiduciary duty, Dissent: no f duty, consent was there

**(MORE) 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)

**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)

**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**)**

**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

**MINORS & CONSENT IN A MEDICAL SETTING**

**COMPETENCY?**

 **\*\*TEST\*\*Ability to understand nature of treatment and risks**

No minimum age in BC regulated by Infant’s Act, s 17 // determined by independence and maturity // Health Care (consent) and Care Facility (Admission) Act

**🡪 parental consent is only required when a minor is deemed incompetent based on competency test**

C v Wren: 16 yo pregnant, leaves home, abortion approved by committee (as per CC)

**🡪 competency encompasses number of factors: age, maturity, independence, etc.**

 Re Dueck: 13 yo refuses chemo, dominating dad told him healed by God, less mature

**🡪 Can waive minor’s competency in dire circumstances**

**🡪 If best interests standard take into account young person’s view, doesn’t violate Charter**

 AC v Manitoba: Jehovah kid needs blood transfusions, taken by CFS, girl deemed competent, consent overridden

***Dissent***: consent, if given by a competent person, should never be overridden

🡪 **psychiatric disorders can invalidate consent, despite patient’s intellectual understanding of risks**

C(L) v Pinhas: anorexic doesn’t want a feeding tube

**VALIDITY OF SUBSITUTE CONSENT**

**🡪 interests of others cannot be considered in exercising substitute consent on behalf of incompetent**

 Eve v Eve: mother sterilized mentally incompetent daughter

**🡪 court ok’d bc wasn’t for contraceptive purpose (touchy re: eugenics)**

 Re K and Public Trustee: hysterectomy on girl with phobic aversion to blood

**🡪 factors such as culture and religion MUST be considered when judging whether a SDM is acting in patien’s best interest**

 Hamilton Health Sciences v DH: child not competent, mom withdraws chemo for alt. treatment, protected decision bc Constitution, s 35(1) – recognizes and affirms aboriginal rights.

🡪 **Consent may be obtained from patients with subpar intelligence or developmental disabilities**

Muir v Alberta: govt institutionalizes and sterilizes P under “mental defectives” legislation

**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 cannot succeed due to unequal power between the parties** Majority – La Forest

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

**🡪 looks at fiduciary relationship** Concurring - McLachlin

* fiduciary has scope for the exercise of discretion
* can unilaterally exercise power or discretion so asa to affect the beneficiary’s legal or practical interests
* beneficiary is particularly vulnerable to, or at the mercy of, the fiduciary

**🡪 D is guilty of breach of duty // general consent for battery** Dissent - Sopinka

* professional misconduct
* unconscionability doesn’t vitiate consent – is an equitable doctrine, therefore shouldn’t be used in torts

Non-Marine Underwriters, Lloyd’s of London v Scalera: 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 is an affirmative defense in “traditional” battery cases, applies equally in sexual battery cases**

**🡪 Consent must be proven by the D!, not an element established by the P**

**🡪 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

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

**Trespass to Land**

**Elements: (**Entick v Carrington**)**

* Directness (excludes pollution)
* Intentional conduct (motive is irrelevant)
* Physical intrusion (excludes smoke, smog, noise, odours, etc.)

**🡪 “every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground with my licence, 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) // Private necessity is only partial privilege (Vincent v Lake Erie)
	2. Harm to trespasser
	3. Harm to possessor of land
	4. Harm to 3rd party
3. Legal Authorization

**🡪 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 bc no lighting

**🡪 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

**🡪 Those without legal title can maintain a trespass action if possession is: clear, exclusive, exercised with intention to possess**

 Penney v Gosse

**🡪 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

**🡪 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

**🡪 trespass can occur after permission to enter has been revoked**

 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

**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, neighbourhodd, 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**

<DEF> 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

**Defamation - Elements**

**Elements:**

1. Defamatory Statements (Sim v Stretch TEST)
	1. Look at plain and ordinary meaning
	2. Look at innuendo(s)
2. References the Plaintiff (Knapper v London TEST)
3. Publication – Expressed to a 3rd Party

**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**

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

**ELEMENT 2 🡪 TEST: Need to answer YES to both!**

**(1) Question of Law: Can the article, having regard to its language, be regarded as capable of referring to the P?**

**(2) Question of Fact: Does the article, in fact, lead reasonable people, who know the P, to the conclusion that it does refer to him?**

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

**🡪 a discernable group that is easily identified**

AUPE v Edmonton Sun: editorial calls correctional officers names … BUT

**🡪 Size and heterogeneity of group matters**

 Bou Malhab v Diffusion Metromedia: radio host mocks taxi drivers with defamatory comments // 1100+ drivers // no ordinary listener would think allegations were matter of fact

ALSO: Barnes v. Carter: Obituary indicating that P’s mom was an unmarried woman = conceived out of wedlock.  Byrne v. Deane: Play on words involving the plaintiff’s name.  Jozwiak v. Sadek: Allegedly fictional character closely resembled the plaintiff. Sceflo v. Rutgers University: Photograph of plaintiff accompanying an article   E.W. Scripps Co. v. Cholmondelay: News article identified one party to a fight but not the plaintiff.  Hayward v. Thompson: Reference to political donations for which plaintiff had gained notoriety.

**ELEMENT 3 🡪 TEST: Statement is communicated in any way, to a 3rd party who understands the statement // Repeating a statement is also liable (**Lambert v Thomson**)**

**Defamation and Digital Media**

**🡪 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 / footnotes don’t count bc references / would restrict flow of information / if repeats info in hyperlink, could be defamation

**Concurring**: only liable if endorsement of content **Dissent**: shallow v deep links

**🡪 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**

**🡪 D must prove 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”

**🡪 Partial Justification of Okay** (Makow v Winnipeg Sun)

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**

* 1. **Judicial Proceedings**

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

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, 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**

🡪 **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)

* Was actually in the public interest
	+ - invite public attention OR draw substantial concern from the public
* Communication was responsible
	+ - Excludes malice by definition
		- 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?

ESSAY???

**Balancing act bt free speech [2(b)] of Charter rights and reputation:**

* WIC then Chernesky
	+ public standard now… safeguarding speech rights
* Grant v Torstar
	+ think about public interest
* Crookes
	+ Courts want to limit liability of hyperlinking bc of free speech

**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**)**

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| **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 ofperson 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 herduty 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 ofpublic interest, or **(b)** the publication was privileged in accordance with the rules of law relating todefamation.**(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 |

**Medical Consent for Minors**

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| **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 BritishColumbia to provide health care.**(2)** Subject to subsection (3), an infant may consent to health care whether or not thathealth care would, in the absence of consent, constitute a trespass to the infant'sperson, and if an infant provides that consent, the consent is effective and it is notnecessary 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 doesnot constitute consent to the health care for the purposes of subsection (2) unless thehealth care provider providing the health care1. 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. |

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| **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**

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| **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 |