Consent to medical treatment

1. Preamble: Who can make decisions for adults who have no capacity:

1) STEP ONE: Presumption of capacity (Re B; s7(1) Sch1 P1 GAA)

* + 1. Apply definition of capacity (if not met, g on)
    2. See page 6 of these notes

1. STEP TWO: What decisions need to be made?

|  |  |  |  |
| --- | --- | --- | --- |
| Financial | Personal | Health | Special Health |
| Sch 2 GAA  Financial or property matters (living costs, debts, business) | Sch 2 GAA  Relates to care (where to live, diet/dress, education, health care) | S66 GAA  AHD  Appointment of guardian  End Power of Attorney  Statutory health attorney (Spouse, >18 care, adult guardian) | S65 GAA  Adv Health directive  Tribunal appointed attorney  Tribunal can make an order |

STEP TWO (A): Go through the things on page 11 of these notes

1. Determine who can make the decision
2. If there is a dispute (All must co-operate – obligation to consult under s79 PAA)

1. INTRODUCTION
   1. Doctors are under a legal duty to obtain the consent of a patient before undertaking invasive medical procedures as a failure to do so may result in civil or criminal charges **s245 CC**
   2. Consent is also required at an ethical level
      1. Patient autonomy
2. **REFUSAL OF TREATMENT**
   1. A competent adult is legally entitled to refuse any treatment, even if that treatment will save their lives
      1. Re B; Re C; Malette v Shulman
3. **CONSENT AT COMMON LAW** 
   1. ***Re B*** *– Refusal*
      1. *Hospital trust caring for a woman who was completely physically incapacitated*
      2. *A ventilator was used to keep her alive and she believed that was invasive and that she had the right to refuse consent to these measures*
      3. *She had originally said no but the Dr’s later changed their minds* 
         1. *She had given written and oral evidence outlining her intentions*
      4. *Trust was arguing that she did not have capacity*
      5. ***HELD:*** *she did have the capacity and she had been treated unlawfully* 
         1. *Considered sanctity of life and patient autonomy*
         2. *There is a PRESUMPTION that the patient has capacity but that can be rebutted if the facts demonstrate so*
   2. ***Re C*** 
      1. *There was a 68 yr old schizophrenic male and he had gang green in his leg and he refused and despite having the mental condition the judge said that in relation to this decision he had the capacity to consent and he is refusing it.*
      2. ***HELD:*** *You cannot amputate his leg.* 
         1. *The point here is that you have to look at the decision contrasted with their mental disability*
      3. *The test for capacity was stated to be:* 
         1. *Look at when a person is unable to comprehend and retain the information material to the decision especially regarding the outcomes and the patients is unable to use the information and weigh it in the balance* 
            1. *More of a legal test than a medical test*
   3. ***Malette*** *(Remember that this is a Canadian case)* 
      1. *Car accident - unconscious was taken to emergency*
      2. *Drs proceeded to treat her*
      3. *While she was being assessed they found a card that said she was a Jehovah’s witness saying no blood products*
      4. *They gave them anyway – her daughter later confirmed that she was a JW*
      5. *Took the Dr to court for tortuous battery and negligence.*
      6. *HELD: The Dr was not found to be negligence but was found liable for battery.*
4. **ASSESSING CAPACITY** 
   1. Understanding of their circumstances
   2. The consequences of whether they do or do not take that treatment
   3. Being aware of the consequences
5. **LIABILITY WHERE NO CONSENT IS OBTAINED**
   1. **Criminal** 
      1. s 245-246 Criminal Code: touching without consent may be unlawful assault.
      2. Note s 282 (*Qld v Nolan* *(2002) 1 Qd R 454*)
   2. **Civil**
      1. Assault/trespass
      2. Negligence
6. **ELEMENTS** 
   1. **Consent must be given voluntarily** 
      1. **Compare to Beausoleil v Sisters of charity** (Canadian case)
         1. *Pl was due to have surgery she specified that she wanted general anesthetic not a spinal… dr had advised that it was fine and that she was to speak to the anesthetist and he decided that a spinal was best. He asked her before she went in and was very persistent and she said no. Eventually, the patient who does not remember saying this, she said do as you like. She had it and ended up being paralysed. The Q was whether her consent was valid in the circumstances.*
         2. ***HELD:*** *Words like do as you like.. which denote an abandonment in will power or evidence of defeat – she was already under sedation. So here, that is not valid consent.*
      2. **Compare to Re T** 
         1. JW blood transfusion
         2. Decided to get a blood transfusion only after speaking to her mother
         3. Was her will overborne by her mother?
         4. Religion – can be very influential
            1. Lord Donaldson: Does the patient really mean what he says or are they doing it to please someone else or have they been so greatly influenced that they could not make a decision themselves.
      3. **Consent will be invalid if:**
         1. Obtained by threats, terror, force, coercion or unfair advantage (Beausoleil)
         2. If there is evidence of pressure from medical staff
         3. If knowledge is withheld that would ordinarily change the nature of the consent (Appleton v Garrett)
            1. *Appleton – where a dentist represented falsely to his patients that they needed dental treatment and then carried out unnecessary treatment the court had no hesitation in finding a battery*
   2. **Consent must be given with sufficient knowledge** 
      1. A patient cannot consent unless given sufficient information
      2. **Civil Assault / action in trespass to person** – Patient must be informed in broad terms of the nature f the procedure to be performed – Chatterton v Gerson
         1. ***Chatterton*** *– had a trapped nerve – referred to a chronic pain specialist which gave treatment that involved blocking the nerve and it involved multiple injections. He outlined the procedure and she underwent one procedure and it came back and he didn’t outline it again (assuming she already knew) and she did it… and it STILL came back.*
            1. *Once a patient is informed in broad terms and gives consent and that is real then they cannot bring an action in trespass, but negligence only.*
      3. **Negligence** (if negligence may have to go through to negligence notes)
         1. Failure to inform of risks in medical procedure goes to an action in negligence
            1. Roger v Whitaker (also set out in s21 CLA)

