

Childcare and children's health

Health care information for childcare staff and families from the Centre for Community Child Health

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DUTY OF CARE

What do we mean by “Duty of Care”?

The fundamental obligation that anyone working in child care, whatever the type of service and whatever their role, is to keep children safe. Parents of children in care of course share this concern and priority. The legal term *duty of care* refers to this obligation and has major implications for the organisation and operation of services. It is interesting to look at duty of care not only as it applies to child care but also in a broader context.

John Donne, a famous poet in the 17th century, wrote that “No man is an island”. What he meant was that no one lives in isolation. Throughout life, in many situations, unless a person becomes a hermit, he or she interacts with people. Whenever people interact and form relationships, whether personal or professional, it is inevitable that obligations will develop. It is generally accepted that people in authority have responsibility for those in their charge. For example, teachers have responsibility for their students, parents for their children and employers for their employees. However, the responsibility extends beyond people in authority in some situations.



What are the origins of the concept of duty of care?

The concept of duty of care has an interesting and somewhat surprising origin. In 1932 a court in the United Kingdom considered a case which involved snails that had found their way into a glass of ginger beer! The woman who consumed the ginger beer suffered from nervous shock as a result of seeing the snails in the bottom of her glass and, in a landmark case, she brought an action against the publican who had served her the drink. She was able to establish that the publican owed her a duty of care and that he had breached that duty of care by unwittingly allowing the snails to get into her glass. After great deliberation, the court upheld the unfortunate woman's claim and the doctrine of duty of care was born.

Since 1932 the courts have been full of people claiming that a duty of care was owed to them by someone, that the person has been negligent in observing that duty of care and has, as a result, breached it. That 1932 case has led to a society in which there is a huge amount of litigation,

where for example, councils are being sued for failing to put up signs that warn of pending dangers, publicans for allowing intoxicated people to drive off from their premises, and homeowners when a trespasser trips over an object left in an awkward place in their own home.

Recognising when a duty of care exists

One of the difficulties in trying to work out when a duty of care exists is that courts always do it with the benefit of hindsight. Whether a duty of care is owed or not very much depends on the facts of the matter, including the positions of the people involved. For example, an expert giving advice to a non-expert can be expected to have a duty of care to the non-expert. The expert is considered to have superior knowledge and the non-expert rightfully expects to be able to rely on that superior knowledge. The expert thus assumes a duty of care in giving the advice and, if that advice is given negligently and without care, then he or she can expect a court to find that the duty of care has been breached.

Consequences of breaching a duty of care

Historically, a breach of a duty of care, once proved, generally leads to damages being awarded to the injured party. In Australia, damages tend to be awarded only to compensate the injured party for their actual financial loss. In the United States, however, the level of damages awarded is often much greater. In courts in the United States juries are able to penalise defendants in cases where a duty of care has been breached by awarding what is called exemplary damages. The reasoning behind such awards is that they will discourage others from

breaching their duty of care. Fortunately for most defendants in Australia, exemplary damages are almost unheard of and damages are awarded only by judges, not juries.

The duty of care for carers in child care

It is obvious that carers in child care owe a duty of care to the children in their care. Trained carers are seen as experts, although this varies depending on the level and extent of their training and qualifications. Children rely on their carers to ensure that they are properly cared for. It is not just children to whom the duty is owed, but also their families. Parents expect that carers will use their expertise to care for their children appropriately. As a consequence, carers also owe a duty of care to the parents of those children.

Different levels of duty of care

The level of the duty of care owed is affected by the status of the person claiming that a duty is owed. An example of this would be a situation in which a real estate agent is selling a property that requires some renovation. If the potential purchaser is someone who is inexperienced in real estate and housing then the agent has a high duty of care to ensure that the potential buyer understands what he or she is taking on before entering into a contract. If the potential purchaser is a builder however, the duty of care owed may be far lower, simply because of the builder's level of expertise.

An extremely high duty of care is owed to children generally because of their limited ability to care for themselves, and a much higher duty of care is owed to

an infant than to a school-aged child because of the differences in their ability to look after themselves and attend to some of their own needs.

Proving a duty of care exists

Before any claim for negligence or breach of duty of care can be upheld by a court, the court must first be convinced that a duty of care existed. The court takes into account all the circumstances and tries to determine what a reasonable person would have expected in those circumstances. Of course, the court has the benefit of hindsight, but the aim is to



look at the circumstances as if the outcome was not known, which is difficult. It is much easier to understand what a reasonable person would have expected when all the facts are known.

Proving a duty of care existed is reasonably easy in child care, particularly when a child suffers an injury. As indicated above, the younger the child the higher the level of duty of care and the more likely a court is to find that a duty of care exists.

