DUTY OF CARE

Legal, ethical and professional aspects of duty of care for nurses

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Abstract
Duty of care is a fundamental aspect of nursing, and many nurses consider this to be an important part of their professional duties as a nurse. However, the legal underpinnings of duty of care are often overlooked, and, as such, nurses may be unsure about when to act if they encounter emergency situations or serious incidents, especially when they are off duty. This article examines the legal, ethical and professional aspects of duty of care, what these mean for nurses in practice, and how duty of care is intrinsically linked with standards of care and negligence.

Keywords accountability, duty of care, ethical issues, legal issues, negligence, professional issues, standards of care

IN THE AUTHOR’S INSTITUTION, nursing students and nurses are frequently informed during their undergraduate and postgraduate education programmes that they are accountable for their actions and omissions as part of their role. They are also informed that they have a duty of care for their patients. However, Young (2009) claimed there is much uncertainty regarding what duty of care means for nurses in practice. For example, nurses may be unsure if they owe a legal duty of care outside of their usual place of work, or when they are off duty.

Duty of care incorporates a legal duty, an ethical duty and a professional duty. This article explores the legal aspects related to duty of care, and their implications for nurses in and outside of practice.

Defining duty of care
While duty of care is not explicitly mentioned in The Code: Professional Standards of Practice and Behaviour for Nurses and Midwives (Nursing and Midwifery Council (NMC) 2015), it is implied within the ‘prioritise people’ section, which states that nurses must make patients’ care and safety their main concern, and ensure that patients’ needs are recognised, assessed and responded to.

Having a duty of care is a part of the fabric of society (Fullbrook 2007). Actions such as driving a car, riding a bike or shopping in a supermarket include an obligation for individuals to ensure the safety of others. Hence, duty of care is not exclusive to medical and nursing practitioners. However, as Bond and Paniagua (2009) suggested, nurses are not ordinary citizens, but rather they possess specific skills through their professional development and various specialisms. Therefore, nurses’ duty of care, and hence their standard of care, is higher than that of someone who has limited or no medical knowledge. As a result, if a non-medically trained person attempted cardiopulmonary resuscitation (CPR) on a member of the public, the standard expected would be lower than that of a nurse, who would be expected to perform the procedure more proficiently.

The modern perspective regarding a legal duty of care arose from the case of Donoghue v Stevenson [1932].
In this case, a friend of a woman named Mrs Donoghue bought a bottle of ginger beer and Mrs Donoghue consumed some of its contents. Mrs Donoghue claimed a decomposing snail was found in the bottle of ginger beer, and she subsequently became unwell and experienced nervous shock. The manufacturer was sued by Mrs Donoghue for negligence; she argued that the manufacturer should have foreseen the danger of leaving ginger beer bottles open in a warehouse, which might consequentially lead to the attraction of snails, slugs and other creatures. Mrs Donoghue won the case, because it was determined that the manufacturer had failed to foresee that his actions and omissions could lead to physical and psychological harm to the end consumer. Lord Atkin, a judge in this case, stated: ‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.’

Nurses should be able to foresee potential events that may occur as a result of their actions or omissions. For example, if a nurse decided to ignore a spillage of water on the floor of their ward, they should be able to foresee that someone could potentially slip and hurt themselves. The law can hold the nurse to be liable for any harm that occurs as a consequence of this, even though they may not have caused the spillage. Similarly, a nurse who administered a drug to a person which had been wrongly prescribed by the prescriber may also be held liable for any harm. This is because the nurse has a duty to ensure that the drug prescribed is safely administered, which includes checking that the dose is correct for the patient. Failing to check medical prescriptions, especially for less common drugs, might lead to accusations that the nurse should have foreseen that a lack of appropriate checks may result in harm to patients.

It is important to note that in the case of Donoghue v Stevenson [1932], Lord Atkin included the word ‘reasonable’ in his statement. For example, it would not be reasonable for the nurse to foresee that a patient would have an allergic reaction to a particular product or drug, if when asked if they had any allergies, the patient stated they had none. However, if a patient experienced an allergic reaction, the nurse should be mindful that they need to document the patient’s allergy so that the reaction does not occur again in the future. If the patient experienced the same allergic reaction again, the nurse would be held liable for any harm that occurred as a result if no record was made of the allergy.

