



**The Diversional Therapy Association of Australia
National Council Ltd.**

**Guidelines to Duty of Care
For
Diversional Therapists**

January 2002

Position Statement of DTAA-National Council

The Diversional Therapy Association of Australia National Council Ltd (DTAA-National Council) upholds the legal principle of duty of care. DTAA-National Council is also accountable to the objects of the memorandum and articles of association (1994) to promote, and advance the profession of diversional therapy in Australia.

The DTAA-National Council recognizes that there is a requirement to assist Diversional Therapists and Recreation Activity Coordinators in understanding their responsibilities with respect to *duty of care* as it relates to the application of their professional duties in the following ways:

1. by maintaining relevant legislative and legal knowledge of what constitutes a duty of care for diversional therapists;
2. by disseminating this knowledge to members of the affiliated State Associations through elected State delegates;
3. to work towards the establishment of benchmarks for best practice in diversional therapy;
4. to monitor diversional therapy professional practice;

DTAA-National Council recommends the information compiled in this document needs to be read in conjunction with; the relevant Federal and State legislation and; workplace policies and procedures for the provision of health and community services in the context of delivering leisure and recreation services.

The DTAA-National Council distributes the enclosed information for use by diversional therapists as a guideline to assist members of the affiliated State Associations in their understanding of the concept of duty of care as it relates to planning and implementing leisure and recreation activity programs.

Preamble to the Guidelines

As health care professionals, diversional therapists have an obligation to meet the legal and statutory requirement of their work place and duty to their neighbour (Williams, G: 1980). There is an obligation placed upon all health care service professionals to provide an appropriate standard of care in a variety of residential and community settings. As part of the multidisciplinary team of health care professionals in these settings awareness of diversional therapists as facilitators of leisure and recreation activities is growing nationally (The Diversional Therapy Association of Australia National Council Ltd: 2000), and the obligation to provide quality activities then places considerable expectation upon all diversional therapists to be aware of their *duty of care* in the delivery of leisure and recreation services. (Bennett, B: 1997, Langslow, A: 2001, Wallace, M: 1995)

In the context of the variety of settings and sectors of the health services industry, diversional therapists will experience particular challenges when providing services for a diverse range of people; some of whom our most vulnerable citizens. Recipients of health services have the entitlement to have their individual needs in ways which are valued by them, in the most supportive, least restrictive manner (Wolfensberger, W: 1992). Because diversional therapists work with health consumers who experience barriers to participation in leisure and recreation activities they need to work in partnership with their clients to support and enhance choice, decision-making and autonomy (O'Brien, P., & Murray, R: 1997).

Client centered activity programs that provide positive challenges and outcomes will often incorporate a degree of relative risk. In fact it may well be the degree of risk involved, which is the motivator in choosing to participate in an activity. In this regard participants are entitled to reasonable, safe care, and are also entitled to make choices and to take risks relative to their skills and abilities. In other words people are entitled to do what they really want to do despite, or because of the risks involved, unless there is objective evidence to suggest that they may not be competent to act in this way. (Burdekin, B: 1993, Commonwealth Department of Human

Services and Health: 1997, Declaration of human rights of disabled persons: 1975, National Information, Communication and Awareness Network:1999, Villamanta Legal Service: 1999b).

Leisure and recreation activities are therefore designed by therapists to enhance, maintain and support function and lifestyle throughout lifespan. Such activities will be conducted in environments, which are safe, while at the same time providing enough challenge and stimulation to motivate participation. In order for clients to experience the benefits of participating in leisure and recreation activities, acting with care requires that therapists provide; an assessment of goals and needs which involve the client in the process; access to timely appropriate information to maximise opportunities for informed choices; and planned positive outcomes. These key components become crucial to the delivery of an appropriate standard of care for all stakeholders. (Commonwealth Department of Health and Aged Care: 1998, Parsons, P: 1992, Queensland Advocacy Incorporated,:1994.)

The Law states that we must do what is reasonable to avoid harm to others. Planning and implementing programs will therefore need to take into consideration the probability or likelihood of actual injury, harm or loss occurring to individuals, or others influenced by actions, as consequence of engaging in activities considered risky. For diversional therapists this will mean doing what is *reasonable* to be “...helpful and constructive without being over protective ...” (Parsons, P: 1992) in providing the required standard of care. Planning activities would include a reasonable assessment of risks, which might be foreseeable, and strategies, which provide opportunities for clients to participate in activities of their choice without actual injury, harm or loss. (Bennett, B: 1997, Wallace, M: 1995.)

