Understanding Duty of Care

People who require paid supports have a right to expect highest quality support. All people who provide support services to people with disability and/or employ support staff have an obligation to ensure that they do what is reasonable to minimise the risks to those people’s rights and to ensure that they do what is reasonable to uphold their rights to safety and well being. In self-direction, it is important for you to understand Duty of Care in relation to what you can expect from Employees and Contractors as well as the duty you have to the people you engage.

Definition - Duty of Care

Duty of Care is part of the larger legal concept of negligence. It is part of Common Law and is largely determined by factors such as legal precedents and the court’s interpretation of prevailing community expectations and attitudes.

Having a Duty of Care simply means being in a position where someone else is likely to be affected by what you do or do not do, and where, if you are not careful, it is reasonably predictable or “foreseeable” that the other person might suffer some harm. In other words “doing what is reasonable to avoid what is foreseeable to avoid harm or injury to others” (Parsons, p5). When a person supports another person with disability it involves a Duty of Care.

Duty of Care - Principles of Support (from Duty of Care, Quality Lives & Dignity of Risk Workshop presented by Sharon Burke)

The law of negligence involves:

Duty of Care exists: A responsibility to be careful where injury or harm is foreseeable

Standard of Care: What would be expected of a reasonable person in your shoes?

Breach of Duty of Care: Failing to do what is reasonable or doing something that is unreasonable

Harm, loss or injury: Physical harm, economic loss, or psychological trauma that is directly attributable to the breach of Duty of Care

Avoiding Injury involves:

- Determining when injury is foreseeable
- Taking account of the seriousness of the potential injury
- Assessing risk from the person’s perspective
- Recognising some risks are reasonable
- Not actively harming the person
- Avoiding discrimination and overly restrictive options
- Avoiding compromises to the rights of others
- Noticing risks the person alerts you to
- Recognising when people are at risk of others
- Supporting people to confront risks safely
- Safeguarding others from injury
- Maintaining confidentiality

**Where is the harm?**

Harm can be defined as injury or damage and includes physical, emotional, financial or psychological loss.

**Examples of harm include:**

- Breach of trust
- Emotional trauma
- Fear of incompetence (other staff)
- Distress
- Embarrassment
- Long term damage to reputations or standing in the community, their value as a citizen, in the eyes of others

Support staff can reasonably be expected to be able to identify risks and problem-solve possible courses of action to minimise harm. It is useful for staff to explore possible harm from the perspective of the person with disability / the person they support.

**Duty of Care and Informed Decision Making**

The law assumes that all adults are competent to make informed decisions unless they have been found, through due legal process, to be unable to do so (Villamanta Legal Service 1996).

Competence to make decisions is not necessarily linked to the level of disability. Duty of Care dilemmas often arise for staff who have doubts about the capacity of the person to make his or her own decisions.

Community Standard dictates that support staff be aware of the limitations of their role. It is not within their role to act as substituted decision makers unless appointed to do so through due legal processes. A significant role of support staff is to provide relevant, useable, accessible information to enable the person to make informed
decisions about as many aspects of their life as possible. Support staff need to be looking for opportunities for the person to grow their competence. The law assumes that we all grow in competence and capacity as we mature. This applies to children and adults.

Empowerment

Workers may consider the following questions when considering how they provide support:

- What am I doing to make it possible for this person to have more control over her or his life in the long term?
- What am I doing to expand this person's experiences?
- What am I doing to expand this person’s relationships so that they are not relying on me alone for the realisation of all their rights?
- What am I doing to ensure that they have more control and power within their relationship with me?
- Am I making adequate use of opportunities to expand this person's experiences and relationships in order to better resource them to make their own decisions?
- Why am I making this decision?
- Is this my role?
- Is there a part of this decision that should be made by someone else?

