

# Sexuality in Long Term Care Homes - the Legal Issues

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NEW \* [www.ancelaw.ca](http://www.ancelaw.ca)

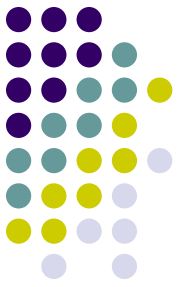


# Advocacy Centre for the Elderly



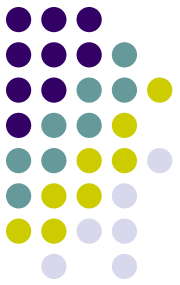
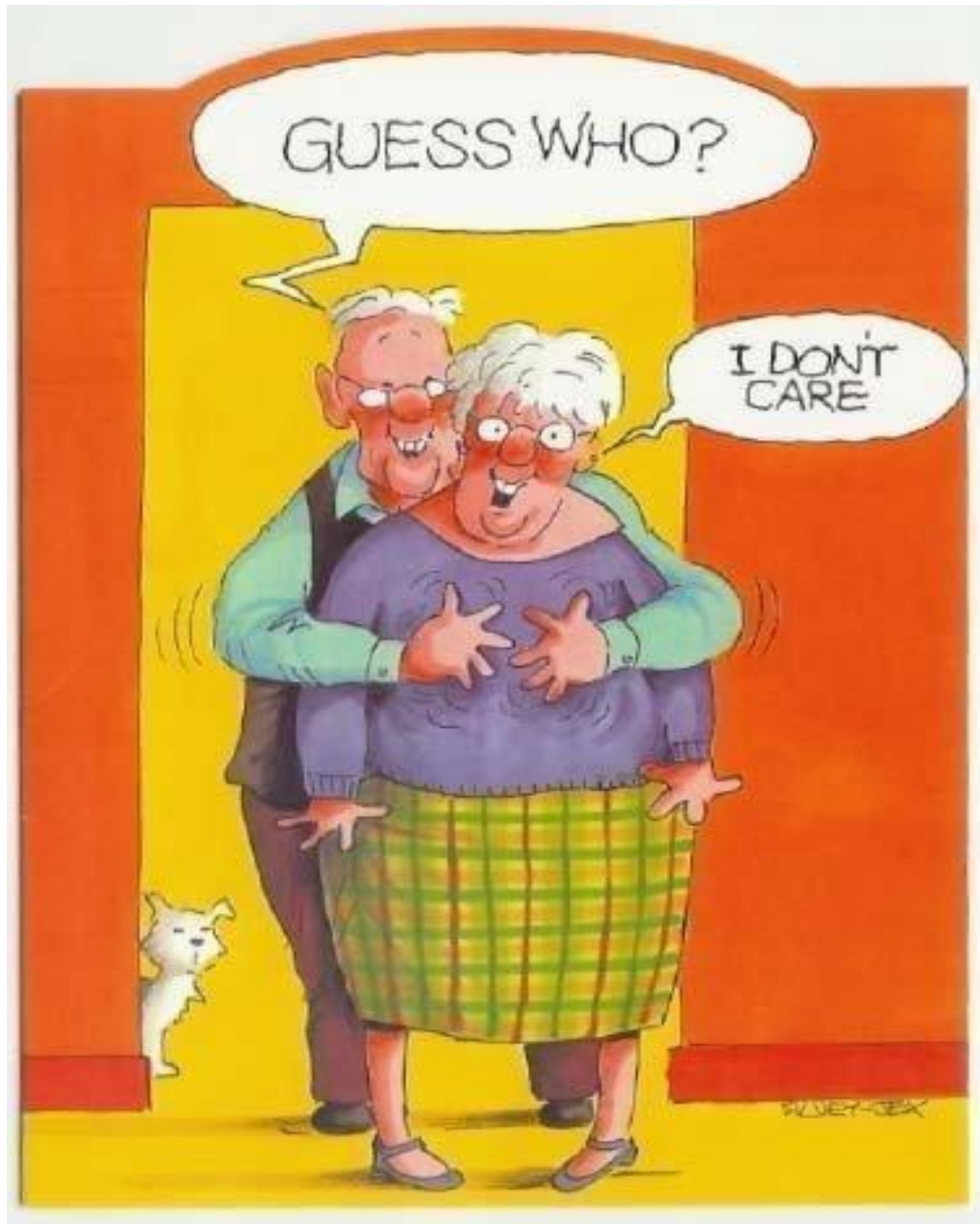
- Community legal clinic
- Opened in 1984 – Funded by Legal Aid Ontario
- Range of Legal Services including
  - Legal advice and representation
  - Public legal education programmes and materials
  - Community Development and
  - Law Reform work