Guidelines to duty of care for diversional therapists

The concept of duty of care is derived from the common law principle of Negligence. The first consideration is to recognize and understand if duty of care exists and between which parties, then to identify whether actions and/or advice are reasonable, and whether injury, harm or loss is foreseeable or probable. (Parsons, P: 1992, Villamanta Legal Service: 1999c, Wallace: 1995).

Duty of care exists when someone's actions and conduct could reasonably be expected to affect other people. Duty of care is owed when agreements are given or contracts are entered into. Agreements or contracts do not need to be in writing (Villimanta Legal Service: 1999c). In the context of professional practice a therapist who says that they will conduct a particular action must apply reasonable effort to do so, if not to do so, would cause injury, harm or loss to the people involved.

To whom do we owe a duty of care?

- Clients
- Employers
- Third parties such as family, carers or others immediately influenced by our actions.

Clients of diversional therapists and third parties (such as family members or other members of a residence or community) will have a reasonable expectation that the professionals who are helping them will do what they say they will, that they are trained and competent to carry out their duties, and will take all reasonable care to avoid actual injury, harm or loss. It is also a reasonable for employers to expect their employees to be appropriately qualified and competent and to avoid negligent actions, which might cause injury, harm or loss. (Parsons: 1992, p 2. Wallace: 1995)

Diversional therapists owe the health consumer a duty of care to take reasonable action to protect each individual from harm, which may result from their health and/or medical condition. This means taking care that the information you give is correct, specific and impartial so a diversional therapist's action can be constructive and helpful without

being overprotective or custodial. (Parsons, 1995) Diversional therapists, therefore, have a duty to be careful and act towards their clients according to a reasonable standard of care considering the implication of the following four key issues:

- Were advice, or activities and actions **reasonable**?
- Could the therapist **foresee** injury, harm or loss occurring as a result of advice, activities or actions?
- Was injury, harm or loss **probable** if a person acts on advice, or engages in the activities or actions?
- Was **actual injury harm or loss** incurred as a result of the action in question to the person to whom the duty of care was owed?

(Parsons, 1992; Wallace, 1995)

Injury, harm or loss is quantified in physical, financial and emotional (psychological) terms. The extent of a claim of damages will be determined by a court and will be presented to the court by the person who has incurred the injury, harm or loss. Prevention of injury, harm or loss is always better than a cure but the legal system in Australia provides remedies for people who have experienced physical, financial or psychological injury, harm or loss.

Negligence is determined by the court and is said to have occurred;

- When someone has been caused injury, harm or loss,
- When a duty of care was owed
- If a reasonable standard of care failed to be delivered.

The court decides

- Firstly if a duty of care was owed
- If actions were or were not **reasonable**,
- And if the harm or loss in question was or was not **foreseeable** as result of actions in question.

(Wallace: 1995, Burke: 1979.)

The court will also decide as to whether injury, harm or loss, was incurred as the result of negligence and by whom. Standard of care is measured by industry standards and expectations. These standards are sometimes referred to as benchmarks and indicate the reasonable minimum requirements of an industry. In residential aged care, for example, the standards and guidelines which accompany the legislation

(The Aged Care Act 1997) are the accepted standards, which are monitored and improved upon through the accreditation process. Other health care service sectors including community care have legislation and associated standards and guidelines that cover each sector in each state of Australia. (Commonwealth of Australia: 1986, 1992, 1997, 1998, 1999.) Yeatman: 1992)

Standard of Care refers to the manner in which we carry out our professional duties. Many of the people who access the services diversional therapist provide have moderate to high support needs and as such have greater reliance on assistance so diversional therapists must be more “careful and thoughtful before they act” (Villimanta Legal Service: 2001.). Individual rights to participate in decision-making and to be treated fairly and with dignity do not cease simply because they are cared for in a group home or a residential care facility. Legislation acknowledges the rights and entitlements of individuals who are aged, frail or has a disability, and standards are developed in order to increase, support and maintain function and independence. (Commonwealth of Australia: 1997, Yeatman: 1992)

Assessing need and planning are of primary importance in delivering a standard of care appropriate to each individual care recipient. Well planned, safe work practice will support individual choices by doing what is reasonable to prevent actual harm or loss and safely confronting situations which may pose risk by providing all the information and resources necessary for the individual:

- To make an informed choices and participate in decision making,
- To plan well, in order to achieve a positive, worthwhile outcome,
- To participate in their chosen action with dignity,
- To understand and accept the responsibility for the outcomes of their actions,
- To enhance, maintain and support current knowledge, skill and capacity.