In the UK, for negligence to be proved, the claimant has to establish three elements as follows (Mason and Laurie 2010):

» A duty of care was owed to the patient by the nurse – there must have been a relationship between the nurse and the patient.
» The duty of care was breached by the nurse.
» Harm occurred to the patient as a consequence of the nurse’s breach in their duty of care.

If there is a breach in the duty of care, but the patient did not experience any harm as a result, there are no grounds for negligence. However, the nurse may still have to appear before a disciplinary panel for any alleged lack of competence and misconduct in their care.

In the case of Caparo Industries v Dickman [1990], Lord Bridge stated that there must be a relationship between the parties owing the duty and the parties to whom the duty is owed. In a healthcare context, it has to be fair, just and reasonable for the nurse to be deemed to have a duty of care to the patient. One example of this might be if a nurse decides to take an authorised break in the staff canteen. She leaves the clinical area under the charge of another nurse with the same experience and skills as herself. In these circumstances, it has to be fair, just and reasonable for the nurse to be deemed to have a duty of care to the patient. One example of this might be if a nurse decides to take an authorised break in the staff canteen. She leaves the clinical area under the charge of another nurse with the same experience and skills as herself. In these circumstances, it would not be fair, just or reasonable for the nurse on her break to be held personally responsible if an incident were to occur during the period she was away from the clinical area. However, if the nurse was late in returning from her break, she may owe liability if a patient was harmed as a consequence.

There are several potential challenges
for nurses in fulfilling their duty of care to patients. Nurses work as part of a multidisciplinary team, and often with many patients who have complex care needs, so the input of other healthcare professionals is essential. Sometimes, other healthcare professionals may refuse to attend to a patient, or make decisions that the nurse may feel are inappropriate.

Powell and Davies (2012) suggested that nurses can adopt a range of strategies to ensure they have fulfilled their own duty of care; for example, they can use written policies to ensure other healthcare professionals are meeting the appropriate standard of care, or they can report any concerns to a senior healthcare professional or the ward manager. They can also act as an advocate for the patient, particularly those with limited mental capacity. To evidence this escalation, it is important for the nurse to document the actions they took to attempt to resolve any challenges they experienced or concerns they may have had.

Box 1 describes a case study and the appropriate standard of care that would be expected from the nurse in this scenario.

Nurses must also be mindful of the Criminal Justice and Courts Act 2015, since healthcare practitioners can be charged with the offence of ill-treatment or wilful neglect towards patients under Sections 20 and 21. One example of this might be if a nurse is on holiday, and ignores a person who has collapsed in front of them. While the nurse has no legal duty to care for the person, they do have a professional and ethical obligation to provide assistance, bearing in mind their normal scope of practice, and checking first that it is safe for them to assist.

Considering the nurses’ normal scope of practice is vital, since at times it may be prudent for them not to get involved in an incident, for example where they have a lack of knowledge. If there are already paramedics at the scene or if the situation is under control, a nurse offering assistance might hinder the actions already being undertaken. Karstadt (2008) identified that

Duty of care outside of practice

In an emergency situation, such as a terrorist incident or significant fire, would it be reasonable for an off-duty nurse to place themselves in personal danger to protect the lives of others? Would it be fair, just and reasonable under such circumstances to impose a duty of care on the nurse? From a legal perspective, there is no legal obligation placed on the nurse to offer help or assistance, unless the nurse themselves was the cause of the incident (Dimond 2015). From a professional perspective, it would be challenging for the NMC to sanction a nurse in these circumstances, since the nurse also has to consider their safety as well as that of others in such a situation.

