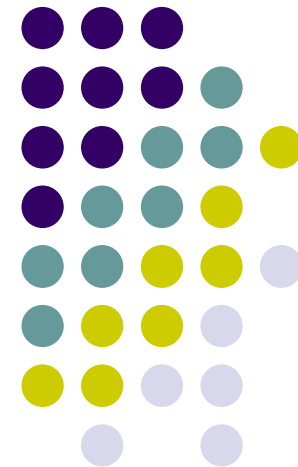


# Sexuality in Long Term Care Homes - the Legal Issues

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# Advocacy Centre for the Elderly



- Community legal clinic
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  - Community Development and
  - Law Reform work
  - NEWSLETTER available through Email by emailing [gillardt@lao.on.ca](mailto:gillardt@lao.on.ca)

# The Long Term Care Setting



- Long Term Care Homes are a “normal” environment, the “home” of persons who live there
- Recognition of sexuality as part of life of older adults
- Recognition of sexuality as part of life of residents in long term care
- Appreciation of individuality of residents and their diversity in sexual orientation and gender identity
- Recognition of right of privacy

# Reasons for Research on Sexuality



- LTC Homes are developing Policies in respect to sexuality
- Concerns about policies as policies may not identify or reflect consideration of some of the legal issues, such as consent, capacity, duty of care
- Concern that a policy will become a “Best Practice” and be followed by others, although not complete
- Need to review policies from point of view of residents, from perspective of all types of residents, from legal perspective
- Basic rule – policies must reflect legal framework of jurisdiction in which home operates



# LTC Home Policies

- Sexuality policies are developing
  - Out of concern for the physical and mental well being of residents
    - to prevent sexual abuse and assault
    - to prevent residents from contracting sexually transmitted infections
    - To prevent abusive or threatening situations
    - To allow patients the opportunity for sexual expression if they so choose and to recognize the decisions of capable adults for sexual expression

# Reasons for Research on Sexuality



- In Ontario, new Long Term Care Homes Act, S.O. 2007 places specific obligations on licensees to protect residents from abuse, including sexual abuse, and to create policies about abuse prevention and response
- What then does this mean in law? What needs to be included in these policies, and why?

# Goal of Policies – should in part be..



- To balance resident's right to make decisions about sexual expression with long term care home's duty to prevent harm.
- How can this be achieved?

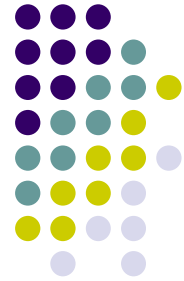
# Coroner's Inquest into the Death of Cinderella Allalouf (August 2000)- Re: Psychiatric Facility



- Jury Recommendation #1:
  - MOH should create a policy that recognizes a patient's right to sexuality
  - MOH should set a minimum standard for assessment of a psychiatric in-patient's capacity to make decisions regarding consensual sexual relations
- RESULT:
  - MOH said this recommendation was "under consideration"



# Coroner's Inquest into the Death of Cinderella Allalouf (August 2000)



- Jury Recommendation #2:
  - Establish a uniform policy throughout psychiatric hospitals with regards to sexual activity of long term in-patients
  - Implement an appeals process
- RESULT:
  - MOH rejected this recommendation “due to flaws”

# Issues that Need Research and Discussion



- Not a lot of legal literature or case law in Canada on these issues
- **Recent case from Supreme Court of Canada on consent should be closely examined See for Copies of S.C.C. Court cases - <http://scc.lexum.org>**
- Literature that is available focuses more on the rights of persons in psychiatric facilities or the rights of persons with intellectual disabilities not on persons with dementia who are likely to live in long term care homes
- Hard to determine the “legal answers” on all issues



- Even if “legal answer”, difficulty in figuring out how to implement “better” practices
- Evidence from interviews is that there are already some fixed misconceptions about some legal answers
- Evidence from interviews is that front line staff may not be getting the guidance/ training / resources they need to respond in appropriate manner, to understand when to intervene or not intervene
- Evidence from interviews is that the tough discussions don’t seem to be taking place or if they are, the results of those discussions aren’t being made public

# IMPORTANT

## Consent clarified \*\*\*\*\*



- Recent Supreme Court of Canada case (May 2011) R. v. J.A., 2011 SCC 28 does confirm that a person cannot give advance consent to sexual activity

And

Consent requires that the person be capable to consent and able to provide active consent throughout every phase of the sexual activity.

