

INTRODUCTION

No doubt you have heard or read about Personal injury litigation recently in the press. I have Been Told that N.S.W. is the litigation capital of Australia. In fact it was suggested that litigation was as prevalent in N.S.W. as it is in U.S.A. I am not sure how true that is, but throughout Australia personal injury litigation has become an emerging Money maker. Public Liability insurance has become exorbitant or impossible to obtain. In some professions professional indemnity insurance premiums have become an impost for practitioners.

It has not yet hit the Church and her ministries as the law generally exempted church and charity organisations from such actions on the grounds that they did not charge for their services. But I don't think it will be long before we see litigation against the church by people who feel wronged.

As chaplains, how then can we ensure that our actions are not used against us in litigation?

In any profession ethics and law must come hand in hand. Ethics is a code of conduct which regulates relationships between people. A breach of ethics is not necessarily always a breach of law, but in most cases it is. Two areas in which chaplains can held liable are *malpractice* and *negligence*.

Malpractice

"The failure to render proper service, through ignorance or negligence, resulting in injury or loss to the client." Corey, 1991.

Negligence

"Departing from usual practice where standards commonly accepted by the profession are not followed, and due care is not exercised." Corey, 1991.

ELEMENTS OF TORT OF NEGLIGENCE

There are three elements of major consideration relating to negligence:

1. Duty of Care
2. Breach of Duty of Care
3. Damages.

CASE STUDY

Nally vs Grace Community Church of the Valley, California, USA.

On April 1, 1979, 24 year old Kenneth Nally committed suicide by shooting himself in the head with a shotgun.

Ken had begun attending Grace Community Church of the Valley in 1974 while a student at UCLA. Coming from a Roman Catholic family there was friction between he and his parents

because of his involvement with evangelicalism. Compounding this was Ken's depression over the break-up with his girl-friend the previous year.

In 1975 Ken began seeing a psychologist to discuss problems he was having with his girlfriend. After his graduation from UCLA the following year he enrolled for one semester in Talbot Theological Seminary's extension campus at the Grace Community Church. During this time he became involved with another girl-friend, who was a fellow student at Talbot, and began a relationship that eventually broke up in 1978.

Early in 1978, Ken began a "discipling relationship" with one of the pastors at Grace Community Church, meeting with him five times before losing interest. Prior to the break-up of his relationship, these five meetings constituted the full extent of Ken's counselling relationship with the church.

Following the break-up with his girl-friend, Ken became increasingly despondent. In February 1979, Ken's mother arranged for him to see a Doctor Milestone, a general practitioner who prescribed Elavil to relieve his depression. Later the same month, Ken saw another physician who suggested that he undergo a full medical examination. Neither physician recommended a psychiatric assessment.

A short time later, Ken went to a drop-in counselling session with another of the pastors at Grace Community Church where he spoke briefly about the marital tensions between his parents, and the problems he was having with his new, current girl-friend.

The following month, Ken attempted suicide by taking an overdose of the Elavil that had been prescribed by Dr Milestone. His parents found him and took him to the hospital where a Dr Evelyn, attending physician, advised Ken's parents that she could not authorise his release from hospital without a psychiatric assessment because Ken was "suicidal". Four days later, staff psychiatrist Dr Hall examined Ken and arranged for him to be examined by Dr John Parker, a physician and church deacon. Parker's examination indicated that Ken was still suicidal, and he also recommended that Ken commit himself for psychiatric treatment. Once again Ken refused.

Dr Parker spoke with Ken's parents and offered to arrange for his involuntary commitment but the parents rejected the offer. A week before his suicide, Ken moved back home and, during this final week of his life was separately examined by two more physicians who agreed that he required further physical and psychiatric evaluation. Later that week, Ken saw a psychologist and a registered psychologist's assistant. A few days later he was found dead in a friend's apartment, the victim of a self-inflicted gunshot wound.

