

Coming to a person's aid when off duty

Everyone might, at times, be first on scene when someone needs assistance. Whether it's coming across a car accident, seeing someone collapse in the shops, the sporting field or the street or being in the vicinity when a night out leads to a trip and fall, or violence.

Everyone's exposed and that is the message behind why we should all learn first aid. But paramedics are in a different position – when they see someone in need of urgent medical care what those people need are the very skills the paramedics use in their daily working life. Doctors, nurses and other registered health professionals may have relevant background but, depending on their practice, it may have been a long time since they were involved in emergency work and a long time since they've had to act away from their clinical environment. For paramedics, assisting at the sudden emergency outside the hospital, is the essence of their profession, so what are the legal obligations?

A duty to treat

It is said that there is no duty to come to the aid of a stranger. A person can simply walk past another in distress without any legal obligation to assist, no matter how easy it would be to give that assistance. In the High Court of Australia, French CJ said 'there is no general duty to rescue' and, what is more, the 'common law of Australia has not recognised, and should not now recognise, such a general duty ...' (*Stuart v Kirkland-Veenstra* [2009] HCA 15, [88], [99]). This case involved police who observed Mr Veenstra apparently contemplating suicide. They knew he was at risk of death, just as a paramedic may recognise that a person may die without their assistance. Paramedics may know of the 'particular risk' to an injured or ill person but that doesn't give rise to an obligation to assist. As French CJ continued (at [116]):

No doubt it can be said that the police officers knew of the particular risk to Mr Veenstra. But considerations of the same kind will almost always be present when a passer-by observes a person in danger. The passer-by can see there is danger; the passer-by can almost always do something that would reduce the risk of harm. Yet there is no general duty to rescue.

Crennan and Kiefel JJ said (at [123], [127]):

The common law does not recognise a duty to rescue another person' and 'The common law generally does not impose a duty upon a person to take affirmative action to protect another from harm. Such an approach is regarded as fundamental to the common law ... The law draws a distinction between the creation of, or the material increase of, a risk of harm to another person and the failure to prevent something one has not brought about.'

This case involved 'on duty' police but even so there was no 'duty to rescue'. But health professionals may be in a different position. In *Woods v Lowins* (1995) 36 NSWLR 344; affirmed on appeal in *Lowins v Woods* (1996) AustTortsReps ¶81-376 (Kirby P and Cole JA; Mahoney JA dissenting) Badgery-Parker J said:

... circumstances may exist in which a medical practitioner comes under a duty of care, the content of which is a duty to treat a patient in need of emergency care, such as will give rise to a cause of action for damages for negligence in the event of a breach of that duty consisting in a failure to afford such treatment as is requisite and as is within the capacity of the individual practitioner to give... Whether in a particular case a medical practitioner comes under such a duty of care must depend upon ... the facts of the particular case...

That's a long way of saying that in the right circumstances a doctor may be under a duty to render assistance when asked to do so. The relevant circumstances in that case were that the doctor was at his place of work, ready to see patients but not yet engaged with any other patient and it was clear that the person in need of assistance was very close. Regardless of one's view of the judicial reasoning in that case (and see Michael Eburn, 'Doctors, the Duty to Rescue and the Ambulance Service', (1999) 10 *Current Therapeutics* 92-95) it can be seen that is not particularly applicable in the situation under discussion. In *Woods v Lowns*, Dr Lowns was at his surgery, ie at work, ready and able to see patients. He was not at home, or out with family, or drinking with friends or just having 'time off'. To the extent that *Woods v Lowns* is a relevant precedent it would suggest that a paramedic who is approached, whilst at work, and who is asked to assist is under a duty to do so even if there has been no triple zero call or 'official' dispatch. Such a conclusion should not be surprising or objectionable, but it is not the situation being discussed here.

The conclusion must be that, as a matter of law (but not ethics) there is no duty to treat a stranger where the paramedic did not cause the initial injury. If you simply observe a person who needs care, you can (legally) just walk past.