# Easier Issues – No Sexual Relations between staff and residents



No sexual relations between staff and residents  
(as differentiated from “appropriate” touching  
and expressions of affection that are non-  
sexual)

Could result in complaints to Professional  
Colleges if staff is a regulated health  
professional or labour sanction if PSW or  
other unregulated staff

# Regulated Health Professions Act, 1991, S.O. 1991, CHAPTER 18



## **Professional misconduct**

- 51.** (1) A panel shall find that a member has committed an act of professional misconduct if,....
- (b.1) the member has sexually abused a patient;....

## **HEALTH PROFESSIONS PROCEDURAL CODE**

### **Sexual abuse of a patient**

- (3) In this Code,  
“sexual abuse” of a patient by a member means,
- (a) sexual intercourse or other forms of physical sexual relations between the member and the patient,
- (b) touching, of a sexual nature, of the patient by the member, or
- (c) behaviour or remarks of a sexual nature by the member towards the patient.

### **Exception**

- (4) For the purposes of subsection (3),  
“sexual nature” does not include touching, behaviour or remarks of a clinical nature appropriate to the service provided.

# Easier Issue

## -No Preconsent



- People cannot “preconsent” to sexual activity- must be consent at time of the activity – See Criminal Code and Supreme Court of Canada Case R. v. J.A., 2011 SCC 28
- An essential element of consent is that it is given at the time – a person could indicate by words and actions that he or she is possibly interested in having sex yet decide to not to consent to having sex at the time of the act
- Also person must be conscious and capable to consent at the time of the activity

## R. v. J.A., 2011 SCC 28

### excerpts from Reasons for Judgment of Majority

### delivered by Chief Justice McLachlin



- “Parliament requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point.”
- “Consent for the purposes of sexual assault is defined in s. 273.1(1) ( *of the Criminal Code*) as “the voluntary agreement of the complainant to engage in the sexual activity in question”. This suggests that the consent of the complainant must be specifically directed to each and every sexual act, negating the argument that broad advance consent is what Parliament had in mind. As discussed below, this Court has also interpreted this provision as requiring the complainant to consent to the activity “at the time it occur[s]”



# Easier Issues - No advance consent through a POA Personal Care



- People cannot provide consent to sexual activity by indicating in a Power of attorney for Personal Care that they want to be able to engage in sexual activity even if they become mentally incapable of providing consent

# Easier Issue – No Implied Consent - *R. v. J.A.*, 2011 SCC 28



- “The jurisprudence of this Court also establishes that there is no substitute for the complainant’s actual consent to the sexual activity at the time it occurred. It is not open to the defendant to argue that the complainant’s consent was implied by the circumstances, or by the relationship between the accused and the complainant. There is no defence of implied consent to sexual assault: *Ewanchuk*, at para. 31.”

Chief Justice McLachlin in *R. v. J.A.*, 2011 SCC 28  
Chief Justice McLachlin in *R. v. J.A.*, 2011 SCC 28

## Easier Issue – Family of capable resident cannot determine resident’s sexual practices



- Family members cannot determine what capable consenting residents can or cannot do in way of sexual expression. Individuals make that decision for themselves.
- In discussions on sexuality policies, a number of people in LTC homes (staff and residents and family) indicated that they thought that there was a requirement for consent from family of the resident in LTC, even if the resident was mentally capable – my opinion is that this is irrelevant

## Easier Issue – SDM cannot provide substitute consent to sexual activity of incapable resident



SDM cannot “consent” on behalf of resident that is incapable to consent to sexual activity. There is no substitute consent to sexual activity

See Criminal Code offences of

- Sexual exploitation
- Sexual Assault

And Supreme Court of Canada Decision  
*R. v. J.A.*, 2011 SCC 28

## Easier Issues- Right of Mentally capable residents to engage in consensual sexual activity



Capable residents in LTC have the right to engage in consensual sexual activity (consenting capable adults)

- Right may not be explicit in the law however that doesn't mean it doesn't exist
- Could be seen as a right under the Charter s. 2, 12
- Could be argued as a right under LTC Homes legislation

# LTC Homes Act, 2007, S.O. 2007, CHAPTER 8 (LTCHA)



## Home: the fundamental principle

1. The fundamental principle to be applied in the interpretation of this Act and anything required or permitted under this Act is that a long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met. 2007, c. 8, s. 1.

# Residents Bill of Rights (LTCHA) s.3



3. (1) Every licensee of a long-term care home shall ensure that the following rights of residents are fully respected and promoted:

1. Every resident has the right to be treated with courtesy and respect and in a way that fully recognizes the resident's individuality and respects the resident's dignity....