In the two month period prior to his death, records show that Ken consulted at least four physicians, one psychiatrist, one psychologist, one psychologist's assistant, and had several counselling sessions with pastors at the Grace Community Church. Ken's parents, Walter and Maria Nally, could have sued any of those whom their son consulted. They chose, however, Grace Community Church, alleging negligent counselling in that the church had committed certain "outrageous conduct" in teaching "certain Protestant religious doctrines that conflicted with Ken's Catholic upbringing". They further alleged that, following the first suicide attempt, the pastors of the church "actively and affirmatively dissuaded Ken from seeking further psychological and psychiatric care". Yet the records showed that the pastors encouraged Ken to keep his appointments with the physicians and counselling professionals.

Despite this, the case went through the California court system twice before the Supreme Court exonerated the church from any wrongdoing in November 1988. The case lasted for

over nine years with the church expending a fortune in legal fees to defend its right to engage in counselling ministry without fear of reprisal.

DUTY OF CARE

Duty of care is defined as a special relationship between chaplain and client to the extent that the chaplain has a responsibility to ensure the client's welfare and safety.

Courts have interpreted this to include the responsibility of preventing the client from harming self or others.

BREACH OF DUTY OF CARE

The standard for defining a breach of duty is based on what the "average prudent person" in the profession would do in similar circumstances.

Breach can occur in two ways:

1. Doing something the chaplain should not do.

This includes giving bad advice, sexual seduction, and psychological manipulation.

It is generally considered intentional in nature.

2. Not doing something the chaplain ought to do.

This is usually considered unintentional and includes not referring clients to more competent professionals, not warning third parties of immanent danger, not taking steps to prevent clients from harming themselves, and not referring to medical practitioners and psychiatrists those clients who need such treatment.

DAMAGES

Damage is the harm done to a person's physical or mental well-being, to one's pride or reputation, or to one's rights or privileges.

For an action to be successful the plaintiff must prove that the chaplain's breach of duty of care was the direct cause of the injury.

WHAT CONSTITUTES DUTY?

1. Respect for the Client

Regardless of whom the client is, and regardless of his/her behaviour, the client has come to the chaplain for help and deserves to be treated as a human being of worth.

In treating the client with "unconditional regard", the chaplain ensures that the client has a safe environment in which discuss his/her problems.

One of the responsibilities of chaplains is to help clients increase their feelings of self-worth.

Trying to impose one's own moral values or belief system onto the client may increase the client's feelings of worthlessness, thus damaging self-esteem rather than increasing it.

It may also lead to the client rejecting the chaplain and terminating the relationship.

If, on the other hand, the chaplain treats the client with respect and unconditional regard, regardless of values or beliefs, then the chaplain-client relationship will be enhanced and the chaplain will have a better chance of influencing the client.

At all times the client's interests take precedence over the chaplain's.

2. Confidentiality

Clients need a secure, safe environment in which to explore their problems and share their feelings and thoughts.

Clients need to know that they can be open with the chaplain and discuss intimate details that will go no further than the counselling room.

Realistically, however, it may be impossible to guarantee total confidentiality:

- It is necessary for chaplains to keep appropriate records of clients' interviews. Chaplains should use the best safeguards possible to ensure records are inaccessible to unauthorised persons.
- Professional supervision requires the discussion of a chaplain's cases. It is important that information that could identify the client be excluded from or disguised in the case study. The requirements of professional supervision demand that chaplains be free to discuss client material with their supervisors. This is essential if clients are to receive the best possible service. It is also necessary for the well-being of the chaplains themselves. Some chaplains openly tell their clients about supervision requirements, while others maintain secrecy about their own supervision in order to give their clients a fuller sense that counselling is in confidence.
- If the client is exhibiting self-destructive behaviour or making threats toward others the chaplain should consider carefully the ramifications of not breaking confidentiality.
- Clearly, chaplains have responsibilities not only to their clients, but also to the community. There may be instances where it is necessary to divulge information to protect a third party. Where there is doubt about the desirability of informing others the chaplain should consult with his/her supervisor.

This case from the USA emphasise the issue of protection of others:

In *TARASTOFF v. REGENTS*, 1976, the California Supreme Court ruled that the University had breached Duty of Care by not warning the intended victim. A client had told his campus (UC) psychologist that he intended to kill his former girlfriend. The psychologist told the supervising psychiatrist, who notified campus security, who interviewed and then let the client go. The client eventually killed his girlfriend, and her parents sued UC for not warning her.

