

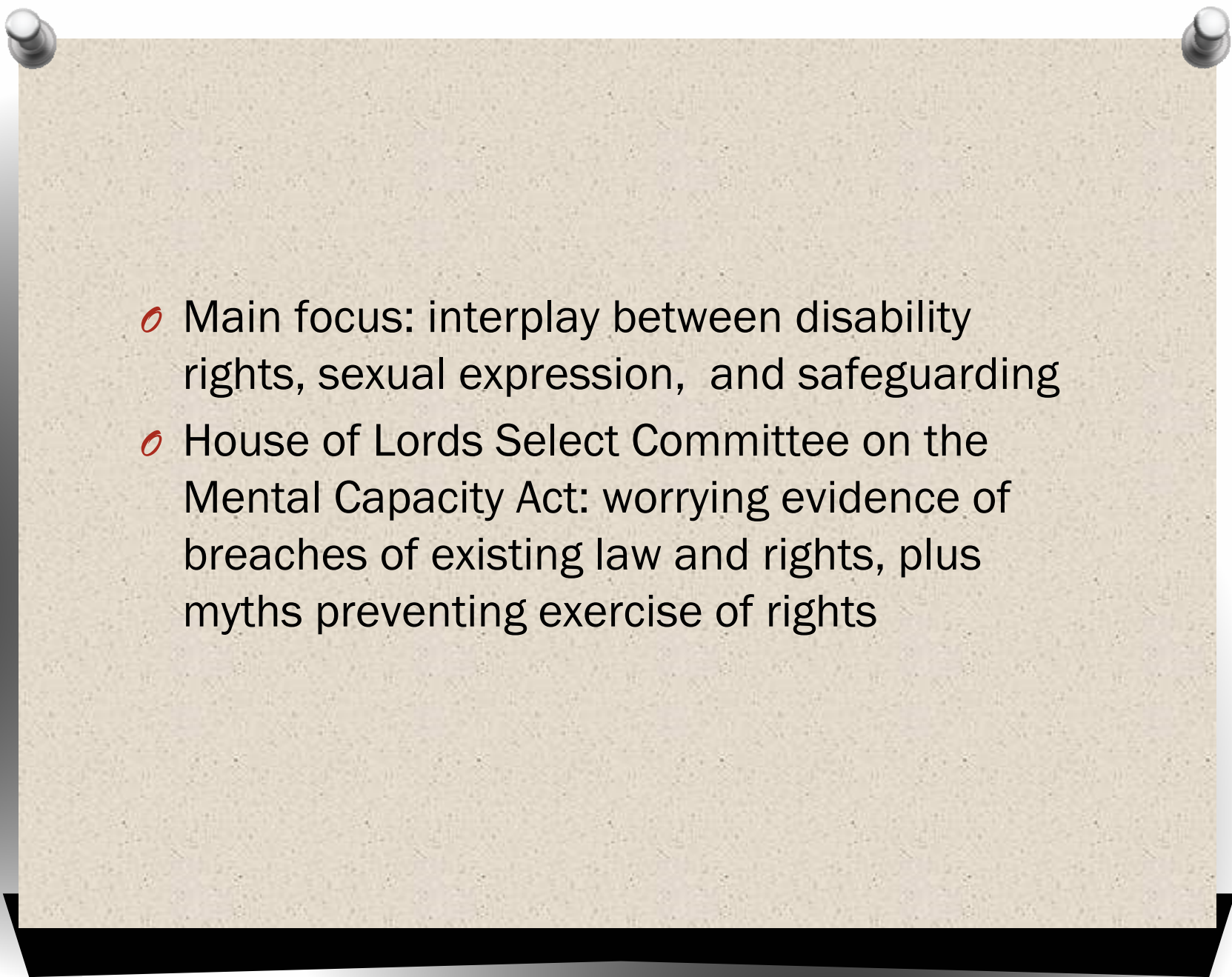
What does the law say? Sex,
LLTCs, safeguarding and
rights'

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A SENSIBLE APPROACH?

- o “The fact is that all life involves risk... ..we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else.... Physical health and safety can sometimes be bought at too high a price in happiness and emotional welfare. What good is it making someone safer if it merely makes them miserable? None at all!”
- o But not everyone with disabilities has been allowed by the courts or by professionals to have a sex life or even any sexual expression at all, and there is a clear need for reform. Some people with disabilities need access to sex workers or surrogates for sexual expression. Work together?