14. Every resident has the right to communicate in confidence, receive visitors of his or her choice and consult in private with any person without interference.

# Residents Bill of Rights (LTCHA) s.3



18. Every resident has the right to form friendships and relationships and to participate in the life of the long-term care home.
19. Every resident has the right to have his or her lifestyle and choices respected.
21. Every resident has the right to meet privately with his or her spouse or another person in a room that assures privacy.
22. Every resident has the right to share a room with another resident according to their mutual wishes, if appropriate accommodation is available.



# Consensual Sexual Activity



- Consensual sexual activity is generally legal in Canada with some exceptions:
  - Where person does not have capacity to consent throughout the sexual activity
  - Public Places

Critical factors in determining whether to intervene

- \* Capacity to make decisions
- \* Location of sexual activity

# Criminal Code – Location of Sexual Activity



- Indecent acts in public place (s173(1)(a))
- Indecent act in another place with intent to offend (s.173(1)(b))
- Nudity in a public place, or exposed to public view on private property (s.174)
- “Public place” includes “any place to which the public have access as of right or by invitation, express or implied(s.150)

# Need to understand then ..



- Need to understand what is
  - Sexual assault
  - Sexual activity
  - Consent
  - Capacity

# Criminal Code – Assault s. 265



265. (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

## Application

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault

# Sexual Assault- Criminal Code s. 271



- Every one who commits a sexual assault is guilty of
  - a) an indictable offence and is liable for imprisonment for a term not exceeding ten years; or
  - (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months

# Sexual Assault - Chief Justice McLachlin in *R. v. J.A.*, 2011 SCC 28



- “A conviction for sexual assault under s. 271(1) of the *Criminal Code* requires proof beyond a reasonable doubt of the *actus reus* and the *mens rea* of the offence. “
- “A person commits the *actus reus* if he touches another person in a sexual way **without her consent**. Consent for this purpose is **actual subjective consent in the mind of the complainant at the time of the sexual activity in question**: *Ewanchuk*. As discussed below, the *Criminal Code*, s. 273.1(2), limits this definition by stipulating circumstances where consent is not obtained.”
- “A person has the required mental state, or *mens rea* of the offence, when he or she **knew that the complainant was not consenting to the sexual act** in question, or was **reckless or wilfully blind to the absence of consent**. The accused may raise the defence of honest but mistaken belief in consent if he believed that the complainant communicated consent to engage in the sexual activity. However, as discussed below, ss. 273.1(2) and 273.2 limit the cases in which the accused may rely on this defence. For instance, the accused cannot argue that he misinterpreted the complainant saying “no” as meaning “yes” (*Ewanchuk*, at para. 51).”



# Sexual Assault

- To be convicted of sexual assault the perpetrator must have capacity – has Mens Rea of “when he or she **knew** that the complainant was not consenting to the sexual act in question, **or was reckless or wilfully blind** to the absence of consent”



# Sexual Activity

- What exactly is “sexual activity”?
  - Holding hands?
  - Hugging?
  - Touching?
  - Lying in bed together fully clothed?
  - More intimate touching?
  - Sexual Intercourse?



**Sexual Assault – R. v. V.( K.B.), (1993) , 82  
C.C.C.(3<sup>rd</sup>), 382 (S.C.C.) affirming 1992 13 C. R (4<sup>th</sup>)  
87, C.C.C.(3<sup>rd</sup>) 65**



- To determine whether sexual assault has been committed a court should consider a number of factors, including the body part touched , the nature of the contact, any words or gestures including threats accompanying the conduct, and D's intent or purpose including the presence or absence of sexual gratification. Sexual assault does not require sexuality or sexual gratification.

# Consent



**273.1** (1) ... “consent” means..., the **voluntary agreement** of the complainant to engage in the sexual activity in question.

(2) No consent is obtained ...where

(a) the agreement is expressed by the **words or conduct of a person other than the complainant**

(b) **the complainant is incapable of consenting to the activity**

(c) the accused induces the complainant to engage in the activity **by abusing a position of trust, power or authority**

(d) the complainant expresses, **by words or conduct, a lack of agreement** to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, **a lack of agreement to continue to engage in the activity**

