CONSENT I. CONSENT In general, under the laws of Hong Kong, a medical practitioner is not allowed to perform any medical treatment or procedure on a patient who does not consent to it. The consent given must be for the actual procedure or treatment performed. Any medical treatment or procedure involving physical contact with the patient's body is a prima facie (which means there is evidence on the face of it) trespass on the person, or a case of battery, unless the patient has expressly or implicitly consented to that contact , even if the doctor believes that it was in the best interest of the patient, and even if it was in fact in the best interest of the patient. The Medical Council of Hong Kong devised a Code of Professional Conduct ("the Code") for all registered medical practitioners in Hong Kong. Section 2 of the Code (revised section 2 of the Code of Professional Conduct promulgated in Issue No. 22 of the newsletter of the Medical Council in December 2015) deals with consent: "2.3 Consent may be either implied or express. In respect of minor and non-invasive treatments (*), consent can usually be implied from a patient's conduct in consulting the doctor for his illness (but not in a situation where the consultation was only for the purpose of seeking an opinion). * "invasive treatments" refer generally to treatments involving puncture of the skin or insertion of an instrument or foreign material into the body. 2.4 Oral consent is acceptable for minor invasive procedures. Documenting oral consent in the patient's medical record offers protection to doctors, in case of subsequent dispute as to whether consent has been given. 2.5 Express and specific consent is required for major treatments, invasive procedures, and any treatment which may have significant risks. Specifically:- (a) Consent for surgical procedures involving general/regional anaesthesia and parenteral sedation must be given in writing. (b) For written consent, a reasonably clear and succinct record of the explanation given should be made in the consent form. The patient, the doctor and the witness (if any) should sign the consent form at the same time. Each signatory must specify his name and the date of signing next to his signature. 2.6 Where there are statutory requirements that consent in specified circumstances be given in prescribed forms, those requirements must be complied with. (e.g, removal of parts of body or specifice parts after death for theraputic purposes or for proposes of medical education or research: Section 2 and 3 of the Medical (Therapy, Education and Research) Ordinance, Cap.278) Section 2.7 of the Code provides that consent is valid only if: "(i) it is given voluntarily; (ii) the doctor has provided proper explanation of the nature, effect and risks of the proposed treatment and other treatment options (including the option of no treatment); and (iii) the patient properly understands the nature and implications of the proposed treatment." 2.10.1 Explanation should be given in clear, simple and consistent language. Explanation should be given in terms which the patient can understand. It is the doctor's duty to ensure that the patient truly understands the explanation by being careful and patient. 2.10.2 The explanation should be balanced and sufficient to enable the patient to make an informed decision. The extent of explanation required will vary, depending on individual circumstances of the patient and complexity of the case. 2.10.3 The explanation should cover not only significant risks, but also risks of serious consequence even though the probability is low (i.e. low probability serious consequence risks). A valid consent in this sense will be an "informed consent". A. INFORMED CONSENT A. INFORMED CONSENT An informed consent should be given voluntarily. The patient has to have the ability to make this decision and should be able to comprehend the information given by the medical practitioner well enough to understand the treatment or procedure: i.e. the nature, effect and risks of the proposed treatment and other options (including the option of no treatment). Section 2.8 of the Code states: "After the explanation, the patient should be given reasonable time to enable the patient (or his family members in applicable cases) to make the decision properly, depending on the complexity of information, the importance of the decision and the urgency of the proposed treatment." If the consent were given following incomplete and unsatisfactory advice, that consent could be of no effect. B. CAPACITY TO CONSENT B. CAPACITY TO CONSENT In Hong Kong, an adult patient (one who has attained the age of 18 and is not "mentally incapacitated") is able to give a consent that is valid under the law. A person who is "mentally incapacitated" may still be able to give consent if he