Must warn of ALL material risks inherent in the proposed treatment

Risk is material if (go to material risk table)

A reasonable person, when warned of the risk, would attach significance to it

The practitioner would be aware of this

* + 1. **Criminal code**
       1. S245
          1. “A person who **strikes, touches, or moves, or otherwise applies force of any kind** to, the **person of another**, either **directly or indirectly**, **without the other person’s consent** or with the other person’s consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person’s consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect that person’s purpose, is **said to assault that other person**, and the act is called an “assault.” The term “applies force” includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degrees as to cause injury or personal discomfort.”
  1. **Consent must be given in relation to the treatment given** 
     1. Consent to one kind of treatment when another is performed does not protect the doctor if different medical procedure is carried out
     2. Subjective test based on what the patient wanted
        1. SO ALWAYS CONSIDER THE ACTUAL CONSENT GIVEN and consider the scope of that particular consent
        2. **Compare to *Brushett v Cowan –*** Only consented to muscle not bone biopsy
           1. *Here she had a biopsy performed on her leg, and then she later fractured her leg at the same site of the biopsy*
           2. *Claimed that she did not know that it was on the bone but on the muscle only. She tried to bring an action for battery for lack of consent but the court said that she had consented to it*
           3. *She got up on the negligence although she was found to be partially negligent as well.*
        3. **Compare to *Murray v Mcmurchy*** 
           1. Where woman was having a C section and the Dr noticed that she had something wrong with her fallopian tubes and so he tied them off
           2. HELD: that you cannot do something without consent merely because it is convenient
  2. **Consent can be express or implied** 
     1. Express: Oral or written (*Re T*)
     2. Implied: Arriving at a hospital for treatment (*O’Brien v Cunard*) provided the treatment is what is impliedly being consented to (i.e. in terms of vaccinations and contraceptive is injected instead)
     3. **Consent forms** are prima facie evidence of express consent however the circumstances of each case will be relevant.
        1. Where the form is in wide and unspecific terms it is less likely to attract protection
        2. If the form states the patient has been fully informed of the procedure and they haven’t, may be able to persuade court otherwise.
        3. Forms will be limited to the words used within them
        4. NOTE that there is n legal requirement for consent to be in writing