# Chief Justice McLachlin in *R. v. J.A.*, 2011 SCC 28



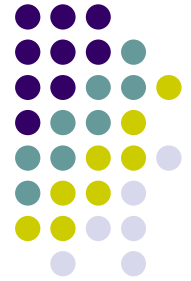
- “Section 273.1(2)(b) provides that no consent is obtained if “the complainant is **incapable** of consenting to the activity”.
- Parliament was concerned that sexual acts might be perpetrated on persons who do not have the mental capacity to give meaningful consent. This might be because of mental impairment. It also might arise from unconsciousness: see *R. v. Esau*, [1997] 2 S.C.R. 777; *R v. Humphrey* (2001), 143 O.A.C. 151, at para. 56, *per* Charron J.A. (as she then was). **It follows that Parliament intended consent to mean the conscious consent of an operating mind.”**

# Chief Justice McLachlin in *R. v. J.A.*, 2011 SCC 28



- “Parliament has defined sexual assault as sexual touching without consent. It has dealt with consent in a way that makes it clear that ongoing, conscious and present consent to “the sexual activity in question” is required. This concept of consent produces just results in the vast majority of cases. It has proved of great value in combating the stereotypes that historically have surrounded consent to sexual relations and undermined the law’s ability to address the crime of sexual assault.
- **In some situations, the concept of consent Parliament has adopted may seem unrealistic.** However, it is inappropriate for this Court to carve out exceptions when they undermine Parliament’s choice.
- **In the absence of a constitutional challenge, the appropriate body to alter the law on consent in relation to sexual assault is Parliament, should it deem this necessary.”**

# Not Easy Issues



As consent is required, what is capacity to consent to sexual activity?

# Capacity as defined in the SDA for Personal Care



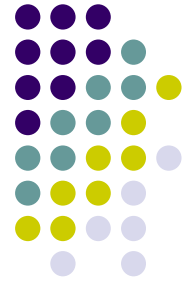
- S. 45 a person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.



# What are Personal Care Decisions?

- Are decisions about sexual activity , decisions related to
  - Safety?
  - Health?

## Different Approaches to Assessing Capacity to have an intimate sexual relationship



- Do these make sense from a legal perspective?
- ***Please note inclusion of these references in this presentation does not signify agreement with or approval of the following approaches by the presenter. Neither does it signify disagreement. Inclusion of this material is intended to stimulate discussion)***





**Lichtenberg, P. & Strzepek, D. (1990). Assessments of institutionalized dementia patients' competencies to participate in intimate relationships.**

**Mini-Mental State score greater than 14**

Yes Perform assessment interview      No Patient unable to consent

**Patient's ability to avoid exploitation**

Yes Continue evaluation      No Patient unable to consent

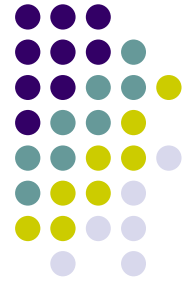
**Patient's awareness of the relationship**

Yes Continue evaluation      No Patient unable to consent

**Patient's awareness of risk**

Yes Consider patient competent  
To participate in an intimate relationship      No Provide frequent reminders  
of risk but permit relationship

## Ames, T., Samowitz, P.: Inclusionary standard for determining sexual consent for individuals with developmental disabilities.



### Criteria for inferring sexual consent capacity.

1. **Voluntariness:** A person must have the ability to voluntarily decide, without coercion, with whom he or she wants to have sexual relations.
2. **Safety:** Both participants in the sexual behavior must be reasonably protected from physical harm (e.g., sexually transmitted disease) or psychological harm (e.g., undesired separation from each other).
3. **No exploitation:** A person should not be taken advantage of or used by another (e.g., someone with power or higher status) in a way that is inconsistent with voluntariness.
4. **No abuse:** Psychological or physical abuse must not be present in the relationship.
5. **Ability to say “no”:** A person must be able to communicate “no” verbally or non-verbally, and to remove himself or herself from the situation at hand, indicating a wish to discontinue the interaction.
6. **Socially appropriate time and place:** Either the person must be able to choose a socially acceptable time and place, or the person must be responsive to directives toward that end.

Mental Retardation. 4, 264–268 (1995).

# Murphy, G., O'Callaghan, A.: Capacity of adults with intellectual disabilities to consent to sexual relationships



## Sexual consent capacity criteria

- (1) knowledge of body parts, sexual relations, and sexual acts;
- (2) knowledge of the consequences of sexual relations, sexually transmitted diseases, and pregnancy;
- (3) understanding of appropriate sexual behavior and the context for it;
- (4) understanding that sexual contact must be voluntary;
- (5) ability to recognize potentially abusive situations; and
- (6) ability to show assertiveness in social and personal situations and to reject unwanted advances.

Psychol. Med. 34, 1347–1357 (2004).