A duty of care

A duty of care will arise if you do stop to treat. The original statement that gave rise to the modern tort of negligence came from Lord Aitken in an English case, *Donoghue v Stevenson* [1932] AC 562. Lord Aitken said (at p 580):

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure ... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation ... when I am directing my mind to the acts or omissions which are called in question.

When rendering first aid, whether a paramedic or not, the person 'so closely and directly affected' by any actions or omissions is the person receiving care so there has to be a duty to take reasonable care in the first aid that is rendered. What is reasonable depends on all the circumstances, including the circumstances of the sudden emergency, the fact that the paramedic does not have the equipment he or she would use at work, and the fact that the paramedic is out and perhaps has competing obligations eg the need to care for their children or that they may have been enjoying a quiet drink (or three) before the incident occurs. The *Ipp Review of the Law of Negligence* (Commonwealth of Australia, 2002), [7.22] said:

... the fact that a person ... was acting in an emergency situation is relevant to deciding whether the person acted negligently.

It may be reasonable in an emergency situation to take a risk that it would not be reasonable to take if there was no emergency...

Equally, it may be appropriate in the circumstances to *not* do something because of the emergency nature of the situation. So a paramedic may well administer oxygen and drugs, monitor heart rhythm and do any other procedures if they were at work and in their ambulance, but it may be quite reasonable *not* to do those things in a sudden emergency where the paramedic is off duty.

Further, an off duty paramedic can't be expected to perform as if he or she had the equipment they would normally have when at work. It can't be a breach of care to fail to administer drugs or use equipment that you just don't have.

Even if the paramedic believes some procedure is warranted and they could perform it with the equipment at hand, they may choose not to if they would normally do the procedure as part of a team, with backup and the capacity for urgent transport to hospital. In the absence of that support, and perhaps with an 'on duty' crew only minutes away, it could be quite reasonable to refrain from acting.

What sets the paramedic apart from others, including other health professionals, may be that the emergency nature of the situation is not so new. To again quote from the Ipp Review ([7.23]):

The standard of care expected of the doctor would be set not only taking account of the emergency nature of the situation, but also of the fact that a doctor who has practised as a dermatologist for many years could not be expected to be as well-qualified and able to provide emergency treatment for a heart-attack victim as a cardiac surgeon or even, perhaps, an active general practitioner.

For a paramedic, out of hospital emergencies are not something new to them. For the dermatologist it may be understandable that he or she forgot something or their technique was not up to scratch. For a paramedic one might expect more nuanced decision making, ie it may be reasonable to do, or not do, something but one would not expect the paramedic to be overwhelmed by the novelty of the situation, or have an out of date skill set.

The answer of what is reasonable cannot be answered beyond the statement that 'what is reasonable depends on *all* the circumstances'.

Good Samaritan legislation

The *Ipp Review of the Law of Negligence* said (at [7.21]-[7.24]) that good Samaritan legislation was not required. The panel was:

... not aware ... of any Australian case in which a good Samaritan (a person who gives assistance in an emergency) has been sued by a person claiming that the actions of the good Samaritan were negligent. Nor are we aware of any insurance-related difficulties in this area...

The Panel's view is that because the emergency nature of the circumstances, and the skills of the good Samaritan, are currently taken into account in determining the

issue of negligence, it is unnecessary and, indeed, undesirable to go further and to exempt good Samaritans entirely from the possibility of being sued for negligence.

Even so, every Australian state and territory has passed 'good samaritan' legislation to provide legal protection for those that come forward to render assistance in an emergency. This legislation was not passed to resolve a legal issue, but a perception issue. If, as reported to the Panel, 'health-care professionals have long expressed a sense of anxiety about the possibility of legal liability for negligence arising from the giving of assistance in emergency situations' then it was seen as prudent to try to put their minds at rest.