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- o Main focus: interplay between disability rights, sexual expression, and safeguarding
 - o House of Lords Select Committee on the Mental Capacity Act: worrying evidence of breaches of existing law and rights, plus myths preventing exercise of rights

HUMAN RIGHTS

- Art 8 ECHR right to respect for private life, family life etc includes quality of life, personal and sexual autonomy (decision-making), confidentiality/privacy, dignity, forming and maintaining personal relationships ; Pretty v UK; ADT v UK and Dudgeon v UK; X v UK
- Arts 9, 10 and 11 expression-rights including right to information, education and possibly support; Handyside v UK

- o United Nations Convention on the Rights of Persons with Disabilities
- o disabled people must be able to enjoy, on the same basis as others, the same rights as others; similarly re children with disabilities
- o Reasons for lack of a sexual autonomy right
- o Other UN documents eg United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities
- o UK: Equality Act 2010

So....

- o Everyone has right to sexual expression, relationships of their choosing, and fun
- o Restrictions need very strong reasons and must be proportionate to their aims (eg protecting children)
- o People who need support in accessing their rights may be entitled to it

PROBLEMS WITH THE CRIMINAL LAW

- o Myths, problems for healthcare workers trying to support their clients, and weak interpretation of the law.
- o Current criminal law does not comply with either the right to consensual sexual expression in private or the ban on disability discrimination
- o examples: cannot legally give sex education to deafblind adults; and the 'mental disorder' offences

Sexual Offences Act 2003

- o Adult? Non-carer? Communicate? Consents? Capacity? Private? OK! Any of those missing? Possible crime!
- o Policy: 'None of the measures in the Act are [sic] intended to interfere with the right to a full and active life, including a sexual life, of people with a mental disorder who have the capacity to consent.'
- o But needs Guidance and reform of the 'mental disorder' offences- campaign!

- o Problem areas:
- o BDSM; Brown, Wilson, discrimination
- o Communication disabilities
- o Care workers trying to help clients who want to have sexual expression: the Daily Mail factor eg headline 24th April 2013' Sex abuse... even murder: How human rights are putting the mentally disabled in deadly peril' and 'Care home brought in PROSTITUTES to have SEX with 'frustrated' disabled residents' (2013)
- o plus the strange myth of procuring- Outsiders survey
- o End result: widespread prevention of sexual expression of people with disabilities, particularly in care homes or care-at-home

BUBBLEWRAPPING

- o Safeguarding: a national obsession, a duty, or a human rights violation?
- o The general belief: a duty to protect vulnerable people from risk
- o The reality: known, real and immediate risk to the life or safety of that person
- o But people with capacity are allowed to decide for themselves how much risk they want to run in their lives: *Ivison v UK*
- o The result: breaking one law by trying to uphold another
- o The Sexuality Guidance and Standards help explain what the law does and does not allow, with accessible and realistic case studies as examples

HOW THE GUIDANCE HELPS: ENABLING RIGHTS

- o right to protection and the autonomy-based rights need to be weighed up against each other, to prevent bubblewrapping
- o Some people need support or help for sexual expression
- o If motivated people work together and apply the Guidance consistently, small changes could make a world of difference towards ensuring that everyone has an equal opportunity to enjoy their human right to fun.

URGENT REFORM AGENDA

- o (apart from many offences specifically related to sex work)
- o current law so complicated that people do not realise how much assistance with sexual expression is actually legal. Sex workers can unwittingly commit crimes.
- o Some aspects of age-related crimes prevent sex education of children with complex disabilities eg deafblind children
- o Communication-related disabilities: presumed sex crime
- o Capacity law: criminalises longstanding relationships; inconsistent judging; surveillance; carers and healthcare workers understandably worried by potential criminalisation; clear evidence that the presumption of capacity is not being applied properly

