

Duty of Care

Some Questions Answered

This information paper was compiled by the Elder Abuse Prevention Unit in Queensland using material from the transcript of a training teleconference provided to members of the elder abuse Peer Support Network in October 2006. The Presenter, Mr Brian Herd provided his services for free and the EAPU gratefully acknowledge his contribution.

"Trust me.....I'm a lawyer" (Brian Herd, Carne Reidy Herd)

The law itself is not a simple mathematical equation of one plus one equals two. Rather it's more an imprecise equation which provides that the facts, plus the law, equals the opinion. In other words, if you tell me what the facts are, I can tell you what the law is and then give you an opinion as to what the situation is, whether it's a case of negligence or not. So in answering your questions I'll give you my opinion, but the landscape of the law is not black and white it is full of shades of grey. So when I say it is my opinion it is not necessarily the right or the wrong answer. Trust me as well - I'm a lawyer, which means that as a lawyer I will answer your questions based on my understanding of the law and, in some respects, you will find the answers unsatisfactory because the answer is unclear.

That's the state of the law.

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Note: Not all the information from the teleconference could be condensed into this information sheet and much of material used has been paraphrased from the original transcript.

The EAPU advises readers to always seek legal advice on duty of care issues and not rely solely on this information sheet.

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The Legal Landscape

It's worth considering the legal landscape. Negligence is part of what is called the Common Law, which is the law made by courts, as opposed to law made by Parliament in statutes and legislation. Another arm of Common Law which is relevant is the Law of Contract, which are agreements signed between you or your organisation and your clients.

Now the other affect that the law can have on your duty of care are laws made by Parliament, in other words - legislation. Parliament can actually change or affect your duty of care and it's done that in many pieces of legislation. It's done it for example in the Civil Liability Act, it's done it with the Aged Care Act, it's done it with the Health Act that applies in Queensland. It's done it with the Privacy Act that applies to you as well. So all these pieces of legislation can have in their own way, an effect on your duty of care, because they can either change your duty, or raise the duty or standard of care for you.

Duty of Care - "Lawyers call it the Law of Negligence"

You call your prevailing and overriding responsibility in your job by the mantra of the Duty of Care. Lawyers call it the Law of Negligence. If you fail in your duty of care you can be sued in a court for what's called negligence. The Law of Negligence, which is your duty of care, says that to be successfully sued for negligence three things must be established:

- 1) That you have a duty of care. In life, everyone doesn't have a duty of care to everyone else. So if I was driving home after this afternoon and I saw someone drowning in the river, the law would say I have absolutely no duty whatsoever to rescue that person. But there must be a duty of care that exists between you and your client, and from what I know about the background of the people at this teleconference, all of you would have a duty of care to your clients or to your customers. That's a given.
- 2) The second thing to establish is that there's been a breach of that duty. In other words, you haven't complied with the standard of care required by you. It's important to understand here that the law is not unreasonable. So it doesn't expect the same standard of care from an ambulance officer as it expects from a surgeon. The standard of care is different in the same situation.
- 3) The third element that has to be proven in negligence is that because of your breach of your duty, there was consequential and foreseeable harm caused to another person by what you did or didn't do.

So those three elements have to be established for it to be shown that you have been negligent. In summary, the test of whether you have been negligent is to ask yourself this objective test question.

Would a reasonable person in your position have failed to take reasonable precautions to avoid a foreseeable risk?

A perfect carer? – No such thing.

It's also important to understand the law does not expect perfection. You will be pleased to know there is no such thing as a perfect lawyer, so there is no such thing as a perfect carer either. So the law does not require you to be perfect in everything you do. What it requires you to do is to live up to a standard of care that a reasonable person, in your position, would be expected to live up to. So it's easy for me to state these legal principals, but it's much harder to apply them in every day practice. Especially because in your trade and your job you can confront urgencies and emergencies which require you to act or not act quickly. So legal principals can be hard to take around with you and apply in those situations. But I can only tell you what the law is. It then becomes a matter of you, to apply it.

