



少林功夫學院
Shaolin Kung Fu Academy

Duty of Care

Kung Fu Instructor in Training Program



Negligence

This civil wrong is most important to all professional groups, as far as being a source of potential legal action. Approximately 35-45% of all litigation relates to negligence. Litigation may be brought before the courts up to 6 years from the time of discovery of the injury/disability.

For the tort (civil wrong) of negligence to be successful certain criteria have to be proved, that there was:

- Duty of care owed
- Breach of that duty
- Damage caused
- Damage foreseeable

Duty of Care

The Courts have determined that, as far as health professional activities at work are concerned, a duty of care is owed to patient/residents/clients/care recipients and fellow employees.

The principle of duty of care is that the 'defendant owed the plaintiff a duty of care'. If a duty of care exists there must be a standard of care inherent in the duty. Therefore the standard of care that was expected of the defendant in the incident must also be established.

In the case of Donoghue v Stevenson (1932) AC 562 where an action brought before the court as a result of the plaintiff on consuming a bottle of ginger beer discovered it contained the decomposed remains of a snail. The plaintiff stated that the manufacturers owed her a duty of care. In handing down the decision the courts stated that the manufacturer does owe a duty of care, in law. Following an appeal to the House of Lords it was stated that each of us owed a duty of care, in law, to our neighbour. In response to the question, 'Who, in law, is my neighbour?' the answer given in the decision was: persons who are closely and directly affected by my act that I ought reasonably to have had them in my contemplation as being likely to be damaged when I set out to do the acts or omissions which are now being complained of.

Who are our neighbours?

The law considers neighbours as any person with whom our actions will have some results. As a nurse/carer who undertakes a task and does it badly, or fails to do it at all, resulting in one or all of those people (either recipients of that care, colleagues – workers or other

staff members)being injured. Legally, therefore, they are his/her ‘neighbours in law and a duty of care clearly exists in relation to them.

It is important to emphasise that the determination of a duty of care embraces ‘acts or omissions’. In other words legal liability can arise as much by a failure to do a particular act as it can be doing it badly.

What is the expected standard of care

In considering the appropriate standard of care, the law recognises that no two sets of facts are ever the same and that circumstances that give rise to an incident rarely repeat themselves. Therefore when acting in a professional capacity at work it is the objective standard of the ordinary reasonable nurse/carer involved. The word objective is stressed and the law cannot take account of subject matter, so the approach would be, what would the ordinary reasonable nurse/carer do in this situation, given that he/she has a particular level of skill, knowledge and expertise. What would a reasonable nurse have foreseen given the level of experience and education that has been attained? It is not what he/she actually knows but what he/she ought to have known. It is no excuse to say that the nurse was having a ‘bad day’.

Breach of duty of care

If the action the defendant performed, or failed to do, fell below the standard of care expected, the defendant may be found in breach of his/her duty of care. In other words, having got to this stage, the plaintiff has established, on balance of probabilities:

- That a duty of care exists,
- The standard of care was expected as part of that duty
- That the defendant failed to achieve the standard of care expected.
- That the defendant is in breach of that duty of care to the plaintiff

Damaged caused

Two issues need to be established:

1. That the plaintiff suffered damage; if no damage suffered – no compensation can be awarded.
2. The damage being complaint about is a consequence of the defendant’s negligent act. That is, there must be a direct or causal relationship between the damage and the negligent act.

Damage in the context of negligence refers to three particular types that are considered by the courts:

Physical damage

Physical damage refers to obvious physical damage that is easily recognised, but with all physical damage there is a degree of pain, suffering and loss of enjoyment of life.

Psychological damage

This is generally referred to as nervous shock. The courts as a form of damage now acknowledge the existence of permanent psychological damage, which can be medically established. It must be greater than normal grief.

Financial damage

Financial damage refers to the obvious burden or loss that people sustain when they suffer physical damage – medical/hospital expenses, loss of income or replacement cost of personal property.

Damages foreseeable

The general thrust here is that the damage must be foreseeable as a result of the negligence act. The test to determine whether the defendant's action caused the plaintiff's injury is the 'but for' test. If it can be said that 'but for' the defendant action the plaintiff would have suffered no injury, then the test is satisfied.

Vicarious Liability

Vicarious liability is when the employer is held liable for the torts of the employees, when the torts are committed in the course of employment.

It is difficult for the employer to avoid liability for economic reason. A plaintiff would have more success in seeking damages from an employer than from an employee (you cannot get blood out of stone!). This does not absolve the employee of their responsibilities; and employer has the legal right to recover the monies so paid out, either wholly or in part, from the employee. The right to seek partial recovery of money is known as seeking an indemnity from the employee. When considering whether the employer is vicariously liable for the negligent act of another, the following principles have to be determined:

- That the person was an employee
- That the negligent act arose in the course and scope of employment

Who is an employee?

For the purpose of the legal system it differentiates between independent contractors and general employees. A person is considered an employee if the employer controls what they do, how they do it and when certain duties have to be performed can direct them.

Indicators used in 'control' are:

- Is the person paid a regular wage and income tax deducted?
- Is the employee entitled to the benefits of an industrial award, annual leave, sick leave, long service leave etc?
- Has the employer an obligation to provide equipment to enable the employee to carry out the duties.