# The Long Term Care Setting



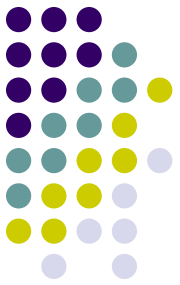
- Long Term Care Homes are a “normal” environment, the “home” of persons who live there
- Recognition of sexuality as part of life of older adults
- Recognition of sexuality as part of life of residents in long term care
- Appreciation of individuality of residents and their diversity in sexual orientation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



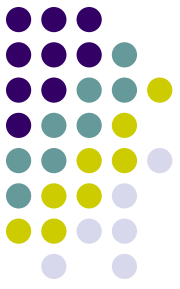


Whatever happened to our sexual relations?

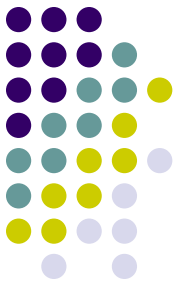
I don't know. I don't even think we got a Christmas card from them this year.



# 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



# Reasons for Research

- Calls to ACE about issues related to sexual assault
- Changes in legislation address sexual abuse more explicitly

# Reasons for Research on Sexuality

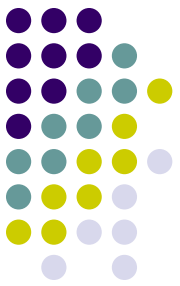


- In Ontario, new Long Term Care Homes Act, S.O. 2007 places specific obligations on licensees to protect residents from abuse, including sexual abuse, and to create policies about abuse prevention and response
- What then does this mean in law? What needs to be included in these policies, and why?

# Issues that Need Research and Discussion



- Issues may be divided into “easier” issues and “not so easy issues”
- Not a lot of legal literature or case law in Canada on these issues
- 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”
- 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



# Easy (Easier?) Issues?

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,

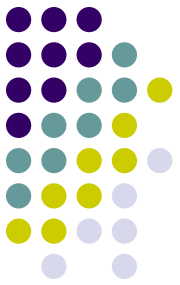
“sexual abuse” of a patient by a member means,

- (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.

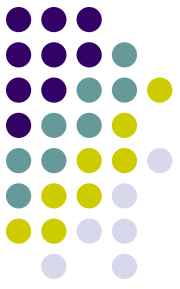


# Easy (Easier?) Issues

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

- Right may not be explicit in the law
- Is it a right under the Charter s. 2, 12?
- Is it under the “reasonable expectation” of privacy?
- Can it be argued a right under LTC Homes legislation?

# 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

# 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

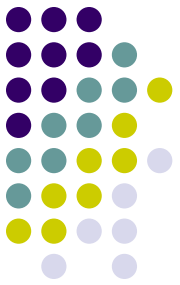


3. (1) Every licensee of a long-term care home shall ensure that the following rights of residents are fully respected and promoted:

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



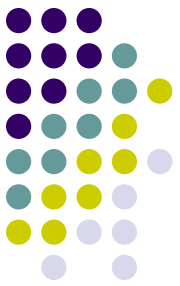
18. Every resident has the right to form friendships and relationships and to participate in the life of the long-term care home.
19. Every resident has the right to have his or her lifestyle and choices respected.
21. Every resident has the right to meet privately with his or her spouse or another person 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.

