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Review

Forensic examination of the mentally disabled sexual abuse complainant

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ABSTRACT

Individuals who have mental disabilities are more vulnerable to sexual abuse than the general population and even less likely to report the offence. Furthermore they face greater barriers if they wish to seek help, support or prosecution. Where abuse is alleged or suspected, a complainant with a mental disability will often have the capacity to decide whether they wish to undergo intimate forensic examination. However, in cases where the individual truly lacks capacity it must be decided on an case to case basis without assumption or preconception whether such an examination is truly in their best interests. This aim of this review is to discuss sexual offences against adults with mental disabilities and the identification and management of these individuals.

1. Introduction

Rape and sexual abuse are highly prevalent international issues. Within the UK it is estimated that there are approximately 270 rapes a day.[1] Furthermore, 9.7–25% of women[2,3] and 6% of men[4] will experience some form of sexual abuse within their lifetime. The Sexual Offences Act (2003) differentiates sexual offences into 3 categories:

- **Rape**: when a person, A, intentionally penetrates another person, B's, mouth, anus or vagina with his penis without B's consent or reasonable belief that B consents.
- **Assault by penetration**: when A intentionally inserts a body part or anything else into B's mouth, anus or vagina when the penetration is sexual without B's consent or reasonable belief that B consents.
- **Sexual assault**: when A touches B in a sexual manner without B's consent or reasonable belief that B consents.

In the majority of sexual offences the perpetrator is known to the victim and is most commonly a current or ex-partner.[3] Many victims are repeatedly assaulted by the same perpetrator in a cycle of abuse from which it can be very hard to break free.

It is recognised that people with disabilities of any kind are more likely to become victims of sexual abuse than the general population and face greater difficulties seeking help, support or prosecution. People with mental disabilities are especially vulnerable yet often overlooked.

2. Mental disabilities and sexual vulnerability

Several studies, with statistically variable results, have been conducted looking at the extent of sexual offences against people with mental disabilities. It has consistently and repeatedly been shown that people with mental disabilities are more likely to be victims of sexual violence than those without.

- 49% people with intellectual disabilities experience 10 or more sexually abusive episodes in their lives.[5]
- Men with disabilities are twice as likely to be victims of sexual violence as men without disabilities.[6]
- >90% of people with developmental disabilities will experience physical or sexual abuse at some point in their life.[5]
- >70% female psychiatric in-patients and 80% of those in secure settings have experienced physical or sexual abuse.[7]

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The reasons for these alarming statistics are multi-factorial. Individuals with severe mental disabilities may not understand what is happening or have the communication skills necessary to report the abuse. People with a milder disability may realise they are being abused but may not understand that it is against the law and they have the right to say no. Furthermore, many people with mental disabilities may be socially isolated and reliant on an authority figure (i.e. family or carer) whose actions they may not question.

Sexual vulnerability is compounded when the abuser is the main carer as the carer has an increased level of control over the victim which may be used as part of the abusive cycle, preventing the victim from seeking help elsewhere. This is an issue for people with physical as well as mental disabilities and there are multiple accounts of demands for sex in return for the provision of care.[8]

It is often mistakenly assumed that people with mental disabilities are sexually inactive, which in combination with the physical, communicative or intellectual difficulties associated with certain mental disabilities can result in people with disabilities being perceived as powerless and an 'easy target' for abuse. Additionally, some people with certain disabilities may be more likely to give and receive affection, which may be falsely interpreted as sexual encouragement.

3. Mental disabilities and disclosure of abuse

It is known that sexual offences are severely under-reported in general, however this phenomenon is compounded in the mentally disabled population. In fact only 3% of sexual abuse cases involving people with developmental disabilities are ever reported.[5] This is most likely due to a combination of communicative difficulties; problems obtaining details of available support services; lack of abuse perception; fear they won't be believed and the control their abuser often has on their lives. Additionally, when a report is attempted, their disability may mean that the police do not view their statement as credible.[9]

Should a complainant of sexual abuse (or their carer) wish to seek help the main options are to go to the police who will refer them to a forensic examiner or, if available in their local area, to a Sexual Assault Referral Centre (to which they may also self-refer) where an integrated service of medical care, legal advice, forensic examination and counselling services are available. There are also numerous charities that provide anonymous support and counselling for victims of rape and sexual assault.