Lanark, Leeds Grenville LTC Working Group  
A Best Practice Approach to Intimacy and Sexuality  
A guide to practice and resource tools for assessment and documentation  
June 2007  
**Appendix C** Assessment of Awareness of Actions (**Understanding & Appreciation**): ( slide one of two)



### **Resident's Awareness of the Relationship:**

Is the resident aware of who is initiating the sexual contact?

Does the resident believe that the other person is a spouse or partner?

Are they aware of the other's identity and intent?

Can the resident state what level of sexual intimacy they would be comfortable with?

### **Resident's Ability to Avoid Exploitation:**

Is the behaviour consistent with formerly held beliefs/ values?

Does the resident have the capacity to say no (verbally or non-verbally) to any uninvited sexual contact?

Lanark, Leeds Grenville LTC Working Group  
A Best Practice Approach to Intimacy and Sexuality  
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June 2007  
**Appendix C** Assessment of Awareness of Actions (**Understanding & Appreciation**): ( slide two of two)



### **Resident's Awareness of Potential Risks:**

Does the resident realize that this relationship may be time limited?

Can the resident describe how they will react when the relationship ends?

Is the resident able to respond to questions adequately (verbally or non-verbally)?

Adapted from:

Lichtenburg, P.A. (1997). Clinical perspectives on sexual issues in nursing homes, *Geriatric Rehabilitation*, 12, 1-10. Lichtenburg, P., Strepzak, D. (1990). Assessments of institutionalized dementia patient's competencies to participate in intimate relationships. *Gerontologist*, 30(1), 117-120

# Assessing Capacity for Sexual Activity



- What would be a better approach to assessing capacity for sexual activity that reflects the applicable legal framework?



# Who Determines Capacity to Consent of Sexual Activity?

Who determines this capacity? (nurse, team, special committee, someone else?)

When does someone have the obligation to determine capacity for this purpose?

Is there such an obligation and why?

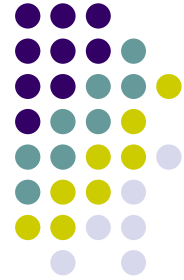
And when should this assessment take place?

# Capacity to Consent



- In sexual assault cases, capacity to consent is a matter of fact that a jury can decide – no requirement for expert testimony in assessing capacity to consent of persons with special needs
- “Expert” evaluation therefore not necessarily determinative





# Not Easy Issues

As consent is required

Spouse - Is there a difference if couple in home are spouses before admission in long term relationship and one of spouse is incapable and other is not?  
Or both are mentally incapable?

**Capacity to consent – Persons with dementia -  
Does the need for consent and capacity mean that certain people must be stopped from being involved in any intimate sexual activity and that the LTCH has an OBLIGATION to intervene?**

# Duty of Care – Civil Responsibility



- Homes have a duty of care to residents
- Arises out of contractual relationship and tort law and statute
- Must exercise reasonable caution or diligence to keep residents safe from harm and prevent them from doing harm to others
- If knowledge or ought to have known then may be held responsible for harm

# Consensual Sexual Activity



“It would seem that there is no legal responsibility placed on institutions to prevent consensual sexual activity. Institutions have a duty to provide reasonable care to their residents and this includes a duty to provide a reasonably safe environment. There is therefore a responsibility to intervene to prevent sexual assaults, but there would not seem to be any duty to prevent sexual activity in general, unless to allow this would constitute a breach of the duty to provide reasonable care to the persons in the institution”

"Sexual Activity among Institutionalized Persons in Need of Special Care" (1998) 16 *Windsor Yearbook of Access to Justice* 90-131. McSherry and Sommerville

# Case Law



In *Wellesley Hospital v. Lawson*, Ms. Lawson was a non-psychiatric patient who was assaulted by a psychiatric patient at the hospital. She brought an action against the hospital founded on an alleged breach of contract to provide care and protection to her and, alternatively, on the negligence of the hospital in permitting a mentally-ill patient, with known propensities to violence, to be at large in the hospital premises without adequate control or supervision of his movements. The Supreme Court of Canada upheld the finding of liability against the hospital for failing to protect all of its inpatients.