Some Questions & Answers

Q. "How do I stand if I have witnessed the son bashing the father, but the father has said he doesn't want me to report it? He doesn't have dementia so I can't go against his wishes can I?"

This is the classic conundrum it's the old "damned if you do and damned if you don't" syndrome. Balancing your duty of care to that person with your duty, for example of confidentiality and privacy, that is; you failed to report it, as opposed to you did report it and thereby breached that person's confidentiality or privacy rights.

It's also important to understand that in most organisations there is an internal reporting protocol. So, if a member of staff comes across a situation where they believe the client is being abused for example, that organisation would normally have a requirement that the staff member report their concerns internally, to the appropriate person within the organisation. So there's an internal duty of care but there is also an external duty of care as well. Having reported it internally, should the responsible person within that organisation take it outside the organisation and report it externally? Because remember, reporting is a risk because if the client is saying "I know I'm getting bashed, but I don't want you to do anything about it" reporting that externally is breaching that person's wish for privacy and confidentiality. Duty of care is a balancing act between your duty to that person and that person's rights. Ask yourself the question "Whether a reasonable person in your position, failed to take reasonable precautions to avoid a foreseeable risk". Would you feel better if you protected his rights of confidentiality and the person continues to be bashed or reporting it and knowing perhaps something could be done about the continued bashing? So my view as a lawyer is, even where someone has the capacity to say to you "don't do anything", generally speaking doing something is better than not doing anything at all. To be sued for negligence is much worse than being sued for a breach of confidentiality.

Now, to say that your organisation's confidentiality regulations prevents you from reporting abuse, is in my view piffle. Because the reality is, in the balancing between, the rights of the client and your duty to the client, if what is occurring to the client is bad, not reporting it can be worse.

If however you feel, that having reported it, the organisation does nothing with it, in other words, does not report it externally, then you're faced as an individual staff member with a really significant conundrum. Because the issue then becomes for you, "Do I go outside my organisation, outside my internal protocols and report my concerns to an outside agency?" Now my advice to you would be at this stage, and the advice I give you is free, that if you are considering doing that, you should get advice before you do it. Because the consequences of doing it, can be significant. I also need to remind you of course as well, in the context of nursing home or residential care, there are going to be some big changes next year in relation to the obligations to report abuse within nursing homes. I'll come to what those changes are shortly, but they overturn and radicalise the whole concept of reporting abuse such that now, the duty of care is going to be basically governed by what the legislation says about what your duty is to report.

Q. What is the duty of care legally. Can I be sued even though abuse is not in my area of responsibility as a volunteer.

What this question is getting at is where does the volunteer sit in the lexicon of the duty of care and reporting abuse. Now, before they introduced the Civil Liability Act about two years ago, volunteers had the same duty of care as any employee within an organisation. That was a major concern for volunteers. So when they introduced the Civil Liability Act they introduced special protective provisions in relation to volunteers. The act now says "...or protects volunteers from any personal civil liability in relation to any act or omission which is done or made by the volunteer in good faith when doing community work organised by a community organisation". What that means is if the volunteer is acting, within the scope of their activities and in accordance

with the instructions that they have been given, they cannot be held personally liable for what may have happened. Even if it results in a breach in their duty of care. That provision doesn't protect paid employees, it only protects volunteers. Nor does that provision protect the organisation. So if something goes wrong because of what the volunteer did, the organisation itself can still be sued.

Just remember if something goes wrong under your watch as a paid employee, they normally sue two people. They sue your organisation, because your organisation is liable for what you did or didn't do as an employee and the second person normally sued is you, the paid employee, because you and your organisation have got a duty of care. So that syndrome doesn't apply to volunteers provided they've acted in accordance with the instructions or the activities for which they have been trained and are required to pursue. So far as then the question of volunteers reporting abuse is concerned, again, the same protocols and principals should apply to them in terms of reporting internally the abuse that they may have witnessed. If they don't, they've got this added protection, that even if they haven't they may still not be sued because of the protection given by the Civil Liability Act. But that protection again I emphasise, does not apply to paid employees.