If a complainant of sexual abuse wishes to pursue prosecution of their alleged assailant the prosecution must prove that:

1. The sexual act occurred.
2. That the sexual act was not consensual (and that the accused did not have reasonable belief that the complainant consented).

In some cases sexual activity can be established by analysis of foreign secretions on the clothes of one or both parties involved or from any secretions, pubic hairs or other evidence collected at the crime scene. However, this material may not be available or may be insufficient to identify and detain the alleged assailant, in which case a forensic examination may be necessary. Note that whilst foreign secretions may indicate the sexual act occurred, the prosecution must still prove the absence of consent.

4. Capacity, consent & examination

In order to conduct a forensic examination the physician must obtain informed consent. In accordance with the Mental Capacity Act, 2005 for England and Wales, adults over the age of 16 are assumed to have the capacity to consent unless they have a disturbance or impairment of the mind or brain which will prevent them from making the decision in question within the necessary timeframe. In order to make the decision, the person must be able to:

1. Understand the information relevant to the decision.
2. Retain that information.
3. Use or weigh that information as part of the decision making process.
4. Communicate their decision (whether by talking, using sign language or by any other means).

Regardless of the level of disability, every complainant must be given as much support as possible from both the forensic physician and other relevant health professionals to enable them to have the capacity to consent. Capacity must always be judged on an individual basis as with the correct support a person whose diagnosis may suggest they would lack capacity may in fact be competent to make their own decision.

There are multiple tools available to aid the assessment of capacity, of which the MacArthur Competence Assessment Tool for Treatment (MacCAT-T) has the highest inter-user reliability ($\kappa > 0.8$).[10–12] The MacCAT-T is a semi-structured interview that takes approximately 15–30 minutes. It guides a clinician and patient (or in this case complainant) through a series of information disclosures whilst evaluating the four aspects of decision making capability deemed necessary for capacity under the Mental Capacity Act, 2005.

However, all capacity assessment tools have their limitations. The MacCAT-T for example requires specific training and lacks a predetermined cut-off separating capacity and incapacity.[11] This should not be prohibitive to its use as it was designed as an aid to capacity assessment rather than as a stand-alone tool but it does highlight the value of experience in such difficult cases. Consequently, when capacity is in question or the complainant is believed to lack capacity it is advisable to seek a second opinion, ideally from a psychiatrist with experience of complex capacity judgements (see Fig. 1).

If somebody is deemed to lack capacity, the first thing to determine is whether they are likely to regain capacity and if so when that is likely to be. Individuals with mental disabilities may have fluctuating capacity and if this is the case it may be possible to wait until they are more competent. In addition to mental disability, other factors such as alcohol, alcohol withdrawal, substances, substance withdrawal and serious injury (e.g. lack of consciousness) as well any fatigue, stress, anxiety or pain caused by the assault may also cause temporarily decreased capacity. It is important to note however that a delay may adversely affect their medical care and result in a loss of forensic material, potentially compromising the identification and apprehension of the alleged assailant.[13]

5. Sexual abuse complainants who lack capacity

During a forensic examination, the physician must decide which samples are relevant to the case from the complainant's account of the alleged assault and determine which will be of the greatest forensic value. As part of the process swabs are normally taken around and inside any orifice that was involved in the alleged assault. This can be distressing to any complainant and especially so to those who have been sexually abused and have not actively decided to undergo the examination. Therefore, whilst a decision can be made on behalf of a complainant lacking in capacity it must be in the best interests of the complainant and be the least restrictive option in terms of the complainant's rights, freedom and