1. **CAPACITY TO CONSENT**

\*\*Capacity is like a continuum – the greater the decision that is being made, the more capacity that is required

**ADULTS**

* 1. **Presumed** to have the capacity to consent (Sch 1 PAA)
  2. Can be DEPRIVED and consent must be sought from someone other than the patient
     1. Compare to *Re T (where she was in a car accident)* 
        1. *“Confusion or other effect of shock, sever fatigue, pain or drugs used in their treatment”*

**CHILD**

**\*\*\***Minor is someone who is under the age of 18 – *s17 of the Law reform Act 1995*

* 1. Parent can consent to the treatment of a minor provided the treatment is lawful
     1. ‘parental responsibility’ under the Family law Act ss 61B and C(1)
     2. It does not matter if the parents are divorced s 61C(2) allows either parent to make medical decisions
        1. May requirea parenting plan under s61C(3)
  2. MATURE MINOR
     1. Can sometimes give consent
     2. Will turn on the childs age, level of understanding and maturity
        1. *“When child achieves sufficient understanding and intelligence to enable him/her to understand fully what is proposed” Gillick [1985] 3 All ER 402; Marion’s case* 
           1. *Gillicks Case (“Gillick Competent”)*

*Where a 16 year old was recognised as having the capacity to consent to the taking of birth control – a five point test was provided (Lord Fraser)*

*That the girl will understand the advice*

*That the Dr cannot persuade her to inform parents*

*That she is likely to begin or continue to have sex regardless*

*That a failure to treat may result in physical or mental illness*

*It is in the patients best interests*

* + 1. Contrast to *Re M*
       1. *15 year old was refused a heart transplant*

1. **WHERE THERE IS CONFLICT BETWEEN THE MATURE MINOR AND THE PARENT**
   1. Not really decided in Australia
2. **CONSENT FOR SERIOUS PROCEDURES – (**Parents can’t consent)
   1. Serious procedures require court approval in addition to parental/child consent were the procedure is *“invasive, irreversible and major surgery… where significant risk of making the wrong decision” (Marion’s case)*
      1. *Marions case*
         1. *Sterilisation of a 14 year old girl who was mentally retarded* 
            1. ***HELD:*** *only where there is court or tribunal authority can you lawfully sterilize a child unless it takes place as a by-product of a surgery undertaken in relation to a disease*
            2. *Must be in the childs best interests after other – less invasive methods have been trialed*
   2. ***BEST INTERESTS*** *include:\*\*\**
      * 1. Wishes expressed by the child: s 60CC3(a);
        2. Child’s relationship with parents and others: s 60CC3(b);
        3. The child’s maturity and background: s 60CC3(g); and
        4. Other facts and circumstances the court considers relevant: s 60CC3(m).
           1. **Family law Act**

*\*\*\** Also make reference to state of Qld v B where parents held not able to give cnsent for termination of pregnancy (Wilson J) – see abortion notes and page two of the health and Gship article by Wilmot and White.

* 1. Who is the **source** of power
     1. It is assumed that if parents have any power that they will act in the best interests of the child
        1. Compare to *Marions case* 
           1. *They referred to another judgment which said that parents can always be trusted to make the right decision – high court rejected this argument*
           2. *There is a potential conflict of interest here – the parents might have a skewed view and caring for someone that is disabled is hard and if something is going to make it even harder then maybe the parents want it done – in Marions case there was nothing untoward about the way the parents acted but it was still considered*
     2. This was different because Marion had a mental disability
     3. The consequences were so great that she did not have capacity
  2. **Therapeutic VS non-therapeutic procedures** (determined in secretary, department of health and community services v JWV and SMB)
     1. If the patient has to get their ovaries removed as a result of having ovarian cancer = **therapeutic**
     2. **Non-therapeutic** = merely operating just to get them out because the parents do not want her to get her period with her mental condition
        1. *The kind of treatment that is disproportionate given the cosmetic deformity, pathological condition or psychiatric disorder – Brennan J in the above case*
     3. *NOTE: that all 7 judges in the above case stated that making this distinction is not easy*
     4. Also compare to *Re A* 
        1. *14 year old, genetically female but through a condition she had she was becoming a man and wanted to undergo the surgery to become a male* 
           1. *Require 2-3 operations over a 3 month period*
           2. *This kind of treatment does not come within normal consent requirements*
           3. *There was evidence given that A had contemplated suicide because they really wanted to surgery and there was evidence stating that if it were postponed that there might be dire consequences*
           4. *Held that parents could not consent – had to go to the court because of the invasive nature of the procedure*
           5. *Court can allow this if it is in the best interests of the child*