Q. Some of the people I visit are pretty isolated. There's no one around for miles. If I report the abuse it could make the situation worse and if my client gets hurt haven't I gone against my duty of care?

Isolation of course, is not an excuse for negligence. In other words, negligence can occur in isolation or in a crowd and it doesn't really matter where it occurs. The balancing act for you to determine is should I report it or not, in terms of the consequences. Now the reality is in most of these scenarios if you don't report it the consequences are that the abuse will continue. The only way to stop the abuse in terms of your duty of care is to report it because at least that has the potential to either reduce or eliminate the abuse. That seems to be a logical conclusion. So whether a person is isolated or not, is neither here nor there when it comes to duty of care.

What's really important is that if you decide to report, it must also come with a plan that your organisation puts in place to react to the change in circumstances that may affect that client. In other words, what can you do as a result of reporting it to ease the consequences to that client? Like making arrangements in advance to move the client, if that's considered necessary. Those sorts of preparations or planning for the consequences of reporting can be important for your organisation.

Q. I have an Indigenous client who fluctuates in and out of hospital on a regular basis. His carer takes all his pension money to support her gambling and alcohol addiction. Often they go without food. As long as she buys him enough smokes, he doesn't complain because he wants her in his life. His medical condition requires daily home monitoring but this is also hampered because they do not have enough to purchase these items (a blood testing kit, bathroom scales and a ventilator). He is not receiving adequate nutrition, his health is declining. What is my duty of care with this client?

First answer – internal reporting. Report it internally to your organisation or the appropriate person within the organisation. That's your duty of care as an employee. The next issue then becomes for your organisation, whether to report that concern externally. Now that's always the more difficult question. What's often not understood is that there's a really interesting law in Queensland, under the Criminal Code. The Criminal Code, is basically a very large piece of legislation which sets up lots and lots and lots of criminal offences. One of the criminal offences it sets out is one called "Failing to supply, the necessaries of life". What this crime says, is that if you have a duty or someone else is reliant upon you to provide the necessaries of life to them and you don't, you can be charged with a criminal offence. Now traditionally, that section has only ever been used to prosecute parents, for example for failing to supply or support their

children. There is no reason however, why that section could not be used to prosecute the carer in this particular situation for failing to supply the necessities of life to the Indigenous client that they're supporting, which means there's a potential here for a criminal offence. In terms of the externally reporting the organisation needs to consider is whether it is serious enough to report it on the basis that it could be a criminal offence. Now my advice to this organisation probably would be you should. Because the reality is this is very serious as the consequences of the lack of care has a very serious consequence on the medical condition and the health of this particular client - and that's a serious issue when it comes to your duty of care.

One thing I need to make conscious of as well when answering these questions, is that I'm assuming each time that the client being spoken about has the capacity to make their own decisions. Whether they don't, is another aspect altogether and another landscape. But I'm assuming for the purpose of answering these questions, that your client has the capacity to make these decisions, because the law says if they have the capacity, they can make silly decisions. They can be stupid. They can be willing victims of abuse. Provided they've got capacity to understand the consequences of their decisions, they can be a victim. That doesn't help you however, because your duty of care still exists, irrespective of what their wishes are.

Note: The EAPU reminds readers that Mr Herd is providing expert legal advice in his capacity as a lawyer. The EAPU, as a rights based organisation, would also encourage readers to explore as many options as possible that will ensure the safety and respect the rights of the older person while fulfilling your legal obligations under your duty of care. As Mr Herd advises above, the organisation should consider whether the situation is serious enough to report a criminal offence, if not then the EAPU suggests you explore options such as:

- Engaging with other family or the Community Elders to seek assistance with working with the family.
- Engaging services for the carer's gambling/alcohol addiction, if available.
- Providing carer support services and provide education about caring.
- The man's GP could speak to the carer about the level of care required.
- Explain the criminal consequences of not providing "the necessities of life" and the organisation's obligation to report this under their duty of care.
- Does the carer have the capacity to make financial decisions given the gambling and alcohol addictions? i.e. can someone be appointed to handle the carer's financial affairs (which would, in turn include the older man's money needed for his care).