# Easy (Easier?) Issue

## -No Preconsent

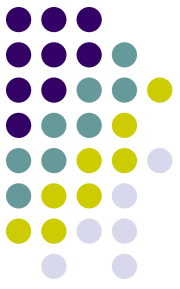


- People cannot “preconsent” to sexual activity- must be consent at time of the activity – See Criminal Code
- People cannot provide consent to sexual activity by indicating in a Power of attorney for Personal Care that they want to be able to engage in sexual activity even if they become mentally incapable of providing consent
- 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



# Easy (Easier?) Issues

- 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 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



# Easy, Easier Issues

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

- Sexual exploitation
- Sexual Assault

# Criminal Code – Assault s. 265



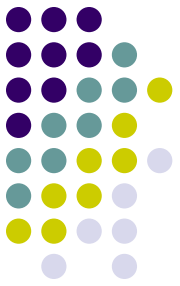
265. (1) A person commits an assault when

- (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

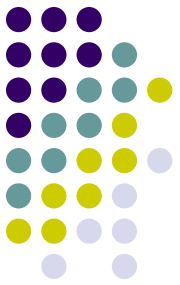
# Criminal Code



## 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

# 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**.

# Not Easy Issues

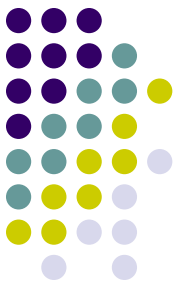


As consent is required, what is capacity to consent to sexual activity?

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



- Do these make sense from a legal perspective?



**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

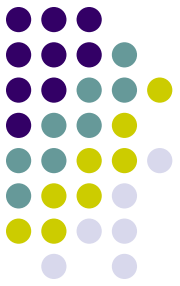
**Patient's awareness of the relationship**

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.

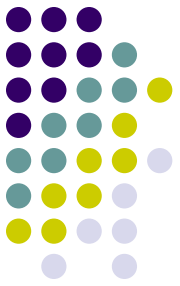


### Criteria for inferring sexual consent capacity.

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.

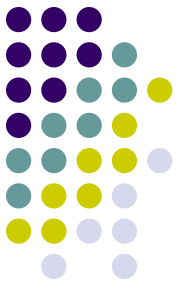
Mental Retardation. 4, 264–268 (1995).

# Assessment of Sexual Consent Capacity – Martin Lynden



- “The three main areas of sexual consent capacity are rationality, knowledge, and voluntariness.”

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

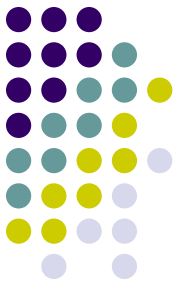


## Sexual consent capacity criteria

- (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):**



**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?

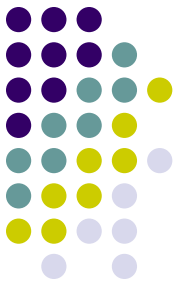
**Resident's Awareness of Potential Risks:**

- 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)?

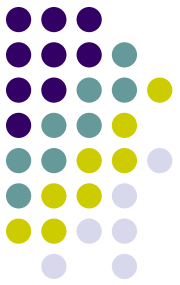
Adapted from:

Lichtenburg, P.A. (1997). Clinical perspectives on sexual issues in nursing homes. *Top 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?



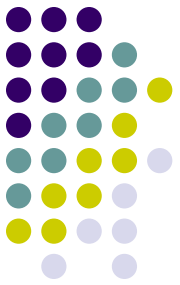
# Who Determines Capacity to Consent of Sexual Activity?

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?



# Not Easy Issues

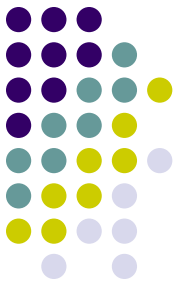
As consent is required

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?