Proving a breach of the duty of care

The next step after it has been established that there is a duty of care is proving that it was breached. To do this, the person making the claim must show that the carer has been negligent in some way in observing the duty of care. Again, courts will look at what a reasonable person would have done in the circumstances, and the circumstances are looked at with the benefit of hindsight.

Carers have to make sure that they comply with obligations set out in agreements with the sponsor, scheme or service, contracts with a parent, legislation and licensing regulations as well as any obligations which can be implied simply because of the duty of care owed to the child. Failure to comply with written or implied obligations makes proving that there has been a breach of the duty of care very easy.

Proving a loss as a result of breach of the duty of care

Proving loss is not always simple. First of all, the loss suffered must have been foreseeable. A fairly simple example would be where a child in care has an accident because of an obvious breach of the duty of care. An ambulance is called and the child is transported to hospital. A phone call to the parent informs them of the accident and that the child is on the way to hospital. The parent, driving to the hospital at high speed, goes through a red light, has a serious accident and is unable to work for three months.

What is the extent of the loss the parent and child are able to claim? The court will look at what was a foreseeable loss and what was not. The child's medical expenses and possibly some extra care are obviously foreseeable consequences. What if the parent claims the loss of three months' wages and medical expenses on the basis that this loss happened as a result of the child's accident and that it was foreseeable that he would suffer this loss in those circumstances?

Only a court can decide what is a foreseeable loss, and it will make a decision based on what a reasonable person would have done in the circumstances. It may seem

reasonable that if a person contributed to his loss he should not be able to claim for that loss. Increasingly however, courts are disregarding the need for people to be responsible for their own actions and are awarding damages to claimants without any real acknowledgement of the part their own negligence has played in contributing to their loss.

Conflicts

The duty of care in child care may involve conflicts in some situations. Issues related to the duty of confidentiality about children and their parents are an example. An issue may arise which would normally require complete confidentiality, but which if not disclosed to parents of other children may put those children at risk. This would then be a breach of the duty of care to the other children. A decision to observe one duty could result in a breach of the other, and unfortunately it is not always the case that one duty automatically has priority over the other. These situations require discussion, and seeking advice and direction, either from the employer or sponsoring service or from a legal advisor.

Conclusion

There is no doubt that people working in child care are at risk of claims for breaches of duty of care. Employers and self-employed carers must ensure that they carry adequate insurance and comply with its terms. In addition it is critical that carers comply with all obligations under any sponsored scheme or employment contract, a contract with a parent and any licensing body.

On-going discussions, self-evaluation, critique of practices and professional development will help to ensure that policies and procedures are thorough, up-to-date, understood by all and most importantly that they translate into sound daily practice. In addition, establishing relationships with parents where there is open communication and where parents are welcomed to ask questions and voice concerns will result in a shared care experience which is better for carers, parents and most importantly children.

*QIAS: Quality Areas 1, 7, and 9 and Principle 8.4
Note in the Quality Practices Guide, 2005:*

Quality Areas 1, 5 and 6

FDCQA Quality Areas 4 and 5, Principles 1.1 and 6.1

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Duty of care in Family Day Care

The duty of care owed by a family day care carer to the children in her care and their guardians is, in principle, almost the same as the duty owed by people in other fields.

Family day care carers are seen to have a degree of training in providing the child care service and accordingly the carer must exercise a high degree of diligence in the provision of that care in order to discharge their duty.

However, the fact that a carer is providing that service from their own home brings with it a unique set of circumstances. People are generally very familiar with and emotionally attached to their homes, so seeing areas of potential hazard is not always easy. Carers must however treat their home as any place of business and take great care to objectively appraise potential areas where accidents might occur and eliminate that potential risk.

This is particularly critical in a childcare setting where children have little control over their own safety.

National Family Day Care Council of Australia

Policy Brief

Translating research evidence to inform policy and practice

Policy Briefs translate the research evidence around early childhood issues into easy to read short publications for policy makers and service managers.

The information is presented under four headings, these being:

- Why is the issue important?
- What does the research tell us?
- What are the implications of the research?
- Considerations for policy and programs.

Each Policy Brief will address a specific theme relevant to early childhood such as work and family balance, universal and specialist services, school readiness, obesity, and community intervention.

There will be eight Policy Briefs released throughout 2006. The first Policy Brief "Early childhood and the lifecourse approach" was launched on 28 February 2006 by The Honourable Sherryl Garbutt, MP, Victorian Minister for Children and Minister for Community Services. The next Policy Brief is due to be released in April 2006.

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