or she can understand the general nature and effect of the treatment. 1. MENTALLY INCAPACITATED PATIENTS (“MIP”) 1. MENTALLY INCAPACITATED PATIENTS (“MIP”) MIP are persons who are incapable, by reason of mental incapacity, of managing and administering their property and affairs; or persons suffering from mental illness or psychopathic disorders or having significant impaired intelligence. Detailed definitions can be be found in Section 2(1) of the Mental Health Ordinance, Chapter 136, Laws of Hong Kong (“MHO”). Part IVC of MHO governs consent to treatment in relation to an MIP who has attained the age of 18 and is incapable of giving consent. A MIP is incapable of giving such consent if that person is incapable of understanding the general nature and effect of the treatment (Section 59ZB(2) of the MHO). So if a MIP can understand the general nature and effect of the treatment, he or she is able to give consent. For MIP who is incapable of understanding the general nature and effect of the treatment, consent may be given by the guardian of the patient under Part IIIA or IVB of the MHO in respect of whom a guardianship order has conferred the power to consent under Sections 44B(1)(d) or 59R(3)(d). Where consent cannot be obtained from guardians, according to section 59ZF(1) of the MHO, a registered medical practitioner or registered dentist can carry out or supervise a treatment if it is a matter of urgency and that treatment is necessary and is in the best interests of the MIP. The exceptions are sterilization and removal of organs for transplantation, even if the treatment is a matter of urgency and is necessary and is in the MIP’s best interests. (Sections 59ZA, 59ZC, 59ZG and 59ZBA of the MHO) In such circumstances, consent may be given by the Court upon application by any person (including a medical superintendent, registered medical practitioner or registered dentist). Under section 59ZB(3), when considering whether or not to give consent the Court shall observe and apply the following principles, namely to: ″(a) ensure that the mentally incapacitated person is not deprived of the treatment merely because he lacks the capacity to consent to the carrying out of that treatment; and (b) ensure that any treatment that is proposed to be carried out in respect of the mentally incapacitated person is carried out in the best interests of that person.″ “In the best interests” , according to section 59ZA of the MHO, means in the best interests of the MIP in order to: “(a) save the life of the MIP; (b) prevent damage or deterioration to the physical or mental health and well-being of that person; or (c) bring about an improvement in the physical or mental health and well-being of that person.” If the Court is satisfied that the treatment should be carried out “in the best interests” of the MIP, the Court may consent to the carrying out of the treatment and make an order to the applicant to that effect. 2. CHILD PATIENTS 2. CHILD PATIENTS There is no specific Ordinance dealing with consent in relaltion to Child Patients. Section 2.12.1 of the Code provides that: “Consent given by a child under the age of 18 years is not valid, unless the child is capable of understanding the nature and implications of the proposed treatment. If the child is not capable of such understanding, consent has to be obtained from the child’s parent or legal guardian.” Consent to treatment for the benefit of the child from a parent or guardian would protect the medical practitioner from a claim in tort of battery or trespass to the person. Medical practitioners can lawfully act to safeguard a child’s life or health without parental agreement on the basis of necessity. Parents or guardians do not have a right to veto treatment in such circumstances. Parents do not have an absolute right to determine what treatment a child receives. Section 2.12.4 of the Code states: “It is usually sufficient to have consent from one parent. However, in relation to major or controversial medical procedures, there may be the duty to consult the other parent. If the parents cannot agree and the dispute cannot be resolved, the doctor should seek legal advice as to whether it is necessary to apply to court for an order.” The decision of parents (to consent to or refuse treatement) can be overruled by the Court. Each case would be decided on its own circumstances and facts. In an English Court case in 1976, (Re D (Wardship: Sterilisation)), the Court refused to endorse the decision of a parent to have an 11-year-old handicapped girl sterilised as the girl’s mental disability was not so profound that she would never be able to decide such matters for herself. In another case (Re B (A Minor) (Wardship: Sterilisation) [1988]), the Court authorised the sterilisation of a much more severly handicapped 17-year-old girl. The key is what would

