



Villamanta Disability  
Rights Legal Service Inc.

# Villamanta Disability Rights Legal Service Inc.

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## Duty of Care and Negligence

### What is Negligence?

Negligence is when someone who owes you a duty of care, has failed to act according to a reasonable standard of care and this has caused you injury.

### What is Duty of Care?

The law says that if it is *reasonably foreseeable* that you might suffer some sort of harm or loss because of something someone else does, then that person owes you a *duty of care*. This duty of care is a reasonably complex legal issue, but basically means that someone must act with a reasonable *standard of care*. If this person does not follow their standard of care, and you suffer harm or loss as a result, then they have been *negligent*.

For example, it is reasonably foreseeable that if the carer of a person with a disability did not act in the correct way, that the person with a disability might suffer harm or loss. Therefore this carer would owe a duty of care not to injure the person with a disability.

If somebody owes you a duty of care, this duty of care only applies in areas where you rely on them. For example, a doctor would owe you a duty of care to make sure that they give you proper medical attention, but would not owe you a duty of care in other areas like taking care of your finances.

You cannot take legal action against someone for being negligent unless you suffer some harm or loss as a result.

### What is standard of care?

The standard of care is the way in which a person should act to make sure that they do not breach their duty of care. The things that need to be done to meet this standard of care are different in every situation, but there are a few guidelines which must always be followed.

A person must act as a *reasonable person* of the same skills would in the same situation. For example, a carer would need to follow the actions of a 'reasonable carer' in any duty of care situation. This also means that less would be expected of an untrained family member when caring for a person with a disability than of a trained professional carer, because the carer has special skills which they are expected to use.

Exactly what this reasonable person would have done is something which the court decides. When looking at what the reasonable person would have done, the court will look at certain things, including:

- The risk of harm occurring
- The possible seriousness of that harm
- The burden (difficulty) of removing or

### IMPORTANT NOTE!

Remember - this Information Sheet has been produced only for use in **Victoria, Australia**. Some of the laws mentioned in this Information

- reducing the risk
- The 'usefulness' of the activity

This means that if there is a big chance that someone could be seriously injured, then the reasonable person would certainly do something to remove or reduce this risk to meet their standard of care. On the other hand, if there is a small chance that someone might receive a minor injury, the reasonable person might do nothing at all, and this would be acceptable.

The amount of effort which should be spent by someone to satisfy their standard of care to you depends on how close your relationship is. The more involved someone is with you, the more effort they must spend to satisfy their standard of care.

It is also important to consider the usefulness of an activity. For example, if a person with a disability wanted to go horse riding, there would always be a risk that they might be injured. This risk could be eliminated by not letting that person go, however this would not necessarily be good, as this activity would benefit that person. Therefore as long as precautions were taken to minimise the risk (e.g. wearing a helmet, being with an instructor etc.) in some situations it might be acceptable to allow the person with a disability to take part in this activity even though a risk still remains.

### **What can I do if someone who owes me a duty of care is not being careful?**

You can point out to them that you don't believe that they are doing the right thing, and that if something goes wrong as a result of this, you could sue them for negligence.

If you don't feel that you want to talk with them directly, the agency they work for might have a complaints procedure which you can follow. Or you might like to talk with an advocacy group, a Community Legal Centre or Villamanta about what your options are.

### **If I do suffer some harm or loss as a result of someone else's carelessness, what can I do about it?**

You can sue the person for negligence and try to get some compensation for the harm or loss that you have suffered.

It is important to know that, sometimes even if you are injured, the court might say that nobody was legally at fault for this because they did everything needed to satisfy their standard of care.

If you are injured by someone else's mistake, the court might sometimes find that this mistake was reasonable and that they did not breach their standard of care. People do make mistakes, and these are allowed so long as they are reasonable mistakes.

Because these things can be complicated, it is very important you get a lawyer to help you if you are considering whether to sue someone for negligence.