The case was significant because it essentially ruled that confidentiality is limited in that psychologists have a duty to warn intended victims if it is reasonably clear who the intended victim is. There is no law that mandates a psychologist to warn. However, Tarastoff gave the psychologist permission to warn (i.e. set limits around confidentiality). A psychologist has the right not to warn, but if the client went through on his/her threat a malpractice suit could still ensue on the basis that the courts have upheld the opinion that a "reasonable person" in that position would have warned the intended victim.

In summing up the Tarastoff case Judge Tobriner stated: "When a doctor or psychotherapist, in the exercise of his professional skill and knowledge, determines, or should determine, that a warning is essential to avert danger arising from the medical or psychological condition of his patient, he incurs a legal obligation to give that warning....."

“We conclude that a doctor or psychotherapist treating a mentally ill patient, just as a doctor treating physical illness, bears a duty to use reasonable care to give threatened persons such warnings as are essential to avert foreseeable danger arising from his patient’s condition or treatment....

“We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield in instances in which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.”

Where the patient has communicated to the psychologist an explicit threat to kill or inflict serious bodily injury upon a reasonably identified person, and the patient has the apparent intent and ability to carry out the threat the counselor shall have “a duty to take reasonable precautions.” A counselor shall be deemed to have taken reasonable precautions if reasonable efforts are made to take one or more of the following actions:

- (a) communicates a threat of death or serious bodily injury to a reasonably identified person;
- (b) notifies an appropriate law enforcement agency in the vicinity where the patient or any potential victim resides;
- (c) arranges for the patient to be hospitalized voluntarily;
- (d) takes appropriate steps to initiate proceedings for involuntary hospitalization pursuant to law.

While these cases relate to health professionals are specific to USA law the similarities in Australian law are sufficient for chaplains to use them as precedents. There is currently debate over whether or not it is mandatory for a chaplain to report a case of child abuse to the authorities. Most chaplains deal with this issue when it arises, and according to their own principles and morals.

Chaplains will sometimes work as part of a team and in order to serve the client effectively it will be necessary to share information with other professionals in the team. Generally in these cases the chaplain informs the client that this will be done.

In cases where the law requires disclosure of information, or where a chaplain’s records have been subpoenaed, the chaplain very carefully needs to consider what the appropriate action is.

There are other cases in which similar rulings have been made. While these cases are from the USA there is much similarity with Australian law.

Breaching Confidentiality

In summary, breaching confidentiality should be considered only in these circumstances:

- ◆ 1 When client poses a danger to others or self
- ◆ 2 When an underage client is the victim of abuse
- ◆ 3 When the client needs hospitalisation
- ◆ 4 When the information is requested by court action

3. Responsibility of the Chaplain

Chaplains frequently experience a sense of conflict between their responsibilities to the client, to their employer or sponsoring body, to their family and to the community.

Generally the chaplain's responsibility to clients must take precedence. Clients come for help, and there is a contract, be it real or implied, to give that help. However, there are times when chaplains need to consider which of their responsibilities might take precedence over that of the client.

Clearly a client's needs cannot be adequately addressed if doing so would:

1. require the chaplain to work outside the policies of the employer or sponsoring body
2. involve a breach of the law
3. put members of the community at risk
4. put excessive personal demands on the client
5. be contrary to Biblical precepts and the chaplains ethics

It may be necessary in some situations for chaplains to clarify their own positions with clients in order to prevent themselves being caught up in an ethical dilemma. Some chaplains might inform their clients that they will not be party to certain confessions of criminal activity, or that they are bound to report such behaviour. Of course the danger here is that the client may feel pre-judged and be reluctant to speak honestly with the chaplain. There are ways to convince the perpetrators of such activities to report the matter themselves. The very fact that they are prepared to confess to the chaplain indicates conscience.

Chaplains should be aware of any mandatory reporting laws in the state in which they practice.

When such dilemmas and conflicts arise, the sensible approach for any chaplain is to talk it through with their professional supervisor.

4. Chaplain Competence

The key responsibility of chaplains is to ensure that they give the highest possible standard of service.