*NOTE: THE OPERATION OF CH 5A OF THE GUARDIANSHIP AND ADMINISTRATION ACT 2000*

**Queensland: Ch 5A GAA** (if therapeutic sterilisation AND child with impairment)

Ch 5A GAA applies to consent to sterilisation of a child with an impairment. Impairment means a cognitive, intellectual, neurological, or psychiatric impairment: s 80A (definitions). However, sterilisation does not include non-therapeutic sterilisation where there is no organic malfunction or disease of the child likely to cause serious or irreversible damage to the child’s health: s 80B(2).

An application may be made to the tribunal for consent to the sterilisation of a child with an impairment: s 80H(1). The application may be made by the parent or guardian of the child (s 80H(2)(a)) or another interested person (s 80H(2)(b)). The tribunal may consent to the sterilisation of the child only if satisfied that it is in the best interests of the child: s 80C(2).

(1) The sterilisation of a child with an impairment is in the child's best interests only if--

(a) one or more of the following applies--

(i) the sterilisation is medically necessary;

(ii) the child is, or is likely to be, sexually active and there is no method of contraception that could reasonably be expected to be successfully applied;

(iii) if the child is female--the child has problems with menstruation and cessation of menstruation by sterilisation is the only practicable way of overcoming the problems; and

(b) the child's impairment results in a substantial reduction of the child's capacity for communication, social interaction and learning; and

(c) the child's impairment is, or is likely to be, permanent and there is a reasonable likelihood, when the child turns 18, the child will have impaired capacity for consenting to sterilisation; and

(d) the sterilisation can not reasonably be postponed; and

(e) the sterilisation is otherwise in the child's best interests.

(2) Sterilisation is not in the child's best interests if the sterilisation is--

(a) for eugenic reasons; or

(b) to remove the risk of pregnancy resulting from sexual abuse.

(3) In deciding whether the sterilisation is in the child's best interests, the tribunal must--

(a) ensure the child is treated in a way that respects the child's dignity and privacy; and

(b) do each of the following--

(i) in a way that has regard to the child's age and impairment, seek the child's views and wishes and take them into account;

(ii) to the greatest extent practicable, seek the views of each of the following persons and take them into account--

(A) any parent or guardian of the child;

(B) if a parent or guardian is not the child's primary carer, the child's primary carer;

(C) the child representative for the child;

(iii) take into account the information given by any health provider who is treating, or has treated, the child; and

(c) take into account--

(i) the wellbeing of the child; and

(ii) alternative forms of health care that have proven to be inadequate in relation to the child; and

(iii) alternative forms of health care that are available, or likely to become available, in the foreseeable future; and

(iv) the nature and extent of short-term, or long-term, significant risks associated with the proposed sterilisation and available alternative forms of health care.

(4) The child's views and wishes may be expressed in the following ways--

(a) orally;

(b) in writing;

(c) in another way including, for example, by conduct.