### **What would I have to prove to win a negligence case in court?**

You would have to show three things:

- That the person owed you a duty of care;
- That the person did something or failed to do something that a reasonable person in the same circumstances wouldn't have done;
- That you suffered some harm or loss because of what the person did or didn't do.

If you are considering suing for personal injury, you may need to have your injury assessed by a doctor before issuing any proceedings to establish what level of impairment your injury has resulted in. You cannot get compensation for any injuries unless you have a certain level of impairment – this is something which only a doctor can decide.

### **Are these things difficult to prove in court?**

Sometimes they can be. Often the most difficult thing to show is what would be considered reasonable in the circumstances. People can have very different ideas about what is reasonable, and if you are suing someone for negligence, they will often try to argue that the things which they did were, in the circumstances, reasonable.

They may also try to prove that you also contributed to the harm and loss you suffered because of something you did or didn't do.

### **How does the court decide who is right?**

In trying to decide who is right and who is wrong on these sorts of issues, the court will take a range of things into account, such as:

- Decisions that other courts have made on the same sorts of issues
- Professional standards that might apply in the situation
- Legislation (laws made by the government) that might give an indication of what is expected in the circumstances

The court's view of what the ordinary person in the community is likely to think about what is reasonable in the circumstances.

Clearly, all of these things are open to interpretation and if you are suing someone for negligence, these things will need to be argued as strongly as possible. This is one reason why it is important to get legal advice if you are thinking about suing someone for negligence.

### **When someone owes me a duty of care, does this mean that they can stop me from doing anything which they think is dangerous?**

In most cases, no. Unless you have a guardian, you can make your own decisions about what you do and don't do. If someone owes you a duty of care, they are supposed to do whatever is reasonable to stop you from being injured or harmed, but this does not mean that they are allowed to take away your normal human rights and freedoms.

If you are doing something that involves some danger, it will generally be the responsibility of whoever owes you a duty of care to point out the dangers to you, and to show you ways of doing the things you want to do in a way that does not involve unreasonable danger. But if, when you know about the risks involved, you still choose to go ahead with those risks, no one can really stop you without legal authority to do so. Having a duty of care is not in itself enough to give a person legal authority to stop you from doing the things that you want to do. People cannot break the law to fulfil their duty of care.

If you engaged in conduct that increased your risk of suffering loss or harm, and it can be demonstrated that a reasonable person may not have engaged in that conduct, then this may ultimately affect your rights to receive compensation for any loss or harm you suffer. For example, if you were travelling in a car without wearing your seatbelt, you would probably get less compensation if you were injured in an accident. This is because your injuries would have been partly your fault because you did not wear your seatbelt.

## **When might someone have legal authority to stop me from doing something that I want to do, but which is dangerous?**

A person could have legal authority to stop you from doing something dangerous if:

- They are your legal guardian, and the guardianship order gives them the power to stop you; or
- If they are administering restraint, seclusion or aversive therapy within the limits set down in the *Intellectually Disabled Persons' Services Act* (Until 31<sup>st</sup> June 2007. On 1<sup>st</sup> July 2007 this law will be replaced by the *Disability Act 2006*); or
- If they are administering involuntary treatment, or are detaining you against your will, within the limits set down in the Mental Health Act; or
- It is an emergency, and they are using reasonable force, no more than is necessary in the circumstances, to remove an immediate danger.

## **What can I do if someone is using duty of care as an excuse for stopping me from doing the things that I want to do?**

You can point out to them that the law does not allow them to do this. If you don't feel comfortable in doing this, or if it doesn't get you anywhere, then you might prefer to follow the grievance procedure, if one exists in the agency that is supporting you. Or, you might be able to take legal action, because they may be committing some form of assault or false imprisonment against you. It's advisable to get legal advice if you think that this might be happening.