This cannot be done without adequate training and supervision.

Apart from any initial training, chaplains need to attend to their on-going professional development.

This is done through professional supervision, reading and seminars.

Supervision from a more experienced colleague keeps chaplains accountable, and enables them to improve their skills and knowledge.

It also allows chaplains to ensure that their own issues do not intrude into the counselling process to the detriment of both chaplain and client.

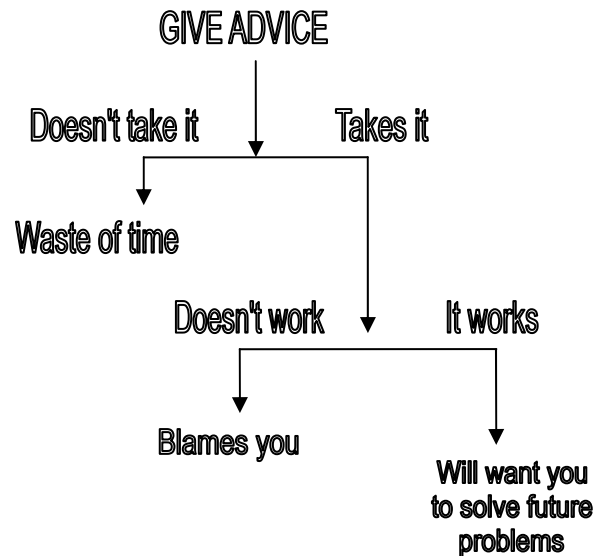
Chaplains also need to recognise their limits of competence and be open with clients in this regard.

It is clearly unethical for chaplains to give clients the impression that they are more qualified, experienced or competent than they are.

Clients come to chaplains for counselling, but chaplains who are not qualified as professional counsellors or therapists should make this clear to clients. In most cases the chaplain will have pastoral skills and this will be sufficient to help the client. But when it is evident that the chaplain's skills are insufficient to assist the client, the chaplain must refer to a more competent professional.

The Danger of Giving Advice

The following diagram illustrates why it is important not to give advice.



It feels great to know that you have given good advice. But your job is to help people take responsibility for themselves and learn to solve their own problems. There may be times, however, when you can offer options that the client is not aware of. But you must make it clear that the client makes the decision to follow an option, not you. When the client is unsure help them explore all the consequences of each option.

The one exception to this rule is in crisis intervention. When the client is in crisis they may not be in a position to make effective decisions, so you may need to take control and advise accordingly. Or you may have to take action yourself.

5. Referral

In summarising the above, when a client's needs cannot be adequately met by a chaplain, that chaplain has a responsibility to make an appropriate referral to another suitable professional. Such referral is usually made in consultation with the client.

6. Limits of Client-Counsellor Relationship

In all relationships we set limits. Each one of us has a boundary around us which preserves our identity as an individual. The nature and strength of that boundary depends on who the

relationship is with and the context of the relationship. The client-chaplain relationship is a special type of relationship.

Chaplains ostensibly seek to establish friendships with their clients, which takes a different form to the professional client-counsellor relationship. However, the chaplain may be working with highly emotional clients who are consequently very vulnerable. A client may see a chaplain as unrealistically caring and beautiful. This might be due to the counsellor's skills and ability to be empathetic. In any case, the chaplain's power and the client's biased perception combine to make the client very vulnerable.

It is all too easy for chaplains to become emotionally involved with clients and allow the boundaries of the client-chaplain relationship to be transgressed, or to transgress them themselves. Through appropriate supervision chaplains can ensure they will become aware of when the boundaries are being breached and determine the necessary action to restore the boundaries.

CONCLUSION

This paper has covered a number of important areas relating to ethics and legal issues in chaplaincy. We have really only scratched the surface of these issues, nevertheless they need to be understood by those who seek a ministry in chaplaincy.

Chaplains need to ensure that they have adequate training (not just Bible College) for the work they are doing. At times the practical skills will be more important than your Biblical knowledge.

Chaplains also need to have a definite calling of God to this ministry. If you are not called to this ministry it will kill you. Working with people is the most stressful work you will ever do.

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