Today, to use the ACT legislation as an example, the *Civil Law (Wrongs) Act 2002* (ACT) defines a 'good samaritan' (at s 5(4)) as:

... a person who, acting without expectation of payment or other consideration, comes to the aid of a person who is apparently—

- (i) injured or at risk of being injured; or
- (ii) in need of emergency medical assistance;

An off duty paramedic who comes forward to help will fall within this definition. The Act goes on to say (s 5(1)):

A good samaritan does not incur personal civil liability for an act done or omission made honestly and without recklessness in assisting, or giving advice about the assistance to be given to, a person who is apparently—

- (a) injured or at risk of being injured; or
- (b) in need of emergency medical assistance.

A paramedic 'does not incur personal civil liability for an act done or omission made' provided that the paramedic is genuinely seeking to assist and who thinks about what they are doing, or choosing not to do, and genuinely considers that their choices are in the best interests of the patient, even if it later turns out a different approach may have been better.

The problem with this Act is s 5(2)(b). It says that the 'good samaritan' protection is lost if 'the good samaritan's capacity to exercise appropriate care and skill was, at the relevant time, significantly impaired by a recreational drug'. What is a 'recreational drug' is not defined but one can infer that it includes alcohol as well as other drugs taken for non-therapeutic reasons.

The problem with this section is that it removes the protection when it is needed most. Imagine an off duty paramedic who has been out and consumed a 'recreational drug', such as alcohol. They observe that someone near them is in urgent need of care. It is at that point that the paramedic may consider that he or she has the skills and is the best person to assist but is also aware that given their consumption, they may not be as 'on their game' as they ideally should be. If they were sober, well rested and performing at their best they would enjoy good Samaritan protection, in circumstances when they are least likely to need it. Now that they have consumed alcohol (or any other drug) they are more likely to come across an accident or perhaps violence and that is when they need protection. They may

still be able to save a life but their judgment may not be as good as it might otherwise be. They're honestly trying to help but may not be performing at their normal level, but if "Any Attempt at Resuscitation is Better Than No Attempt" (Australian Resuscitation Council <http://resus.org.au/>) they should be encouraged to act. As it is even though they may be the patient's best hope, the off duty paramedic is actively discouraged from helping. It is as if the governments of every state and territory, other than Victoria (*Wrongs Act 1958* (Vic) s 31B) and *Queensland (Law Reform Act 1995* (Qld) s 16), believes people would rather die than be treated by a well-qualified person who may be affected by alcohol or some other drug.

This should not, however, put paramedics off. It must be remembered that even without this legislation people have not been sued for rendering assistance and in deciding whether conduct was, or was not, negligent all the circumstances must be considered, including the circumstances of the injury or illness and that the intoxicated paramedic may still have been the patient's best option and the only person able to act. Even so, s 5(2)(b) is bad policy.

Will professional registration make a difference?

It has been announced that paramedics will be brought under the National health professional registration scheme. There they will join medical practitioners, nurses and 12 other registered health professions (COAG Health Council, *Communique*, 7 October 2016 <<http://www.coaghealthcouncil.gov.au/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=0&moduleid=527&articleid=93&documentid=108>>). That may make a difference.

First it has been noted that the common law does not impose a duty to rescue. When registered there will be a Paramedics Board (or something similar) that will set professional practice standards for Paramedics. Failure to live up to the expectation of the profession may be 'unprofessional conduct' or 'professional misconduct' or 'unsatisfactory professional performance' (see the *Health Practitioner Regulation National Law* adopted into ACT law by the *Health Practitioner Regulation National Law (ACT) Act 2010* and equivalent law in each state and territory).

The Medical Board of Australia's *Good Medical Practice: A Code of Conduct for Doctors in Australia* (March 2014) says (at [2.5]):

Good medical practice involves offering assistance in an emergency that takes account of your own safety, your skills, the availability of other options and the impact on any other patients under your care; and continuing to provide that assistance until your services are no longer required.