1. **CAPACITY TO CONSENT**

* **CONSIDER THIS IF SOMEONE IS TRYING TO MAKE A DECISION FOR AN ADULT**
  1. **Adult lacking capacity** 
     1. Powers of attorney Act 1998
        1. Allows individuals to make decisions regarding certain treatments
     2. Guardianship and administration Act 2000
        1. Guardianships and treatment of persons unable to consent
        2. NOTE: These acts need to be read together in QLD

## Health care and special health matters dealt with separately: sch GAA/ POA

## Advance Health Directives: s 35-6, 39 POA

## Priority for decision-making:

### Health matters: s66 GAA

### Special health matters: s65 GAA

### When a decision is being made for someone else the court will consider the following (from within sch 1 of the PAA, GAA):

* + - Presumption of capacity
    - Human rights
    - Individual value of the adult
    - Adult valued as a member of society
    - Participation in community life
    - Encouragement of self reliance
    - Maximum participation, minimal limitations and substituted judgement
    - Maintenance of existing supported relationships
* *Remember the case study we did in class about the disabled child where his parents wanted to send him to a special home* 
  + *Encouragement of self development*
  + *Maintenance of existing supported relationships*
  + *Participation in community life*
* ***Make sure you always go through and figure out which ones of these are going to apply***

***Guardianship and Administration Act 2000* (Qld) & *Powers of Attorney Act 1998* (Qld)**

**SCHEDULE 1- Principles**

**PART 1—GENERAL PRINCIPLES**

**1 Presumption of capacity**

An adult is presumed to have capacity for a matter.

**2 Same human rights**

**(1)** The right of all adults to the same basic human rights regardless of a particular adult’s capacity must be recognised and taken into account.

**(2)** The importance of empowering an adult to exercise the adult’s basic human rights must also be recognised and taken into account.

**3 Individual value**

An adult’s right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.

**4 Valued role as member of society**

**(1)** An adult’s right to be a valued member of society must be recognised and taken into account.

**(2)** Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.

**5 Participation in community life**

The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.

**6 Encouragement of self-reliance**

The importance of encouraging and supporting an adult to achieve the adult’s maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.

**7 Maximum participation, minimal limitations and substituted**

**judgment**

**(1)** An adult’s right to participate, to the greatest extent practicable, in decisions affecting the adult’s life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.

**(2)** Also, the importance of preserving, to the greatest extent practicable, an adult’s right to make his or her own decisions must be taken into account.

**(3)** So, for example—

(a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult’s life; and

(b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult’s views and wishes are to be sought and taken into account; and

(c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult’s rights.

**(4)** Also, the principle of substituted judgment must be used so that if, from the adult’s previous actions, it is reasonably practicable to work out what the adult’s views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult’s views and wishes.

**(5)** However, a person or other entity in performing a function or exercising a power under this Act must do so in a way consistent with the adult’s proper care and protection.

**(6)** Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

**8 Maintenance of existing supportive relationships**

The importance of maintaining an adult’s existing supportive relationships must be taken into account.

**9 Maintenance of environment and values**

**(1)** The importance of maintaining an adult’s cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.

**(2)** For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult’s Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition[[1]](#footnote-2) or Island custom[[2]](#footnote-3)), must be taken into account.

**10 Appropriate to circumstances**

Power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult’s characteristics and needs.

**11 Confidentiality**

An adult’s right to confidentiality of information about the adult must be recognised and taken into account.

**The court will also need to consider the following:**

Health Care Principles: Schedule 2 GAA, POA

**Financial Matters**: are defined in Sch 2 GAA, POA as matter relating to the adult's financial or property matters including 1 or more of the following

(a) paying maintenance and accommodation expenses for the adult and the adult's dependants, including, for example, purchasing an interest in, or making another contribution to, an establishment that will maintain or accommodate the adult or a dependant of the adult;

(b) paying the adult's debts, including any fees and expenses to which an administrator is entitled under a document made by the adult or under a law;

(c) receiving and recovering money payable to the adult;

(d) carrying on a trade or business of the adult;

(e) performing contracts entered into by the adult;

(f) discharging a mortgage over the adult's property;

(g) paying rates, taxes, insurance premiums or other outgoings for the adult's property;

(h) insuring the adult or the adult's property;

(i) otherwise preserving or improving the adult's estate;

(j) investing for the adult in authorised investments;

(l) continuing investments of the adult, including taking up rights to issues of new shares, or options for new shares, to which the adult becomes entitled by the adult's existing shareholding;

