

LEGAL AND ETHICAL ISSUES CONCERNING SEXUAL CONSENT CAPACITY FOR PERSONS LIVING WITH DEMENTIA IN LONG-TERM CARE

Graham Webb, LL.B., LL.M.
Lawyer/Executive Director
Advocacy Centre for the Elderly
Toronto, Canada

- Older adults living in long-term care continue to have a need for love and belonging.
- The continuing desire for affection is natural, desirable and healthy.
- Demonstrations of affection can be verbal and/or physical, and sexual and/or non-sexual or other acts of intimacy.
- These acts may cause embarrassment or distress to caregivers and family members.
- Caregivers and family members should be careful not to impose their own values and beliefs on the actions of the residents.

LOVE AND BELONGING

Literature on sexual consent capacity in long-term care reports that:

- Although most family members are generally supportive of appropriate displays of affection, a significant minority report feelings of embarrassment, anger and humiliation by their loved-one's actions.
- Staff members in long-term care have reported significant discomfort, disgust, and panic, and have made attempts to conceal or deny residents' sexual behavior even when it was considered appropriate and consensual.

See e.g.: "Sexual Consent Capacity: Ethical Issues and Challenges in Long-Term Care", *Clinical Gerontologist* (2017, 40:1, 43-50).

FAMILIES AND CAREGIVERS

The Ontario *Long-Term Care Homes Act* contains a Residents' Bill of Rights which states that the following rights shall be respected and promoted:

- **2. The right to be protected from abuse.**
- **18. The right to form friendships and relationships and to participate in the life of the long-term care home.**
- **19. The right to have his or her lifestyle and choices respected.**
- **21. The right to meet privately with his or her spouse or another person in a room that assures privacy.**

RESIDENTS' RIGHTS

- Safety and protection from abuse, and the right to personal autonomy in forming relationships are two sets of protected rights of long-term care home residents.
- Residents with diminished mental capacity may present special challenges to family members and caregivers in ensuring resident safety while at the same time respecting the resident's right to make autonomous decisions on matters of love and belonging, and acts of sexual and non-sexual intimacy.
- Consenting adults always have right to make their own decisions, provided they are mentally capable of doing so.

SAFETY AND AUTONOMY

- Ontario's *Substitute Decisions Act* does not apply to decisions on acts of sexual or non-sexual personal intimacy.
- An attorney or guardian of property only has authority to make property decisions.
- An attorney or guardian of the person only has authority to make personal care decisions, concerning **health care, nutrition, shelter, clothing, hygiene or safety**.
- The hierarchy of substitute decision-makers under the *Health Care Consent Act* only applies to decisions concerning treatment, admission to long-term care and personal assistance services within a long-term care home.
- It is not possible for an SDM to give or refuse consent on matters of personal intimacy, except as they may relate to personal-care decision-making in respect of safety.

NO SUBSTITUTE CONSENT

- Persons living with dementia may have fluctuating capacity that changes from time-to-time and from decision-to-decision.
- Despite this, every person is his or her own decision-maker concerning consent to acts of person intimacy because, unlike property, personal care or treatment decisions, authority to give or refuse consent is not capable of being delegated to another person.
- Legal issues arise over what “consent” means, and over what “capacity” to give or refuse consent means.

CONSENT BY PERSONS LIVING WITH DEMENTIA

- The non-consensual touching of another person could form an assault or a sexual assault.
- Under the *Criminal Code*, an assault could be committed when someone “without the consent of another person, he applies force intentionally to that other person, directly or indirectly.”
- A sexual assault is an assault that has a sexual character or connotation.
- The criminal law provides a higher standard of “consent” for sexual assault that could be useful in thinking of a person’s capacity to consent to sexual and non-sexual acts of intimacy.