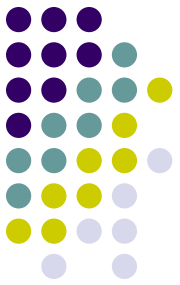
Or both are mentally incapable?

Does the need for consent and capacity mean that certain people must be stopped from being involved in any intimate sexual activity?

# Information about Past Sexual Abuse?



Is there a difference if family member provides information about past values/ info on relationship? ie Past history of abuse, fractious relationship?



# Duty of Care

- 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
- If knowledge or ought to have known then may be held responsible for harm

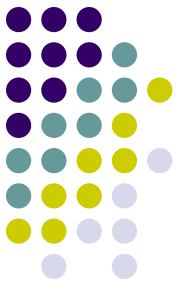
# Case Law



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

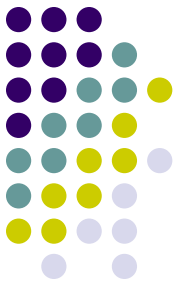


A nursing home was found liable for failing to take reasonable care to prevent a resident from assaulting another resident in *Stewart v. Extendicare*. In this case, Ms. Stewart suffered from advanced Alzheimer's and Parkinson's diseases. As a result, she tended to wander the halls of the nursing home 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.);

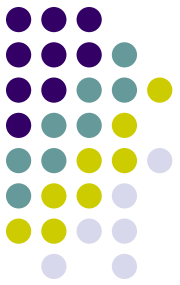
# Long Term Care Homes Act

## - 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

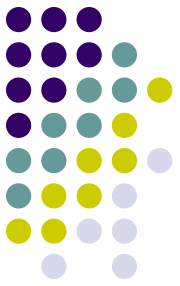
### **Duty to protect**

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)

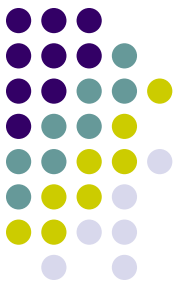
# Abuse Prevention and Response



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

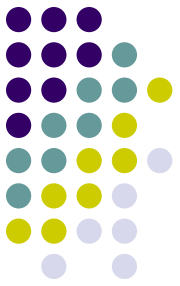
- (2) At a minimum, the policy to promote zero tolerance of abuse and neglect of residents,
- (a) shall provide that abuse and neglect are not to be tolerated;
  - (b) shall clearly set out what constitutes abuse and neglect;
  - (c) shall provide for a program, that complies with the regulations, for 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?

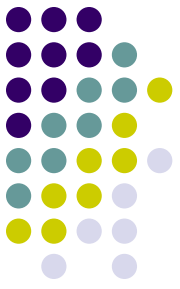
# Duty of Care



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.”

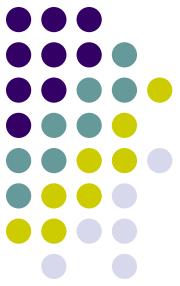
Specifically, “the hospital may in some cases have a duty to establish procedures to prevent patients from injuring either themselves or someone else, and to protect vulnerable patients from being harmed by others.”