(m) undertaking a real estate transaction for the adult;

(n) dealing with land for the adult under the [Land Act 1994](http://www.austlii.edu.au/au/legis/qld/consol_act/la199448/) or [Land Title Act 1994](http://www.austlii.edu.au/au/legis/qld/consol_act/lta1994109/);

(o) undertaking a transaction for the adult involving the use of the adult's property as security (for example, for a loan or by way of a guarantee) for an obligation the performance of which is beneficial to the adult;

(p) a legal matter relating to the adult's financial or property matters;

(q) withdrawing money from, or depositing money into, the adult's account with a financial institution

**Personal Matters:** are defined in Sch 2 GAA, POA as a matter, other than a special personal matter or special health matter, relating to the adult's care, including the adult's health care, or welfare including 1 or more of the following

(a) where the adult lives;

(b) with whom the adult lives;

(c) whether the adult works and, if so, the kind and place of work and the employer;

(d) what education or training the adult undertakes;

(e) whether the adult applies for a licence or permit;

(f) day-to-day issues, including, for example, diet and dress;

(g) health care of the adult;

(h) whether to consent to a forensic examination of the adult;

(i) a legal matter not relating to the adult's financial or property matter;

(j) a restrictive practice matter under chapter 5B;

(k) seeking help and making representations about the use of restrictive practices for an adult who is the subject of a containment or seclusion approval under chapter 5B.

**Special Personal Matter**: is defined in Sch 2 GAA, POA as a matter relating to 1 or more of the following

(a) making or revoking the adult's will;

(b) making or revoking a power of attorney, enduring power of attorney or advance health directive of the adult;

(c) exercising the adult's right to vote in a Commonwealth, State or local government election or referendum;

(d) consenting to adoption of a child of the adult under 18 years;

(e) consenting to marriage of the adult

**ALSO CONSIDER WHETHER IT IS A HEALTH OR A SPECIAL HEALTH MATTER (OUTLINED BELOW)**

1. **WHERE IS CONSENT NOT NEEDED** 
   1. If the procedure is being performed out of necessity/emergency
   2. If the procedure is being done pursuant to a court order
      1. Where the hospital applies to the court for an order that treatment is given
   3. If there are statutory provisions stating that you must
      1. E.g. Transplantation and Anatomy Act 1979 s 20
         1. Giving a blood transfusion to a child that would otherwise die
         2. PPRA
            1. Forced testing of a person in custody upon application to a magistrate
      2. S 282 of the criminal code can excuse if a procedure is undertaken for certain reasons and is reasonable having regard to certain circumstances of the case
         1. *This was relied on in* ***Qld v Nolan****: A and B were conjoined twin babies. Application for medical treatment – Court’s sanction for operation to separate them. Weaker twin surviving only through stronger twin’s blood supply. Separation required to prevent death of both children but certain to result in death of weaker twin.*
         2. ***Held:*** *The operation was one to save the life of A. The circumstances, including the loss of B, would make the operation reasonable for the purposes of the section (A was regarded as the patient). Accordingly the operation might lawfully be carried out to save the life of A.*
2. **CATEGORIES OF INCOMPETENT PATIENTS** 
   1. Those with temporary or permanent mental illnesses or disability, birth defect etc.
   2. It is the Dr’s responsibility to assess each patient’s ability to consent
      1. This must be assessed on a case by case basis *(Re Marion).*
   3. TEST FOR DETERMINING COMPETENCY: A person will have capacity to consent where they are capable of understanding the nature and effect of the treatment and are capable of freely and voluntarily communicating their consent or refusal (Sch 4 GAA).
3. **WHO IS THE APPROPRIATE DECISION MAKER AND WHAT POWERS CAN THEY EXERCISE UNDER THE GAA OR POA**

\*\*\*This will depend on whether it is health care or special health care.