Further Reading

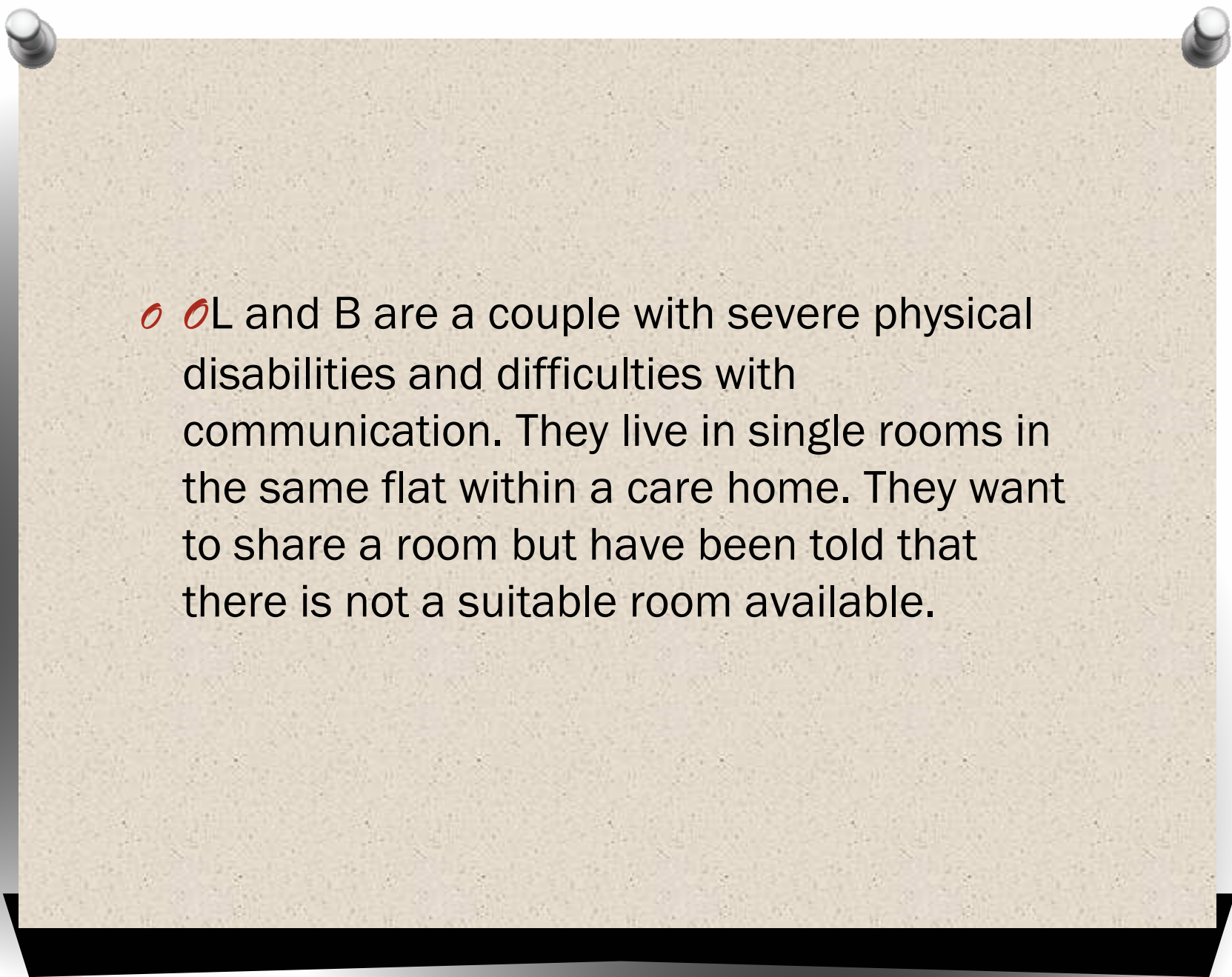
- o oC. Elliott and C. de Than, 'The Case for a Rational Reconstruction of Consent in Criminal Law' (2007) 70 MLR 225.
- o oC. de Than and J. Elvin, 'How should criminal law deal with people who have 'partial capacity'?', in A. Reed, N. Wake, and B. Livings (eds), *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* [2015].
- o oC. de Than and J Elvin, 'The relationship between capacity and consent' in Reed and Bohlander (eds) *Consent* [imminent]
- o oC. de Than, *Criminal Law*, Oxford University Press