[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

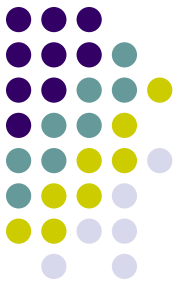
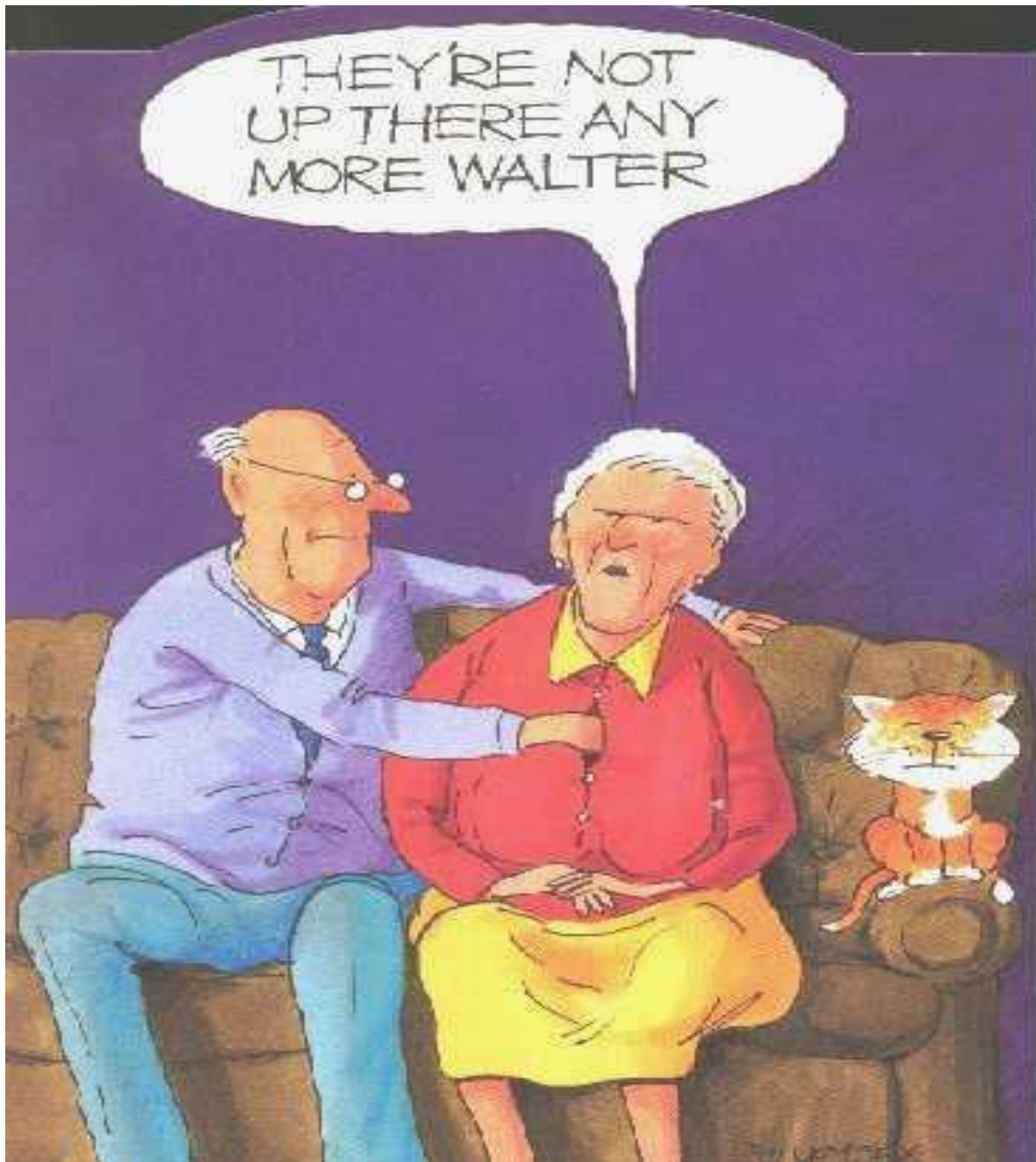
- Is this an Issue of assessing physical risk to the resident or more than that?
- And what is risk in respect of sexual activity?