\*\*\* Also see the diagram that you have drawn

* 1. There are two different categories:

**HEALTH CARE**

* 1. Defined in sch 2, s5
     1. Treatment, care, service or procedure for the adult
        1. to diagnose, maintain, or treat the adult's physical or mental condition; and
        2. carried out by, or under the direction or supervision of, a health provider.
        3. Includes withholding or withdrawal of a life-sustaining measure for the adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice
     2. DOES NOT include
        1. first aid treatment; or
        2. a non-intrusive examination made for diagnostic purposes; or
        3. the administration of a pharmaceutical drug if—
           1. A prescription is not needed to obtain the drug; and
           2. The drug is normally self-administered; and
           3. The administration is for a recommended purpose and at a recommended dosage level.

**SPECIAL HEALTH CARE**   
Special Health Care Definition (sch2, s7):

* + 1. Special health care of an adult is the
       1. removal of tissue from the adult while alive for donation to someone else;
       2. sterilisation of the adult;
       3. termination of a pregnancy of the adult;
       4. participation by the adult in special medical research or experimental health care;
       5. electroconvulsive therapy or psychosurgery for the adult;
       6. prescribed special health care of the adult

1. **HOW HAS THE AUTHORITY TO MAKE THE DECISION**

**HEALTH MATTERS:** S66 GA

* 1. Does the patient have an ***advance health directive*** in place?
     1. A person may make an AHD only where they understand
        1. Nature and likely effects of each direction;
        2. Direction operates only while has impaired capacity;
        3. May revoke a direction at any time while has capacity;
        4. At any time not capable of revoking a direction, unable to effectively oversee implementation of direction.
     2. An *advance health directive* allows a person to (s35 PAA):
        1. give directions, about health matters and special health matters, for his or her future health care; and
        2. give information about his or her directions; and
        3. appoint 1 or more persons who are eligible attorneys to exercise power for a health matter for the principal in the event the directions prove inadequate; and
        4. provide terms or information about exercising the power
        5. provide consent in future specified circumstances for their health care when necessary and despite objection by the principal when the health care is provided
        6. require in the circumstances specified, a life-sustaining measure to be withheld or withdrawn
        7. authorise an attorney to physically restrain, move or manage the principal, or have the principal physically restrained, moved or managed, for the purpose of health care when necessary and despite objection by the principal when the restraint, movement or management is provided.
        8. **NOTE:** that with life support legislation governs when this can be included in a SHD
           1. You have to have a terminal illness and be expected to die withina year
           2. Be permanently unconscious
        9. NOTE: that s39 PAA
           1. States that the CL continues to operate side by side with the statutory scheme

So the statutory scheme will promote patient autonomy

Allows the patient to express wishes in a legal document

* 1. If there is **no directive,** is there an appointed guardian/s or a tribunal order?
  2. Where there is none of the above is there **has an attorney been appointed** under an enduring power?
  3. If none of the above, only a ***statutory health attorney*** may make decisions
     1. A *Statutory health attorney* is the first in the following list who are readily available and culturally appropriate to exercise power (s63 PAA)
        1. a **spouse** of the adult if the relationship between the adult and the spouse is close and continuing
        2. a person who is **18 years** or more and who **has the care of the adult** and is not a paid carer for the adult
           1. a ‘person who has care of the adult’ where they provides or arrange domestic services and support to the adult; or
        3. a person who **is 18 years** or more and who is **a close friend** or relation of the adult and is not a paid carer for the adult
        4. the adult guardian

**SPECIAL HEALTH CARE:** S65 GAA

* 1. Does the patient have an ***advance health directive*** in place?
     1. See above
  2. If there is **no directive**, has an entity other than a tribunal been appointed?
  3. Where there is none of the above the tribunal may make an order.

