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Duty of care

by

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Abstract

What is the duty of care and to whom do you, as a health care professional, owe it? Further, to what standard will your duty be held? These are the questions that this article will address.

This article will consider the ethical, professional and legal implications of the duty of care in addressing the above questions.

Introduction

Duty of care – three little words with so much meaning behind them. Much has been written about the duty of care but it still remains elusive and mysterious for many health care professionals. Mostly when you read about a healthcare professional's duty of care, it is from a negative perspective; there is some report or media commentary exposing a healthcare professional who has not met their duty of care in a specific circumstance. Indeed many of the recent Inquiries into healthcare failures, such as the Mid Staffordshire NHS Foundation Trust Public Inquiry (Chaired by Robert Francis QC and available at <http://www.midstaffspublicinquiry.com/>), make reference to a lack of accountability and healthcare professionals failing to meet their duty of care to their patients (for more on accountability see below and also Cornock 2014) .

However, this article is going to take a more positive approach and examine what duty of care is and how, as a healthcare professional, you can ensure that you meet the relevant duty of care when dealing with your patients.

Ethical considerations

For a health care professional, there is not only the legal duty of care (which we will discuss below) but the moral, ethical and professional duties of care as well. For Cranmer & Nhemachena, 'moral duties trigger how we ought, should or are expected to behave' (2013 p.141). Furthering this, Johnstone notes that duty comes from the deontology ethical theory and this sees duty as 'the basis of morality and holds...that some acts are obligatory' (1994 p. 65).

Thus, health care professionals are under a moral and ethical duty in relation to certain aspect of their professional work. However, there is no punishment associated with a failure to act. The 'punishment' is the effect on the individual's own conscience and possible criticism from one's colleagues and loss of reputation.

The professional duty of care addresses the lack of a punishment associated with the moral and ethical dimension. It does so through the use of codes of conduct; failure to adhere to these codes can result in sanctions being applied by the relevant professional regulatory body, as the Nursing and Midwifery Council.

Indeed the Nursing and Midwifery Council's code (Nursing and Midwifery Council 2008) reflects the duty on nurses by starting each of its statements with the words 'you must'. There is not much room for doubt that this is something that has to be undertaken by a nurse.

If a nurse is found to have failed in a duty, there are a number of sanctions that can be applied by the Nursing and Midwifery Council. These range from a 'caution order', which is essentially a note on the individual's record with the Nursing and Midwifery Council, through having conditions placed on the nurse's practice, to suspension from practice and ultimately removal from the Nursing and Midwifery Council professional register which means being unable to work as a nurse.

As a health care professional, to fulfil one's ethical and professional duty of care, you must ensure that you are aware of, and work to, your regulatory body's code of conduct. This is something that most health care professional do on a daily basis without any special consideration, as it is an integral part of their professional working practice.

A legal perspective

The legal duty of care is related to the ethical and professional duty and vice versa. However, the legal duty of care originates, as one may expect, from the law and thus has its own set of sanctions for breaching, or failing to meet, the duty.

As a legal principle, the duty of care arises from the law of negligence. Negligence is the breach of an obligation that one has to another. Negligence in the health care setting is no different to any other form of negligence and the same elements have to be proved for negligence to be established.

Therefore, the duty of care from a legal perspective means the legal duty that one person is obliged to take toward another person. This seems relatively straightforward and, in essence, it is. However, negligence is only proved in the negative; that is, that someone has not fulfilled their duty of care.

This requires consideration of two separate elements:
that the duty of care exists
and, there has been a breach of that duty
These two elements will be discussed in turn.

Duty of care in general

As a health care professional, you have an ethical and professional duty to your patients and your colleagues by virtue of the clauses in the code of conduct issued by your professional regulatory body. However, to whom do you have a legal duty of care?

As a general legal principle, the law does not place a duty of care on individuals to others. There are some exceptions to this such as a mother and her child, where the law places a duty of care on the mother. However, where an individual assumes some responsibility or role, this privilege comes with an associated duty. So someone who assumes the role of a driver has an associated duty of care to other road users. In essence, where you claim a legal advantage, you also assume a legal duty.

However, this general principle leaves some situations where it is unclear as to whether a duty of care is owed by one person to another. Following the seminal 'snail in a bottle' case in 1932, the 'neighbour principle' was advanced. This principle states that 'you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour' (per Lord Atkin in *Donoghue v Stevenson* [1932] at page 580).

This does raise the question of who, in law, is my neighbour that I have to consider in relation to my actions. Thankfully, Lord Atkin provided us with the answer when he stated that 'the answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question' (Donoghue v Stevenson [1932] at page 580).

So, if your action or omission to act would affect someone else, you have a duty of care to that person.

Duty of care and the health care professional

Who, then, do health care professionals have a duty of care to? In essence, health care professionals are the same as anyone else, and have to abide by the neighbour principle. They have a duty to anyone who is, or may be, affected by their actions or omissions.

How do you know if someone is going to be affected by your action or omission?

If a patient is assigned to you personally, you have a duty of care to that patient.

If a patient is assigned to your team or department, you have a duty of care to that patient.

If you touch or intervene with regards to a patient, you have a duty of care to that patient.

If a patient is in the care of your employer, you have a duty of care to that patient.

Essentially, you have a duty of care to any patient whom you come into contact to as a result of your job; those with whom you have a health care professional – patient relationship.

What about individuals who are not patients?

