Fact sheet: Understanding Duty of Care, 2016

Purpose

The purpose of this fact sheet is to define duty of care and outline duty-of-care obligations.

Introduction

For nurses and midwives there is a close relationship between professional and legal obligations. This fact sheet provides clarity for members regarding duty of care and duty of care obligations. NZNO recommends reading this fact sheet in conjunction with the NZNO summary guideline on *Obligations in a Pandemic or Disaster* (2014) and the NZNO guideline on *Obligations in a Pandemic* (2008).

Duty of care – legal obligations

Duty of care has a particular significance in a medico-legal framework and has a different meaning from "the duty to provide care" and the "duty to give care". It is a legally imposed obligation or duty (derived from common law) to "take care". The duty of care only arises once a health practitioner accepts the care of a patient. A duty of care is about ensuring our actions (or omissions) do not harm someone else. Legally, all people owe a duty of care to people who could foreseeably be harmed by their actions or inactions. Once s/he has accepted a patient into his/her care a nurse, midwife or other health care worker always has a duty of care to prevent harm to a patient they are caring for. That means a duty to ensure they take care that any actions carried out in relation to the patient do no harm, and they do not omit anything that could have prevented harm to the patient. If they fail to do this, they are negligent (Johnson & O'Brien, 2010). Practitioners caring for a patient may also have a duty of care to third persons, such as family members or others if, through their actions or ommissions, harm (for example mental harm) occurs to the third party.

Duty of care becomes important during exceptional circumstances, such as a pandemic or disaster – refer to the NZNO Guideline on Obligations in a Pandemic or Disaster for futher information. Health practitioners do not have a legal duty to go to the aid of those injured in an accident (Johnson & O'Brien, 2010). However, if they do go to the aid of those injured, they have a duty of care to ensure their actions do no harm. Johnson and O'Brien note that, although a duty of care exists, when the care provided is assessed (by, for example, Nursing Council), consideration is given to factors such as the difficult circumstances in which care is given, the speed with which decisions may have to be made, and the shock that may occur among rescuers.

Accountability in the professional context

The amount of care nurses and midwives are required to take depends on a number of factors including:

> the magnitude of potential harm and the extent to which it is foreseeable; and
> how much a nurse or midwife could objectively be expected to take care to prevent the harm.

As a part of their professional responsibilities,[1] nurses and midwives are expected to take the same amount of care to prevent harm as any other "reasonable regulated nurse or midwife" in the same situation. It is also important to note that nurses or midwives holding a practising certificate are expected to meet nursing and midwifery competencies at all times,ie, the same competencies apply when giving care as a nurse to a family member, friend, neighbour or person on the street. If your next door neighbour arrives at your door seeking advice for a sick child, you are accountable for the standard of nursing advice you give. Regulated nurses and midwives must also practise within their scope at all times (there are limited exceptions, eg. where care is provided in an emergency[2]).

Duty of care when taking industrial action

Among other things, a strike or lockout that may affect essential services must be preceeded by a minimum of 14 and no more than 28 days' formal notice to the employer or affected employees, if the proposed action will affect public interest. Essential services include hospitals, welfare institutions and prisons, among others (see the Employment Relations Act 2000 for further details). This length of notice enables employers to prepare for the strike or lockout. By law, the employer may employ new staff to cover those on strike or locked out, if the work of the employee must be done for health and safety reasons or where consumer safety is a concern. However, the employer must also consider other avenues to ensure safety, including cancelling or postponing non-urgent treatment (Johnson & O'Brien, 2010).

While a nurse or midwife taking industrial action theoretically still has a duty of care to those they care for while on strike or locked out, the provisions in law, outlined above, ensure the employer must continue to uphold the obligation to "take care" through alternate means.

Example

Nurses and midwives do not have to be perfect but do need to exercise the same skills as any other reasonable nurse or midwife would in the same circumstances (Johnson & O'Brien, 2010). The Health and Disability Commissioner investigates cases where a complaint has been made regarding the standard of care given by health practitioners. What follows is an example of where a nurse breached Right 4(1) of the Code of Health and Disability Consumer's Rights. Right 4(1) states that every consumer has the right to have services provided with reasonable care and skill. Where this right is breached, it can be assumed the nurse has breached their duty of care.

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[1] See the Health Practitioner's Competence Assurance Act, 2003; NZNO's Standards of Professional Practice (2013), Nursing Council of New Zealand's (NCNZ) Code of Conduct (2012) and Scopes of Practice for Registered Nurses (2012), Nurse Practitioners (2012) and Enrolled Nurses (2012), the Code of Health and Disability Services Consumers' Rights (1996), the Midwifery Council's Competencies for Entry to the Register of Midwives (2007), and NZNO's Code of Ethics (2010) for further information on professional responsibility and accountability.

[2] s8 (3)(a) Health Practitioners Competence Assurance Act 2003

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Master A was prescribed paracetamol and codeine preoperatively. Before administering the medications, RN D asked RN C to check the prescription. Both RNs read Master A's prescription for codeine as 85mg. The nurses discussed the fact it was a large dose (the recommended dose is 8.5mg for a child of Master A's size) but neither checked the prescription with the doctor. RN D administered Master A 85mg of codeine orally. The error was discovered soon afterwards and Master A had his stomach washed out and the surgery proceeded as planned. The Health and Disability Commissioner found both RN D and RN C had breached Right 4(1). Adverse comment was also made regarding the prescribing doctors handwriting. Further details can be found here: http://www.hdc.org.nz/decisions--case-notes/commissioner's-decisions/2015/13hdc00213

Further case decisions can be found on the Health and Disability website (www.hdc.org.nz). Further examples can also be found in Keenan (2010).

References

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Mission statement
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