NON-CONSENSUAL TOUCHING

Under s. 273.1 of the *Criminal Code*:

- **“Consent” means, the voluntary agreement of the complainant to engage in the sexual activity in question.**
- **Consent must be present at the time the sexual activity in question takes place.**

CONSENT IN CASES OF SEXUAL ASSAULT

Under s. 273.1 of the *Criminal Code*, no consent is obtained where:

- the agreement is expressed by the words or conduct of a person other than the complainant;
- the complainant is incapable of consenting to the activity;
- the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- 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.

EXCLUSIONS TO CONSENT

- **The Supreme Court of Canada held that:**
 - **“Consent” is defined in s. 273.1(1) of the Code as “the voluntary agreement of the complainant to engage in the sexual activity in question”. It is the “conscious agreement of the complainant to engage in every sexual act in a particular encounter”, and it must be freely given. This consent must exist at the time the sexual activity in question occurs, and it can be revoked at any time.**
 - See: *R. v. Barton*, 2019 SCC 33, per Moldaver, J., at para. 88.
- **Following this law, “consent” must (i) be voluntarily and freely given; (ii) relate to the entire encounter; (iii) coincide with the time of the encounter; and (iv) can be revoked at any time.**

LEGAL INTERPRETATIONS OF “CONSENT”

- In the very same passage, Justice Moldaver in *R. v. Barton* continued that:
 - . . . “consent” is not considered in the abstract. Rather, it must be linked to the “sexual activity in question”, which encompasses “the specific physical sex act”, “the sexual nature of the activity”, and “the identity of the partner”, though it does not include “conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases.”
 - See: *R. v. Barton*, 2019 SCC 33, per Moldaver, J., at para. 88.
- Neither the *Criminal Code* nor the courts have defined “capacity”, but this passage may give some clues as to the eventual definition.

CLUES TO INDICIA OF CAPACITY TO CONSENT

- A general legal definition of decisional “capacity” is the mental ability to understand information that is relevant to a decision, and to appreciate the reasonably foreseeable consequences of making or not making a decision.
- Following the Court’s lead, the elements of consent to sexual activity may include understanding:
 - The nature of the sexual act; and,
 - The identity of one’s partner.
- Justice Moldaver seemed to exclude appreciation of the reasonably foreseeable consequences of the sexual activity from the legal definition of “consent”.

ELEMENTS OF CONSENT TO SEXUAL ACTIVITY

- The *Love and Belonging* materials suggest asking the following questions:
 - Is the activity sexual or non-sexual?
 - Does the person show signs of discomfort or distress?
 - Would the person like to stay, or come away with a care provider?
 - Are there identified risks of abuse?
 - Is there a need for privacy for capable, consensual activity?
 - Are both residents happy with the outcome?
 - Is there a need to assess ongoing unmet needs?
- This model could provide a suitably supportive framework for both the protection of safety and the expression of personal autonomy.

LOVE AND BELONGING – ASSESSMENT OF NEED

- A very physically attractive older woman resides in a language-specific long-term care home.
- The resident has advanced dementia to the point that she is non-verbal and is not able to express herself in any language.
- She does not recognize her adult sons and daughters who visit her daily.
- She is widowed.
- Single men within the home recognize her frailties, and lead her into her room where they are believed to have sexual intercourse with her on a daily basis or more.
- Does this woman appear to be capable of sexual consent?

CASE SCENARIO – HIGHLY INCAPABLE PARTNER

- A couple has been married for more than 60 years with no previous separations.
- The wife has developed advanced dementia and has been admitted to a private room in a long-term care home.
- Her husband continues to live in the community, and visits her daily for an extended period of time.
- Each afternoon, the couple retreat to the woman's private room, where it is believed they enjoy sexual relations.
- Which legal and ethical issues are present?

CASE SCENARIO – VISITING SPOUSES

- A married woman with mild to moderate dementia resides in long-term care while her husband, who visits periodically, continues to reside in the community.
- While in long-term care, the woman forms a relationship with another man with whom she holds hands and kisses occasionally.
- The woman's husband and children insist that the woman and her boyfriend must be separated.
- What issues are in play?

CASE SCENARIO – KISSING AND HOLDING HANDS