be in the child’s “best interest”. The interests of a child are not limited to interests in physical health but must also relate the child’s welfare. WITHDRAWAL II. WITHDRAWAL It is for the patient to decide whether or not to receive medical treatment even if refusal means his or her life would be at risk. It is the patient’s right of self-determination. A mentally competent patient can refuse life-saving treatment if they want to. Any refusal of treatment must be clear, voluntary and unambiguous in order to be effective. In case of uncertainly, a prudent medical practitioner should refer the matter to the Court. Unless there are clear terms/words indicating refusal of treatment, the Court would normally rule in favour of the preservation of life. Advance Directives If a patient issued an advance directive refusing consent to medical treatment which, properly construed, was to apply even where that person was in no fit state to give or refuse consent, that directive has to be respected. The patient must have been competent when executing the advance directive for it to be effective. There is currently no legislation governing advance directives. For more details about advance directives, please click here. TREATMENT PERFORMED WITHOUT CONSENT III. TREATMENT PERFORMED WITHOUT CONSENT A. LEGAL ACTION IN TORT A. LEGAL ACTION IN TORT Any medical treatment involving physical contact with the patient’s body is prima facie a tort of battery unless the patient has expressly consented (agreed) to that contact, or has at least implied their consent.” If the consent were given following incomplete or unsatisfactory advice, that consent could not be used as a defence agaist a claim. In such circumstances, the patient can sue the medical practitioner for damages in tort. The time limit to take action in tort is 6 years from the date on which the cause of the action occured (Section 4(1) of the Limitation Ordinance, Cap. 347). B. NEGLIGENT TREATMENT B. NEGLIGENT TREATMENT Irrespective of whether the patient has given consent to a treatment or not, if the medical practitioner committed any negligent error in carrying out that treatment and caused injury to the patient, the medical practitioner would be liable to the patient for negligence. A medical practitioner owes a duty in tort to his patient: he must exercise reasonable care and skill in his/her treatment of the patient. Failure to do so would render the practitioner liable to the patient for damages for personal injury caused by the negligent treatment. In order to claim damages, the injury must be shown to be the result of an error on the part of the medical practitioner and not the a result of an inherent risk of the treatment, and that such an error is something a reasonably competent medical practitioner would have avoided. A negligent treatment is a treatment which fails to attain the degree of skill and competence required of a reasonable practitioner. The basis of the test used to determine whether or not a practitioner has been negligent is the standard which would ordinarily be expected of a person trained in, exercising, and professing to have the special skills in question. It is not considered negligece if the practitioner exercises the ordinary or normal skill of a competent person exercising that particular art, even if the result of the treatment proves unsatisfactory. This test is called the “Bolam Test”, which is derived from the English case of Bolam v Friern HMC [1957]. The test is to be considered in the light of the practitioner’s specialisation and the post he holds. Inexperience is irrelevant to the required standard of care. The treatment must be judged in the context of proper treatment at the time the negligence occured. We could not use a more current or advanced medical standard to judge a treatment that occurred in the past when the resources and equipment used were less advanced. A practitioner who acts in conformity with an accepted current practice is not negligent merely because there is a body of opinion which would take a contrary view. The practice relied on must be respectable, responsible and reasonable a nd has to have a logical basis. The time limit to take action for personal injures is three years from the date on which the cause of action occurred , or three years from the date (if later) on which the plaintiff first discovered something was wrong (section 27 of the Limitation Ordinance, Cap. 347). For more information, you may refer to another topic: Medical Negligence. C. LODGING A COMPLAINT WITH THE MEDICAL COUNCIL C. LODGING A COMPLAINT WITH THE MEDICAL COUNCIL The patient can also lodge a complaint with the Medical Council of Hong Kong, which is responsible for registration and the professional discipline of medical practitioners. The Medical Council of Hong Kong was established under the Medical Registration

Ordinance, Chapters 161, Laws of Hong Kong (“MRO”), There in no time limit for making complaints. The Council will in appropriate cases carry out an investigation and/or hold public hearings. Under section 21(1) of the MRO, the Council is empowered to discipline a registered medical practitioner who commits an offence that is subject to discipline. If a practitioner is found guilty of a disciplinary offence, he or she will be reprimanded or given a public warning by the Council. In serious cases, his or her name may be removed from the General Register. However, the Council can not grant damages to an aggrieved patient. The patient has to take legal action and sue for damages in Court.