*Wellesley Hospital v. Lawson* (1977), [1978] 1 S.C.R. 893, 76 D.L.R. (3d) 688

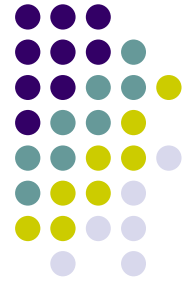


# Case Law

A nursing home was found liable for failing to take reasonable care to prevent a resident from assaulting another resident in *Stewart v. Extendicare*. In this case, Ms. Stewart suffered from advanced Alzheimer's and Parkinson's diseases. As a result, she tended to wander the halls of the nursing home and sometime she would go in and out of other patients' rooms. On one occasion, Stewart wandered into the room of another patient who was aggressive and territorial. Although there were no witnesses, the court concluded that the resident must have pushed Mrs. Stewart out of his room, causing her to fall and break her hip. The court ruled that Extendicare owed Stewart a duty to "make the premises of the nursing home reasonably safe for her," and held that the accident was almost inevitable given the characteristics of the two individuals involved.

*Stewart v. Extendicare. Ltd* (1986), 38 C.C.L.T. 67 (Sask Q.B.);

# Long Term Care Homes Act - Abuse Prevention and Response



## Home to be safe, secure environment

5. Every licensee of a long-term care home shall ensure that the home is a safe and secure environment for its residents. 2007, c. 8, s. 5.

# Abuse Prevention and Response



Prevention of Abuse and Neglect

## **Duty to protect**

19. (1) Every licensee of a long-term care home shall protect residents from abuse by anyone and shall ensure that residents are not neglected by the licensee or staff. 2007, c. 8, s. 19 (1).

## **If absent from the home**

(2) The duties in subsection (1) do not apply where the resident is absent from the home, unless the resident continues to receive care or services from the licensee, staff or volunteers of the home. 2007, c. 8, s. 19 (2)

# Abuse Prevention and Response



20. (1) Without in any way restricting the generality of the duty provided for in section 19, every licensee shall ensure that there is in place a written policy to promote zero tolerance of abuse and neglect of residents, and shall ensure that the policy is complied with. 2007, c. 8, s. 20 (1).

## **Contents**

- (2) At a minimum, the policy to promote zero tolerance of abuse and neglect of residents,
- (a) shall provide that abuse and neglect are not to be tolerated;
  - (b) shall clearly set out what constitutes abuse and neglect;
  - (c) shall provide for a program, that complies with the regulations, for preventing abuse and neglect;
  - (d) shall contain an explanation of the duty under section 24 to make mandatory reports;
  - (e) shall contain procedures for investigating and responding to alleged, suspected or witnessed abuse and neglect of residents;
  - (f) shall set out the consequences for those who abuse or neglect residents;
  - (g) shall comply with any requirements respecting the matters provided for in clauses (a) through (f) that are provided for in the regulations; and
  - (h) shall deal with any additional matters as may be provided for in the regulations. 2007, c. 8, s. 20 (2).





# Duty of Care

- What does this mean then for homes in respect to
  - Assessments of behaviours?
  - Specific assessment of sexual behaviours?
  - Educational opportunities for residents about sexuality?
  - Provisions of condoms etc for safe sex
  - Provisions for privacy?
  - Interventions in sexual activity between residents?
  - Training of Staff?

# Duty of Care



A “hospital has a duty not only to establish necessary systems and protocols to promote patient safety, it must also take reasonable steps to ensure that its staff (including medical staff) comply with these protocols.”

Specifically, “the hospital may in some cases have a duty to establish procedures to prevent patients from injuring either themselves or someone else, and to protect vulnerable patients from being harmed by others.”

[Ellen Picard and Gerald Robertson, \*Legal Liability of Doctors and Hospitals in Canada\*, 4th ed. \(Toronto: Thomson Carswell, 2007\) 463-464, 469.](#)



# Duty of Care

- Is this an Issue of assessing physical risk to the resident or more than that?
- And what is risk in respect of sexual activity?



# Not Easy Issues

When and how do staff/home intervene

- to support a relationship?
- to provide privacy ?
- to divert resident into safe expressions?
- to stop residents from sexual activities?

How are attitudes of staff “managed”

- such as moral or value based judgments about the nature of the sexual activity ( eg same sex, “cheating” on a spouse”, what is or is not “sexual activity” )

# Criminal Code



## Sexual exploitation of person with disability

**153.1** (1) Every person who is in a **position of trust or authority** towards a person with a mental or physical disability or who is a person with whom a person with a mental or physical disability **is in a relationship of dependency** and who, for a sexual purpose, counsels or incites that person to touch, without that person's consent, his or her own body, the body of the person who so counsels or incites, or the body of any other person, directly or indirectly, with a part of the body or with an object, is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months



# Discussion

- So??
- Consent?
- Capacity?
- Duty of Care?
  
- Practical issues?



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