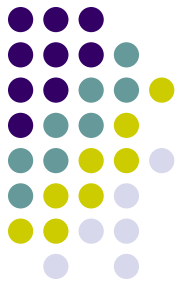
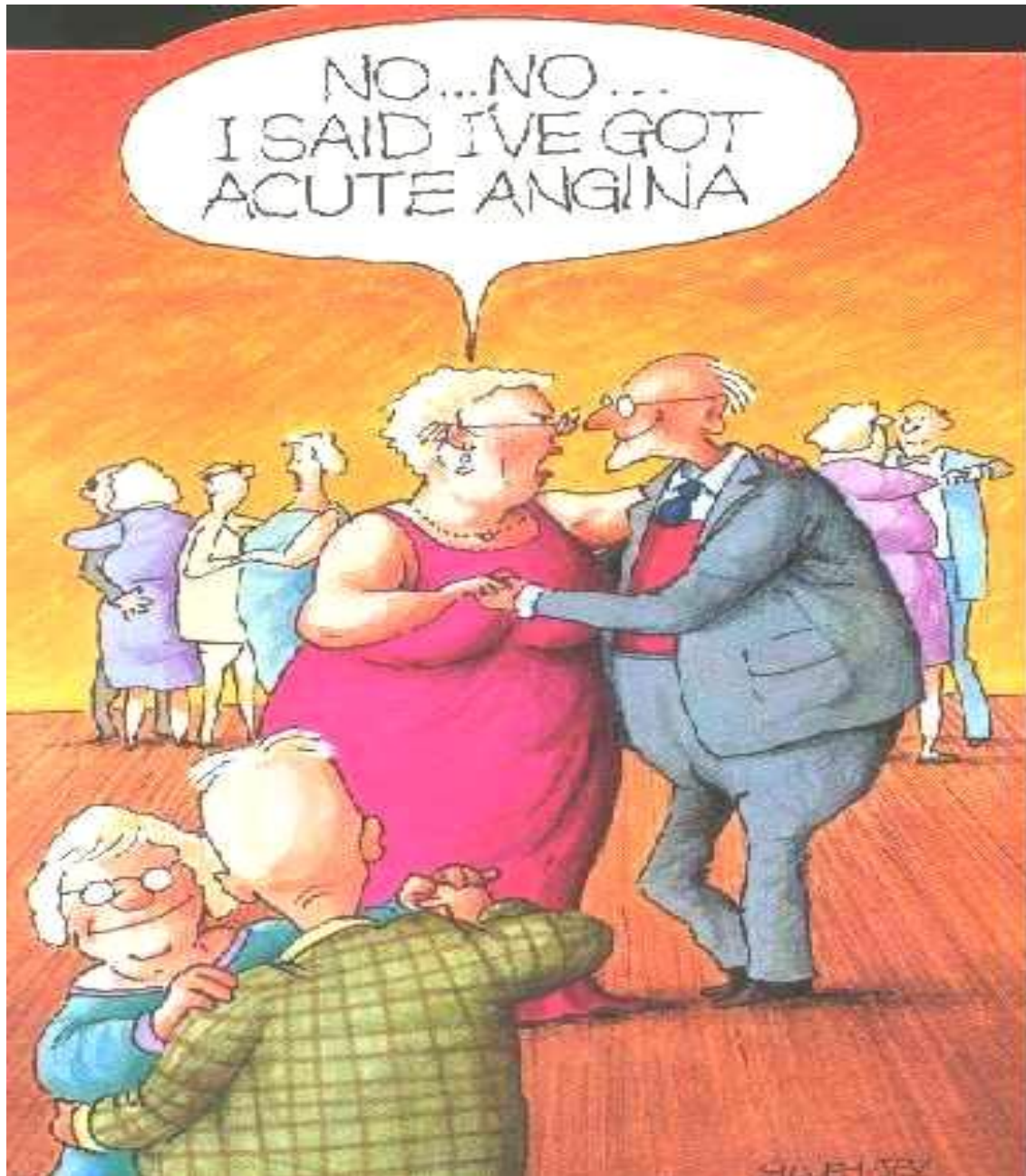


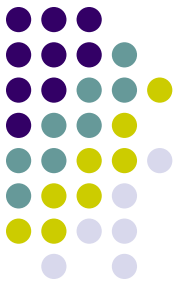
# Not Easy Issues

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?







# Discussion

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