Duty of Care Procedures

Under the requirements of the Workplace Health and Safety legislation, all employers have a Duty of Care to ensure staff are not exposed to hazards while they are working and therefore, you must assess risks and implement and review control measures to prevent or minimise exposure to the risks. For more information follow link.

You can achieve this by providing general information to staff during induction and through ongoing training.

- Provide information during induction to ensure staff are aware of any precautions to take whenever hazards cannot be avoided.
- Undertake regular self assessment of the risks in the working environments within your home or while being supported in the community and consult with support staff during this process.

The legislation also recognises that employees have certain rights and responsibilities with regard to health and safety in their workplaces. These include:

- Being informed of any potential hazards, provided this does not breach people’s right to confidentiality
- Noticing and reporting risks in a respectful way
• Working with the person and their family to problem solve around the setting up of safe practices in the areas of the home that are a workplace
• Being represented on matters relating to health and safety
• Discontinuing work if they have reason to believe that they are or would be exposed to risk of imminent and serious injury and illness

What is ‘reasonable’ standard of care?

Standard of care is based on community expectations e.g. “what a reasonable person would do in my shoes”. Duty of Care is part of Common Law or Court made law and as such, the standards are reflective of community attitudes as determined by precedents. As such the standard will change as community standards changes.

In areas where a person is relying on a staff member, the staff member needs to reflect on their own practice, identify risks and respond according to ‘what would a reasonable person in my shoes be expected to do?’ An example of this would be where staff are required to give medication. A reasonable practice would be to take care, read instructions, understand what the medication is administered for and to follow instructions written on the packaging by a relevant registered medical practitioner or pharmacist. By following reasonable practice, the staff member would therefore not be actively harming the person.

In the instance of safeguarding others from injury, it would be unreasonable, for example, not to inform a new staff member that if the person is in pain, the person is likely to strike out. It is reasonable that if we ensure the person is supported appropriately then others will have little or no risk.

When working with a person, staff have a significant responsibility to know that person well, to know their needs, to understand their preferences, dislikes and how they respond to their world. This will also require staff to understand how their own actions and communication might affect that person.

Effective support means that staff will have a deep understanding and knowledge of what is important to the person and that they will avoid any action or communication that will cause injury or harm, e.g.

• Not continuing to act in a way that is against the person’s wishes and needs
• Not ignoring instructions or preferences that have been voiced or signalled or written
• Taking action if the person indicates that they have been assaulted or harmed

It is foreseeable that a person will suffer harm if their needs and wishes are not met.

It is foreseeable that a person will become frustrated if they are ignored.
It is reasonable that, if you are alerted or informed of possible harm or injury, medical attention be sought.

**Breach of Duty of Care**

A breach of Duty of Care is a failure to meet the relevant standard of care; that is, when staff either do something they should not have done, or, when they fail to do something they should have done.

This does not mean that mistakes are a breach of Duty of Care. This will depend on the reasonable and foreseeable test. If at any time, a staff member is unsure of their Duty of Care in a particular situation, they should contact the person directing support.

As well, under the legislation employees must:

- Take reasonable care to protect their own health and safety and the safety of others. This requirement will normally be satisfied by knowing the person, identifying risks and using reasonable problem solving skills to establish practices that also safeguard the person they support.
- Co-operate with the person receiving support and/or the person directing support to ensure that the workplace is safe and report any situation at the workplace that could constitute a hazard.
- Follow the instruction and training provided by the person directing support, use personal protective equipment and not interfere with any procedures / processes or practices set up in the interests of health and safety.

**Injury to Person being supported**

The following procedures could be adopted if a person being supported is injured or has an accident while in care of a staff member:

- Attempt immediate first aid in line with their level of training, in the event of an injury to an individual in their care.
- Contact emergency services if necessary and stay with the person, and try to keep them calm until help arrives.
- Follow any procedures established by the person receiving support and/or their family / friends.
- Accompany the person at all times should the person require medical attention either at a hospital or by a doctor

Document any injuries using an Injury Report form