Legal duty of care and the community nurse

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The term duty of care is frequently used in the literature (Griffith, 2014; Dowie, 2017; Duncan, 2019) to illustrate the community nurses' responsibility to prioritise patient care, alongside the potential consequences of failing to do so. However, what does it mean from a legal perspective?

In law, having a duty of care is a part of living in a society, so all of us, whether a nurse or not, owe a duty of care to each other. Such duties include being courteous to other road users or ensuring we do not crash into another person with our supermarket trolley while shopping. This means that we are all accountable for our actions or inactions, and accountability increases as the responsibility increases. For example, having responsibility over other people increases the duty of care a person has, so a bus driver will need to ensure the safety of all passengers on their bus as well as to themselves. In a similar vein, the community nurse has to consider the safety of all patients who are on their caseload.

Duty of care is a part of the laws of tort. Tort is an old French word for harm; therefore, the laws of tort has as its focus the possible penalties and sanctions if someone was to cause intentional harm to another without sufficient grounds for doing so. Establishing a duty of care is an important first step to determining a potential negligent action or inaction. Community nurses will automatically have a duty of care to any patients they have seen or are due to see. For example, a community nurse was due to see Mr Smith at 11 am for a daily dressing change, but then forgot to visit him so no call was made that day. If Mr Smith was to deteriorate, for example the wound became more infected, then the nurse could be accused of failing in their duty of care to Mr Smith.

The modern concept of a duty of care is best illustrated in the case of Donoghue v Stevenson [1932]. In this case a friend of Mrs Donoghue purchased a bottle of ginger beer for her. The bottle contained a decomposed snail. Mrs Donoghue suffered with shock and gastroenteritis. However, she could not sue the supplier of the product as she had not entered into a contract with them (her friend had the contractual relationship). Instead, she had to sue the manufacturer, Mr Stevenson. Mr Stevenson was leaving bottles unsealed in a damp warehouse. This case brought into law the concept of foreseeability. Could Mr Stevenson have foreseen that his actions or, in this case, inaction could lead to probable harm? The court decided yes. He should have foreseen that his actions could lead to eventual harm to the consumer.

While most nursing and medical procedures are not contractual, the principle of foreseeability still applies. If a community nurse decided to go ahead with a four-layer compression bandaging system for a venous leg ulcer, without first undertaking a Doppler assessment, and harm was to occur to the patient because four-layer compression bandaging was unsuitable for them as a result of significant arterial disease, would the nurse be seen as responsible? The nurse would be seen as a major contributing factor to this harm because of not foreseeing the risks to the patient. Donoghue v Stevenson also brought into law the neighbour principle, which stated that a nurse should always have in mind their neighbour and take reasonable care to avoid acts or omissions that can be reasonably foreseen, which would be likely to injure the neighbour. The case does use the term 'reasonableness'. For example, a community nurse is visiting a patient for the first time, and the patient needs a silver dressing for an infected wound. The patient has previously stated that they have no allergy to a silver dressing, but later develop a severe reaction to the product. Would it be reasonable for the community nurse to have foreseen this happening? The answer would be no.

Duty of care and the test of foreseeability is a key consideration for determining negligence. If a patient was to complain that community nurse Jones had failed in their duty of care and as a consequence harm occurred, the patient needs to prove that a duty of care was indeed owed by community nurse Jones. If no duty of care is owed by nurse Jones, there is no liability for negligence on their part. For example, nurse Jones may have been off sick for the previous four months and the trust/health board may have failed to provide adequate cover. In this case, nurse Jones cannot be held accountable, although the trust or health board will retain the accountability. However, if nurse Jones was on duty and failed to visit the patient, then she does owe a duty of care, and by not visiting, has breached the duty of care to the patient. Nevertheless, even if it is proven that nurse Jones owes

Abstract

In this month's Policy column, the author explores the concepts of duty of care, forseeability and proximity, and how the community nurse can be better prepared when caring for the patient.

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a duty of care and has breached the duty of care, the patient may not have suffered any harm. If no harm has occurred to the patient, whether this be physical or psychological harm, then there has been no negligence. Negligence is only a factor when harm has occurred and the patient has proved a duty of care was owed by the nurse, that this duty had been breached by the nurse, and their actions or inactions were a contributory factor to the harm. This is referred to as causation. Therefore, there needs to be a proven direct link of an act or omission by the community nurse to the physical and/or psychological harm suffered by the patient.

In the case of Caparo Industries v Dickman [1990], the court determined that there also needs to be a proximal relationship between the person owing a duty and the person or persons owed a duty of care. Proximity simply means a near relationship, although the near element in law is not a geographical relationship. Therefore, it would be possible to have a near relationship with a patient even if you were undertaking a telephone consultation from 500 miles away. This case also stated that it must be fair, just and reasonable to impose a duty of care upon the nurse.

If there is no causational link between the community nurse and the patient, there can be no negligence on the part of the nurse, even if the nurse may have not acted appropriately or professionally. In the case of Barnett v Chelsea and Kensington Hospital Management Committee [1969], a night watchman who had been poisoned by arsenic was told to go home by the Emergency Department doctor and advised to see his general practitioner in the morning. The man died overnight. However, the court determined that even if the doctor had attended the patient, he could not have saved his life. There was no causational link between the doctor's omission to see the patient and his death. Therefore, the doctor was not held to be negligent. From a community nursing perspective, if the nurse failed to visit the patient and the patient died, but if the patient would have died anyway even if a visit had taken place, then a causational link between the nurse not visiting and the patient's death cannot be proved. Nonetheless, professional accountability may still apply even if there is no legal accountability.

When there has been a breach in the duty of care by the community nurse to the patient and that breach has contributed to direct harm to the patient, the redress for the patient is to make a claim against the employer, that is the trust or the health board of the employee. This is referred to as vicarious liability. In simple terms, this means that the employer is held responsible for the mistakes of its employees, and it would be the employer that would need to pay for any compensation owed to the patient. However, the nurse may face disciplinary proceedings.

Owing a legal duty of care can also be different from owing a professional duty of care. For example, there is no legal duty of care placed upon a community nurse who outside of work does not attend an emergency (although there may be legal duty attached to a contract of employment). On the contrary, even if there may not be a legal duty of care, there will be a professional duty of care, and therefore the community nurse may be at risk of a sanction from the professional regulator, in this case the NMC. While duty of care is not mentioned in the 2015 Code it is implicitly included as a part of the prioritising people section.

In conclusion, while a duty of care is a commonly known concept, it can be a complex concept. It is often difficult for the patient to prove that the community nurse was the direct cause of harm resulting from other contributory factors, such as their own actions or inactions towards their own health and finding the necessary evidence to have grounds for a case against the employer of the nurse. However, litigation in health is on the increase, and community nurses should be mindful that even if they would not, in law, be held personally responsible (in most circumstances this would fall to the employer), professionally they can still be held to account. Understanding the legal definitions of a duty of care, in particular the test of foreseeability, and an understanding of the Code, will help the community nurse mitigate the risk of being liable for a negligent action. **BJCN**

Declaration of interest: None

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