Diversional therapists owe a duty of care

- to point out the risks and dangers involved to them and or others,

- to ensure that recipients of this information understand the risks and dangers before they make a decision about a course of action.
- to provide reasonable alternatives.

Unless there is a good reason to think otherwise it is reasonable to assume individual health consumers are competent and capable to make their own decisions and to give consent. (Parsons: 1995)

Informed consent and capacity

Making choices means making informed choices. Exposure to relative risk and challenge may be entirely appropriate to some individuals as a fundamental part of their quality of life. The reality of what constitutes a positive leisure experience and its desired outcome occurs when the individual is the functional centre of their plan and individuals may exercise their rights only if they know about them. Accessing and understanding information so that individuals can participate in making decisions about their rights and entitlements needs may require the support of advocacy.

Informed consent relies of two principles:

1. The opportunity to make decisions.

This means an individual, or a person with legal authority (such as a legal guardian or someone with a power of attorney), has made a decision based on reasonable, relevant, reliable, and available information about an activity and its outcomes. Diversional therapist must consider whether the health consumers who have access to their services are provided opportunities to make decisions and whether these people actually make informed decisions. This will include work practice policies, procedures and planned strategies that encourage and enhance decision-making.

2. The capacity to give consent

The legal system has certain rules that apply to capacity of “human legal persons ... sometimes described as rules of status” (Derham, Mayer & Waller: 1979. p 81.) Age, marriage and the nature of a health and/or medical condition may influence an individual’s capacity according to these legal rules. As a legal concept, courts, tribunals or medical experts decide capacity.

Voluntary Assumption of Risk

Health workers stop people from doing what is dangerous or exposes them to risk, unless there are objective reasons to indicate that the person is unable to understand the danger to them or others and to take an appropriate decision. The duty of care of the diversional therapist is to ensure that when their clients give consent to treatments and activities they have done so with all the information and resources reasonably available to them. If this has occurred then an individual may voluntarily assume responsibility for the risk of harm or loss related to these treatments and activities. In other words they have consented and participated in an activity or action with the full understanding of all the risks involved and in doing so may have contributed to injury, harm or loss.

In a circumstance where a risk becomes injury despite all reasonable precautions a diversional therapist would conduct the necessary emergency or other appropriate procedures required to minimize the impact of injury harm or loss to himself or herself, to the individual and to other people influenced by the actions of the individual in their care. This may include other parties such as family/carers, colleagues, or onlookers in the immediate vicinity affected by the consequence of an action.

Safety of individuals including third parties

Where a duty of care exists diversional therapists have obligations not only their clients but also their clients carers or any person closely or directly affected by their actions or the actions of the client. Employers and the public at large are also included in the scope of duty and standard of care and are relative to the circumstances of the activity a client may wish to engage in and **reasonable** standards which apply.

Conclusion

For the most part diversional therapists are called upon to plan, implement and evaluate leisure and recreation experiences, which add to life quality and enjoyment. Maintaining objectivity can often be a professional issue when meeting and sustaining the high support needs of many clients and an awareness that you may not please all of the

people all of the time, however the diversional therapists obligation under the law is to show ordinary care and skill to avoid harm or loss and reasonably foresee the likelihood of harm or loss.

Health professionals need to develop a “much better understanding of the social and legal guidelines within which they are supposed to function” (Bennett, 1990) in the context of providing leisure and recreation activities and services. Responsible service providers will ensure that work practices are proactive through policies and procedures for service delivery which reflect:

- **Awareness** of the legislation and standards under which to provide service.
- **Education**, which keeps up to date with, changes which impact on the quality of care and common practice.
- **Consultation** with team members and allied health care professionals on policies, codes of ethics and protocols of both work place and professional associations,
- **Commitment** to a standard of work practice which supports and respects the rights and entitlements of colleagues and clients alike.
- **Well-planned** activities and programs.
- **Documentation** that ensures work practice is ‘transparent’ and accountable.
- **Evaluation** of programs outcomes and subsequent growth and change.

Using a commonsense approach to professional practice is often the cornerstone of building professional client/therapist relationship. If diversional therapists add commonsense to reasonable action in the interests of others, conduct which may result in liability for damages can be minimized or prevented.

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