ABOUT ME

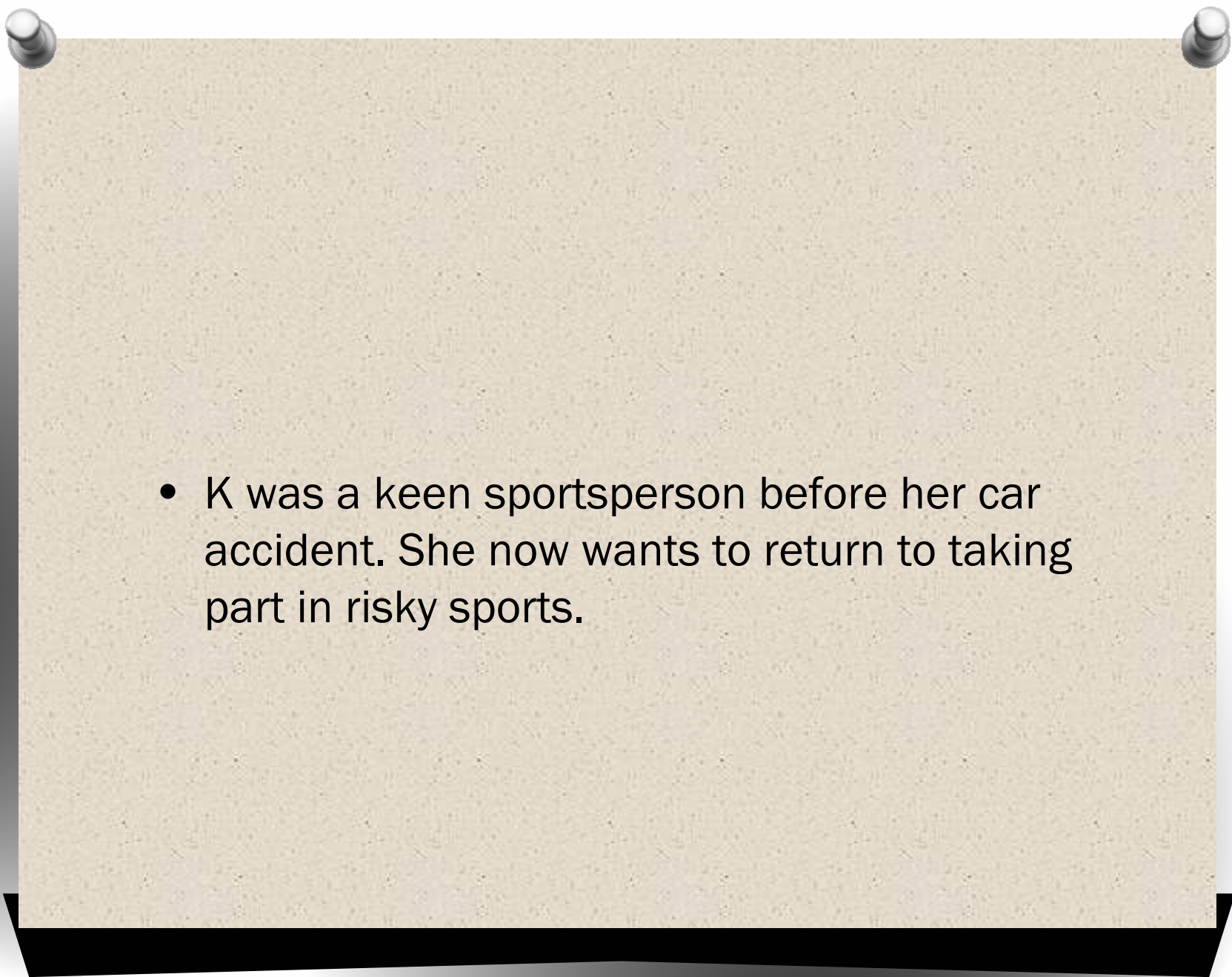
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EXAMPLES TO PONDER

- o J is a 17 year old with a LLTC and multiple disabilities. He has never had a sexual relationship and would like a sex worker to visit him at home. Does it make a difference if he is 15, or if he lives in a care home? Or is 15 and wants time in private with his longterm girlfriend?
- o What if he is deafblind and has not had any sex education?



o o L and B are a couple with severe physical disabilities and difficulties with communication. They live in single rooms in the same flat within a care home. They want to share a room but have been told that there is not a suitable room available.

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- K was a keen sports person before her car accident. She now wants to return to taking part in risky sports.