Another scenario to consider might be if

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<th>Box 1. Case study – Wendy</th>
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<td>Wendy is a nurse practitioner who has accepted a referral from the doctor of a patient with chronic back pain. However, Wendy cannot see the patient for long because she has a large amount of paperwork to complete, so she gives the patient an advice sheet without undertaking a thorough initial assessment. Has Wendy fulfilled an appropriate duty of care to the patient?</td>
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<td>Professionally, Wendy is expected to maintain an appropriate standard of care. In this example, Wendy has not undertaken a thorough assessment, and if it can be proven that her practice did not meet the expected standard of care, Wendy may be considered deficient in her duty of care towards the patient. Assessment of the patient is vital to establish their medical history, including how long they have experienced the back pain. It can also inform the practitioner of other issues, for example if the patient is unable to read or if the patient does not speak English as a first language. Thus, nurses have a responsibility to establish this information. Giving an advice sheet may not be enough to fulfil a nurse’s duty of care to the patient, and does not meet the standard of care expected by the profession.</td>
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| KEY POINT |
| Nurses must also be mindful of the Criminal Justice and Courts Act 2015, since healthcare practitioners can be charged with the offence of ill-treatment or wilful neglect towards patients under Sections 20 and 21. |
it is important that nurses recognise their own limits of competence, and that nurses only have a legal duty to care if they have an existing professional relationship with those affected in an incident. When nurses do act in an emergency situation, they must ensure that their practice is up to date, and of the standard expected of them as a nurse. In a serious incident, it is reasonable for a nurse to act on their instincts, or to offer assistance through a sense of ethical or moral duty, and the law would not obstruct the nurse in taking such actions. In the US case of Wagner v International Railway Co [1921], Justice Cardozo stated that ‘danger invites rescue, the cry of distress is the summons to relief’, and the law tends to be supportive of the nurse in these situations. Hence, the myth that a person can be sued if they break the ribs of a person while performing CPR is unlikely to succeed, unless their actions were seen as unreasonable to the courts; for example, if they used their foot to administer chest compressions. In an internet search, the author could not find any successful cases against a person performing CPR outside of a hospital environment.

If while witnessing a distressing incident, a nurse went into shock and was unable to assist, even if they were on duty at the time, the law would decide if it would be fair, just and reasonable to impose liability for any harm that occurred to the patient. Much of this decision would depend on the nurse’s normal scope of practice. For instance, if the nurse is employed in the emergency department or a critical care environment, it may be fair to impose liability for harm, whereas if the nurse is the lead nurse for education, with limited recent clinical experience, it may not be fair to impose liability.

One important consideration for nurses who offer assistance while off duty is the issue of vicarious liability. Most employers will have vicarious liability, which means they will be liable for acts or omissions by the nurse that occur during the nurse’s normal course of employment (Brack 2014). However, there is no vicarious liability for acts or omissions by the nurse that occur outside of work, although many professional unions such as the Royal College of Nursing and UNISON will provide cover for ‘good Samaritan acts’ (NMC 2008) as part of their membership.

**Ethical duty to care**

Nurses may feel that even in the absence of a legal or professional duty of care, they have an ethical or moral duty to assist in an emergency situation. Ruderman et al (2006) suggested that the duty to provide care is closely aligned with the ethical principle of beneficence, which is acting in the best interests of a patient. Rustom et al (2010) stated that ‘beneficence refers to the moral obligation to act for the benefit of others’, and that the duty of a healthcare professional is to make their patients their first concern. For instance, there is no legal duty placed on the nurse to rescue a patient from a burning building; however, to act in the patient’s best interest and make the patient their first concern, the nurse may feel an ethical or moral obligation to do as much as they can to assist in such a situation.

Nurses should be mindful that in acting beneficently they do not become paternalistic in their approach to care and treatment; that is, the attitude that ‘the nurse knows best’. In most cases, the patient’s autonomy will supersede what the nurse might think is best. Therefore, it is vital for the nurse to listen to patients and be respectful of their choices, even if those choices could lead to a deterioration in their health.

**Duty to warn patients of potential risks**

One aspect of a nurse’s duty of care is to inform patients of risks associated with treatment, and to warn patients that not following recommended treatment may have a detrimental effect on their health. Such duties to warn have been established in case law; in the case of Canterbury v Spence [1972], the court stated that there is an onus on practitioners to disclose material risks to a patient. In the case of Sidaway v Bethlem Royal Hospital Governors [1985], it was determined that if the percentage of the risk was significantly low, the doctor did not have to disclose the risk to the patient. However, in the Supreme Court
judgement made in the case of Montgomery v Lanarkshire [2015], percentages of risk were dispensed with: ‘The doctor is… under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances, of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.’

Determining the appropriate standard of care
If a patient accuses a nurse of breaching their duty of care, and the patient experienced harm as a consequence of that breach, the law will examine the standard of care expected of the nurse to decide, on the balance of probabilities, if the nurse breached their duty of care to the patient, and if the harm experienced by the patient can be directly attributed to the nurse’s actions or omissions.