1. **WHAT POWERS CAN EACH CATEGORY EXERCISE?**
   1. **Tribunals:** s12 GAA:
      1. **May appoint** 
         1. guardians for personal matters
         2. administrators for financial matters
      2. **where satisfied** 
         1. the adult has impaired capacity for the matter; and
         2. there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property;
      3. **and without an appointment**
         1. the adult's needs will not be adequately met or
         2. the adult's interests will not be adequately protected
   2. **Appointed Guardians** (!!!!! Make sure the question says appointed guardian and that it’s not a statutory health attorney)
      1. *Health care matters only*
      2. s33(1) GAA: Guardians have the power to do anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter when the power is exercised.
      3. s34 GAA: Guardians must apply the health care principles under schedule 2
      4. S36 GAA: must act in accordance with any terms of a tribunal order (200 penalty units)
      5. S35 GAA: must exercise any power honestly and with reasonable diligence to protect the adult's interests (200 penalty units)
      6. S44(1) POA: A right to all information needed to make a decision
   3. **Multiple Guardians**
      1. S38 GAA: Are appointed as joint guardians
      2. S39 GAA: must exercise the power unanimously
   4. **Statutory Health Attorney**
      1. Adult Guardian
         1. Appointed by the Governor in council under s199 GAA
         2. S174(3): Must apply the general and health care principles
         3. S175: the adult guardian may do all things necessary or convenient to be done to perform the adult guardian's functions
         4. S174(2): Functions
            1. protecting adults who have impaired capacity for a matter from neglect, exploitation or abuse
            2. investigating complaints and allegations about actions by

an attorney

a guardian or administrator

another person acting or purporting to act under a power of attorney, advance health directive or order of the tribunal made under this Act

* + - * 1. mediating and conciliating between attorneys, guardians and administrators or between attorneys, guardians or administrators and others, for example, health providers, if the adult guardian considers this appropriate to resolve an issue
        2. acting as attorney

for a personal matter under an enduring power of attorney; or

under an advance health directive; or

for a health matter if authorised as a statutory health attorney; or

if appointed by the court or the tribunal;

* + - * 1. acting as guardian if appointed by the tribunal

1. IS THERE A DISPUTE BETWEEN DECISION MAKERS?
   1. Where there are multiple guardians, administrators or attorneys for an adult, those persons must consult with one another on a regular basis to ensure the adult's interests are not prejudiced by a breakdown in communication between them (s40(1) GAA, s79 POA).
   2. However any breakdown in communication will not affect the validity of an exercise of power by a guardian, administrator or attorney (s40(2) GAA).
   3. **Where there is a disagreement about a health matter**
      1. The adult guardian is to act as a mediator, and where no decision is reached is to exercise the power (s42(1), s174(2)(c) GAA)
      2. The adult guardian must inform the Tribunal of the decision
         1. An application may be made to the tribunal for a declaration, order, direction, recommendation or advice in relation to an adult (s115(1), s116 GAA)
         2. An application may be made to the Supreme Court (s240 GAA)
         3. NOTE: there may be different outcomes from the GAAT vs the court
2. **ACTIONS** 
   1. **Common law** 
      1. Trespass
         1. Battery: unauthorised touching of a person
         2. Assault: an act causing apprehension of battery
      2. NB: Rogers v Whitaker
         1. Trespass action only available if patient has not been informed of the nature of the intended procedure
            1. Where this is the case you must go to a negligence action instead
   2. **Criminal law** 
      1. S245 CC – Assault
3. **DEFENCES** 
   1. The doctor does not need consent in some situations – i.e. where emergency or necessity required immediate treatment
      1. **Emergency** 
         1. Construed strictly and must not be relied upon lightly
            1. Only good where the action taken is reasonable and the Dr honestly believes that without it the person will die be seriously afflicted
      2. **Necessity** 
         1. See re Marion
            1. Note that this has not been judicially accepted in Australia

**England**

In England a necessity principle was held to exist in *Re F* where ‘it is not practicable to communicate with the assisted person and the action taken is such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person.’ A ‘reasonable’ person will be satisfied where the doctor has acted in accordance with a responsible and competent body of professional opinion.

**Three basic elements**

If it were not provided the patient would be deprived of necessary care

A doctor has a duty of care once having assumed responsibility for the care of the patient

There is a deemed authority from the patient

1. **Aboriginal tradition”** means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships—see *Acts Interpretation Act 1954*, section 36. [↑](#footnote-ref-2)
2. **“Island custom”**, known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships—see *Acts Interpretation Act 1954*, section 36. [↑](#footnote-ref-3)