And there will probably be more options available as more details are explored. This is what the EAPU Helpline is used for (1300 651 192)

Also, workers should consider the context of the situation in terms of the life experiences of their older indigenous clients. For example, if the client in this scenario had his working career in a rural community he may have received a tobacco ration while most of his wages were withheld. Similarly his experience of good nutrition and access to health services would likely have been limited. This does not excuse the current behaviour of the carer (who would have her own story) and it does not in any way reduce the legal advice given by Mr Herd, but an understanding of the client's history and the Aboriginal experience generally may provide an insight into the apparent satisfaction this older man has with the current care arrangement.

Cultural awareness training can be arranged through the Queensland Community Arts Network – 07 3254 4922

Q. What are our legal responsibilities when a client chooses to live in a very unhealthy environment, i.e. dog never leaves the inside of home. No clothes washing being done. No home cleaning? But yet this client remains to manage own medication and is of sound mind. General complaints of living status continue to surface.

There's a very interesting movement in America at the moment called "Squalor Rights". It's an organisation devoted to the interests of people who wish to live in squalor and they call it squalor rights. The mantra is "I have the right to live in squalor". Now the reality is the law says you do have a right to live in squalor. Unless of course by doing so you are adversely impacting on other people, such as your neighbours. That may of course require the intervention of health authorities for example. But fundamentally, you have the right to live in squalor.

We see this often for example with older people who live alone, who end up hoarding for example. Hoarding things, be it paper, animals, clothes I've seen as well, anything. Now, in my opinion as a lawyer, people who live in squalor or hoard, there is a concern that even though they appear to be doing it willingly and understanding what they're doing, that it is a clear indication that perhaps they don't have the capacity to make their own decisions. Therefore for you, as a carer or an organisation, it raises real issues about whether you should intervene on the basis the person has no capacity to understand the circumstances in which they live.

There are some very interesting developments going on at the moment in relation to the whole issue of capacity and incapacity so far as caring organisations are concerned. There's an increasing trend for community care organisations, for residential care organisations, to be making their own applications to the Guardianship and Administration Tribunal seeking what's called a "Declaration for Capacity" about their client. In other words, the organisation goes to the Tribunal and says "Tribunal, I want you to declare whether our client here, who may be living in squalor or hoarding, has capacity." Because the reality is that hoarding and squalor can be signs of incapacity. They may not be, but they can be, and as an organisation this does cause concern for you as it offends your standards and it offends your duty of care. You don't want to see people living in squalor. You can even apply as some organisations are to have for example the Public Trustee or the Adult Guardian appointed as decision makers for these people and that's happening, as I said more and more.

Q. How much abuse can a carer take from a client? What are our rights, for example, can we refuse to work with the client and still hold our job?

Well the reality is, there's no law which requires you to work with a client who abuses you, and in fact, more than likely, your organisation's agreement with that client would specifically say they shouldn't. So if they do, they're breaching their agreement and there is simply no legal obligation on you to work with a client who is abusing you. None whatsoever. So if you go to the organisation and say this is the situation, this is the abuse we're getting, I'm not going to put up with it any more, then the organisation has a responsibility to you. It has a duty of care to you as the employee, as much as it has a duty of care to the client. So then it has to balance it's duties to you and the client. The reality is if the abuse is bad enough, the duty of care they have to you should prevail over the duty of care they have to the client. So the services should be withdrawn and further services refused.

For information about the Peer Support Network and the training teleconferences

please contact the EAPU – 1300 651 192.