## **But what if a carer thinks that I cannot understand the dangers facing me?**

This decision is not really for the carer to make. The law says that you can make your own decisions, unless the Guardianship and Administration Board or a Court has said that you are unable to make those decisions for yourself. If a carer thinks that you cannot understand the risks and dangers of a particular situation, it is their responsibility to try to help you understand those risks, and to minimise those dangers, in a way that does not involve taking away your normal rights and freedoms. If this can't be done, it may be advisable for the matter to go the Guardianship and Administration Board so the Board can decide whether or not you can make your own decisions about taking risks.

## **Do I owe a duty of care to anyone?**

Yes. If your actions are reasonably likely to affect someone else, then you owe them a duty of care. This means that you have to take reasonable care to ensure that those people are not harmed or injured as a result of the things you do.

## **Does the service or carer have a responsibility to help me to meet my duty of care to others?**

Yes, if it is reasonable for this to be part of the support you should be getting. Sometimes it will be reasonable for you to take full responsibility for yourself. At other times the service will share some of the responsibility with you. For example, the service might have a responsibility to show you how to use a new piece of equipment, such as an electric wheelchair, in a way that does not injure others. You will still have a duty to use the chair carefully, but the service has a duty to help you learn how to do this.

## **How does the service balance the duty of care it owes me with my rights or the rights of others?**

This varies from one situation to another. In balancing its various responsibilities, the service should take into account the following:

- The different degrees to which different people are relying on the service. If you use a service, it will have a higher standard of care to you than to others outside the service or to those who rely less on the service than you do;

- The degree to which you are able to understand the risk involved and are able to accept responsibility for that risk yourself;
- How likely harm or injury will occur if a particular course of action is chosen;
- The severity of the harm or injury likely to occur;
- What would happen in similar circumstances if you didn't have a disability;
- Does the fact that you have a disability affect the risk associated with a particular course of action;
- What legal or human rights are breached if a particular course of action is chosen;
- How important are these rights relative to the risk of harm to you.

Sometimes there is no clear answer about what is the reasonable standard of care in a particular situation. In trying to balance its competing responsibilities, the service should always use commonsense, together with a basic respect for the legal and human rights of everyone to whom it owes a duty of care.

If your rights, or the rights of others are to be interfered with, service providers should ensure there is due process. You should be involved in any decision which affects you personally. Disability related legislation sets out appropriate ways for decisions which affect your rights to be independently reviewed. For example the Intellectual Disability Review Panel, or the Mental Health Review Board can review decisions about people. You can ask the Panel or Review Board to review any decision you are unhappy with. After 1<sup>st</sup> July 2007, when the *Disability Act 2006* comes into effect, the Panel will no longer exist. Instead, you will be able to make a complaint about a decision to the Disability Services Commissioner or ask the Victorian Civil and Administrative Tribunal (VCAT) to review some decisions.

### **What happens if the only way a service can ensure my safety is by restricting my freedoms?**

This is a problem for the service to work out. No one is allowed to break the law for the sake of their duty of care. Services have a responsibility to find solutions to these problems - solutions that are within the law. Often services break the law because they do not have enough resources to ensure people's safety in lawful ways. But they would also be breaking the law if they did not ensure people's safety. You are entitled to expect that services ensure your safety in ways that do not break the law.

### **What are some of the more common ways in which services try to ensure people's safety, using unlawful methods?**

These include such things as:

- Locking doors to stop people from wandering out
- Giving people too much medication, so they are always sedated
- Punishing people by not letting them have access to their own money or property or threatening to evict people if they do not 'behave'.

All of these are unlawful, and services have a responsibility to find other ways of ensuring people's safety - ways which do not involve an infringement of your human and legal rights.

If you believe a service is being unlawful in the way it is treating you or someone else, or you believe it is failing in its standard of care, contact:

- Villamanta Disability Rights Legal Service Inc. 1800 014 111
- Office of the Public Advocate (03) 9603 9500 or 1300 309 337
- Disability Services Commissioner: 1800 677 342
- Disability Services Abuse & Neglect Hotline 1800 880 052