The law recognises that it is not appropriate to have a general duty of care and that a duty of care should only exist in certain circumstances, therefore there is no 'Good Samaritan' law. So if you were to come across someone in an emergency situation outside of your area of employment, you would have no legal duty to act; although you may have a duty under your professional code of conduct. This was explained by

Lord Goff who stated ‘the “doctor in the house” who volunteers to assist a lady in the audience who, overcome by the drama or by the heat in the theatre, has fainted away is impelled to act by no greater duty than that imposed by his own Hippocratic Oath’ (F v West Berkshire Health Authority [1989] at page 567).

However if you assume a duty in an emergency situation, by assuming responsibility for the person or starting to treat them, you are bound by the same principles and standards as to those that you have a duty to through your job. Once you assume responsibility, you assume the duty of care and all that entails.

Breach of the duty of care

If you have a duty of care to someone, how do you know that you have succeeded in meeting that duty? To what standard are you being held to account?

In general negligence law, the standard to which someone who has a duty of care is judged by the reasonable person, sometimes known as ‘the man on the Clapham omnibus’ after a case from 1932 (Hall v Brooklands Auto-Racing Club [1932]). What this means is that someone would be held to what the public think is reasonable in the circumstances.

However, in the case of health care professionals, further case law has determined that a higher standard than that of ‘the man on the Clapham omnibus’ is needed. This was identified by Mr Justice McNair in the Bolam v Friern Hospital Management Committee [1957] case. He explained that ‘where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art’ (at page 121).

This has become known as the 'Bolam standard' or 'Bolam test'; asking what would others with the same skills as you do in the same circumstances? In essence, health care professionals are judged against the actions of their peers.

More recently, the subjective nature of the Bolam test was called into question. There were concerns that, whilst the duty of care is a legal determination, health care professionals were able to escape liability because they were being judged against their peers as opposed to an objective test.

In 1998, a modification to the Bolam test was introduced when Lord Browne-Wilkinson stated that 'a court is not bound to hold that a doctor can escape liability for negligence merely by producing evidence from a number of experts that his opinion accorded with medical practice. The body of opinion relied upon must have a basis in logic, and the judge must be satisfied that the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter. However, only in rare cases might it be possible to demonstrate that the professional opinion does not withstand logical analysis' (*Bolitho v City & Hackney Health Authority* [1998] at page 242).

This has become known as the 'Bolitho test' and has had two consequences for the duty of care. The first is that it modified rather than replacing the Bolam test. In practice, this means that the peers that a health care professional would be judged against have to provide a logical and reasonable explanation for the opinion they give in court. The second consequence is that it resulted in the explosion in evidence-based health care that occurred following the case; as all clinical decisions must now be logical and stand up to scrutiny, there must be some evidence to support them.

The standard for juniors and students

Consider the following: should the student or junior health care professional be judged against the same standard as the experienced health care professional?

As you may expect, there have been a number of legal cases which have considered this. In 1952, it was held that 'errors due to inexperience or lack of supervision are no defence against the injured person' (per Lord Justice Denning in *Jones v Manchester Corporation* [1952] at page 871).

Whilst in 1986, Lord Justice Glidewell held that ‘in my view, the law requires the trainee or learner to be judged by the same standard as his more experienced colleagues. If he did not, inexperience would frequently be urged as a defence to an action for professional negligence’ (Wilsher v Essex Area Health Authority [1986] at page 831).

At first reading this may seem to be unfair to the student or junior health care professional. However, all it is saying is that, in law, every health care professional would be judged against the Bolam standard as modified by the Bolitho test, that is against their peers. However, who should their peers be, other students or junior health care professionals or the experienced health care professionals who possess specific skills for the role being undertaken? Which would be fair for the student or junior health care professional? Which would be fair for the patient who was affected by their action?

Lord Justice Glidewell answers this for us, when he went on to say ‘I should add that, in my view, the inexperienced doctor called on to exercise a specialist skill will, as part of that skill, seek the advice and help of his superiors when he does or may need it. If he does seek such help, he will have satisfied the test, even though he may himself have made a mistake’ (Wilsher v Essex Area Health Authority [1986] at page 831). Thus the student or junior health care professional should be judged against someone with the same skills as them and that this person would be expected to ask for advice and help.

Those health care professionals with specialist skills

Having dealt with students and junior health care professionals, we can consider those health care professionals who profess to have specialist skills above that of the ordinary health care professional. Should there be a special, or different, standard for this group of individuals?

Lord Scarman has said of skilled surgeons ‘a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality’ (Maynard v West Midlands RHA [1984] at page 638). This means that those possessing specialist

skills would still be judged by the modified Bolam test but that the group of peers used would be others who also profess to have those skills.

Thus, it can be seen that a health care professional, whether student, junior or having specialist skills, is always judged against their own peer group. However, there is one caveat to this situation. If you work beyond the normal limits for your professional group, you will be judged by those who normally undertake that role or task who may not be your own peer group. For example, if a nurse was to undertake a task that is normally undertaken by a doctor, they would be judged against the standard of the modified Bolam test but the peer group used would be doctors and not other nurses.

Conclusion

All health care professionals have a duty of care to their patients. They also have a duty of care for other patients that are within their sphere of influence and for others who may be affected by their actions and omissions. Where this duty of care exists, they have to meet a certain standard of care and that this standard is judged by the modified Bolam test against a group of their peers.

Therefore, undertaking your professional health care practice according to the norms and standards of your peer group will ensure that you discharge your duty of care ethically, legally and professionally.

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