In Western Australia, the State Administrative Tribunal had to consider the conduct of a doctor who failed to render assistance at a car accident. In *Medical Board of Australia v Dekker* [2013] WASAT 182 the Tribunal said (at [39]):

Because saving human life and healing sick and injured people is a core purpose and ethic of the medical profession, and because members of the profession have the knowledge and skills to do so, the failure by a medical practitioner to make an assessment and render assistance when he or she is aware that a motor vehicle accident has or may have occurred in their vicinity and that people have or may have

been injured, ... would...reasonably be regarded as improper by medical practitioners of good repute and competency...

On appeal, the Supreme Court of Western Australia set aside the finding that Dr Dekker had been guilty of 'improper conduct in a professional respect' finding that there was no general duty to render assistance.

Given the nature of the paramedic profession one can anticipate that there will be some reference in the future code of conduct to the need to render emergency assistance when a paramedic is aware that assistance is required and where, taking into account all of the circumstances, the paramedic is in a position to provide that assistance. Even finding that there is no general duty to assist (ie a duty to assist in all circumstances) does not deny that there could be a finding in the right *specific* circumstances that failure to assist 'would...reasonably be regarded as improper by [paramedic] practitioners of good repute and competency...'

Professional registration may therefore change the legal situation for paramedics. With registration there is likely to be an extra, professional obligation to assist where a paramedic is able to do so. Whether a failure to assist represents 'unsatisfactory professional performance' that is failure to demonstrate knowledge, or exercise professional skill and judgment in circumstances where their conduct 'is below the standard reasonably expected of a health practitioner of an equivalent level of training or experience' *Health Practitioner Regulation National Law (ACT) s 5*) would require an assessment of all the circumstances including the practitioners current mental state, the circumstances in which they became aware someone needed assistance and all other relevant circumstances. A 'callous' failure to provide assistance, that is a 'deliberate and conscious choice not to assist ... in circumstances where it would "offend common standards of respect, decency and kindness in the sense that a reasonable person would regard the accused's failure as callous" (*Salmon v Chute* (1994) 94 NTR 1, [17] cited in Michael Eburn, *Emergency Law* (4th ed, Federation Press, 2013) may well be subject to professional sanctions.

Paramedics in the Northern Territory

Those who practice paramedicine in, or travel to, the Northern Territory need to be aware of a unique provision that applies in that jurisdiction. The Criminal Code of the Northern Territory (s 155) says:

Any person who, being able to provide rescue, resuscitation, medical treatment, first aid or succour of any kind to a person urgently in need of it and whose life may be endangered if it is not provided, callously fails to do so is guilty of an offence and is liable to imprisonment for 7 years.

In the Northern Territory, failure to provide assistance in circumstances that could be described as 'callous' (see above) can also carry a criminal penalty of imprisonment.

Conclusion

The law is never straightforward nor is it easy to get a simple answer. What can be said is that for off-duty paramedics there is no general duty to render assistance to a stranger even where the paramedic is aware, perhaps uniquely aware, of the person's need as is capable

of providing that care. That situation may change with professional registration where failure to render assistance in those circumstances may amount to 'unsatisfactory professional performance'. Whether that is the case, or not, will depend on the Codes of Conduct that will no doubt be developed by the professional registration board that will, in due course, be established.

Where a paramedic does assist, he or she must act with honest regard to putting their patient's best interests first. This will involve choices about what to do, as well as what *not* to do. Whether conduct falls below the standard expected of a reasonable paramedic will require consideration of all the circumstances and the off-duty paramedic will not be expected to provide the treatment that would be provided when on duty, with a fully stocked ambulance and the backup of the ambulance and other emergency services.

An off-duty paramedic, who is not affected by a 'recreational drug', will also be able to take comfort from the good samaritan legislation in every state and territory.

Finally, a paramedic resident or travelling in the Northern Territory should be aware that in that jurisdiction it is a criminal offence to 'callously fail' to 'provide rescue, resuscitation, medical treatment, first aid or succour of any kind' where the paramedic is 'able' to provide that care and the person's 'life may be endangered if' that assistance is not provided.