In the UK, what would be determined as the appropriate standard of care was first decided in the case of Bolam v Friern Hospital Management Committee [1957]. In this case, a patient underwent electroconvulsive therapy but was not given any muscle relaxant drugs or any form of restraint during the procedure. Consequently, he experienced several injuries, including fractures of the acetabula. However, expert witnesses considered it to be standard medical practice not to restrain or provide muscle relaxants and not to warn the patient of the potential risk of harm associated with electroconvulsive therapy. Therefore, Bolam lost the case.

The case set a precedent in determining the appropriate standard of care and treatment expected. Although the case involved medical practitioners, this has been extended to all healthcare professionals, including nurses. Thus, as long as a responsible body of opinion in the nursing profession (expert witnesses, who are usually experienced practitioners in the profession) agree with the actions taken or not taken by the nurse, they would not be held as negligent.

For example, a nurse administers an intramuscular injection after undertaking standard checks. However, the patient experiences a severe reaction unforeseen by the nurse. If the action taken by the nurse was considered to have met the appropriate standard by a responsible body of opinion in the nursing profession, it is to be expected that the nurse would not be held as negligent by a court. However, if the nurse had decided to use a non-sterile needle, it is unlikely that a responsible body of opinion in the nursing profession would support the decision of the nurse, and should harm be experienced by the patient as a consequence of the procedure, the nurse would likely be held as negligent by a court. Using a non-sterile needle without a sound rationale would also be regarded as misconduct by a professional or employment hearing, for example by the NMC, even in the absence of any physical or psychological harm to the patient, because the potential for harm is present.

The ruling in the Bolam case was controversial, because it was the medical profession setting the appropriate standard of care, and it enabled clinical negligence judgements from the courts to habitually operate in favour of healthcare professionals (Young 2009). In the case of Bolitho v City and Hackney Health Authority [1997], the courts sought to address some of the anomalies that arose as a consequence of the Bolam case, and to regain responsibility as the arbiter of patient rights.

In the Bolitho case, a child with severe breathing complications had a cardiac arrest following a doctor’s failed attendance because their bleeper did not work as result of a low battery. The issue before the court was whether the doctor was negligent because the child was not intubated. The doctor claimed that even if she had attended to the child she would not have intubated them. Another doctor testified that they would not have intubated the child. Although in this case the doctor was held not to be negligent,
the House of Lords decided in effect that, if the responsible body of opinion in the medical profession was not demonstrably reasonable and respectable or not capable of withstanding logical analysis, it would not necessarily constitute an acceptable defence. Thus, while the Bolam case is still used as a defence, cases such as Bolitho have modified its effect.

The Bolitho case also examined causation. For example, whether a nurse would be held negligent for harm if their failure to attend to a patient were proven. To prove negligence, it would depend on whether the nurse's attendance to the patient would have altered the outcome. If the patient would have died or experienced harm despite the nurse's attendance, it would be challenging – if not impossible – for the plaintiff to succeed in their action.

In the case of Barnett v Chelsea & Kensington Hospital Management Committee [1969] 1 QB 428, three night watchmen had been poisoned by arsenic, unknown at the time to the men, and had presented to the local emergency department with profuse vomiting. The nurse called for the duty doctor to see the men, but he told her to send them home and for the men to see their GP in the morning. One of the men subsequently died. However, the doctor was held not to be negligent because even if he had attended to the patient he would not have been able to prevent the man’s death. Consequently, because a causational link between the practitioner’s actions or omissions and the harm that occurred must be found, it is often challenging for patients to prove negligence as a result of a nurse’s breach in their duty of care to them. Nevertheless, the nurse should be mindful that even if a causational link cannot be established, the NMC can still find that the nurse has demonstrated misconduct in their practice, and that their practice is currently impaired.

**Conclusion**

All nurses owe a legal duty of care to their patients and have a higher duty of care than someone who has limited or no medical knowledge. If nurses fail in their duty of care, and harm is experienced as a result, it is right that patients can expect redress for that harm. However, the law can only hold nurses responsible for actions and omissions that are themselves reasonably foreseeable. Furthermore, nurses generally have no legal duty to provide assistance in incidents they encounter when they are off duty. Nonetheless, in such situations, there are professional and ethical duties that nurses need to consider, and many nurses feel personally and professionally obliged to assist if they encounter an emergency situation or serious incident. How much assistance the nurse provides will depend on several considerations, with safety to themselves and others being paramount. Any assistance that the nurse offers must meet the appropriate standard expected of them as a nurse.

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- Donoghue v Stevenson (1932) AC 562.
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