

Supervision within the counselling professions in England, Northern Ireland and Wales

Good Practice in Action 032 Legal Resource

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Northern Ireland and Wales

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Context

This resource is one of a suite prepared by BACP to enable members to engage with the current BACP's *Ethical Framework for the Counselling Professions* (2018) in respect of supervision.

Purpose

The purpose of this resource is to provide information for supervisors, supervisees and organisations in respect of legal matters relating to supervision in England, Northern Ireland and Wales.

Using the legal resources

The *Ethical Framework for the Counselling Professions* (BACP, 2018) (the *Ethical Framework*) establishes a contractual commitment between BACP members and BACP. These legal resources are not contractually binding on members but support good practice by offering general information on principles and policy applicable at the time of publication.

The legal resources should not be used to constitute legal advice in specific cases, nor are they sufficient on their own to resolve legal issues arising in practice. As practice issues and dilemmas arising from work with clients are often complex, we strongly recommend consulting your supervisor, and also, wherever necessary, a suitably qualified practitioner or lawyer. Some professional insurers will provide legal advice as part of their service.

Specific issues in practice will vary depending on clients, particular models of working, the context of the work and the kind of therapeutic intervention provided.

Please be alert for any changes that may affect your practice, as organisations and agencies may change their practice and policies. References in this resource were up to date at the time of writing but there may be changes to the law, government departments, websites and web addresses, and it is important for you to keep informed of any changes that may affect your practice.

In this resource, the word 'therapist' is used to mean specifically counsellors and psychotherapists and 'therapy' to mean specifically counselling and psychotherapy.

The terms 'practitioner' and 'counselling related services' are used generically in a wider sense, to include the practice of counselling, psychotherapy, coaching and pastoral care.

Introduction

Supervision can vary widely in response to modality, requirements of professional organisations and the nature of the service provided. The respective duties of the supervisor and supervisee will also depend in part on their professional modality, their supervision contract and the requirements of the organisational setting within which they work. In some organisations, supervisors have both a managerial and a supervisory relationship with their supervisees, and where there is a management responsibility there is likely to be an additional employment or other work-based contractual relationship between them. In order to avoid a potential conflict of interests, the *Ethical Framework* provides that a substantial part or all of supervision should be independent of line management, (see Good Practice, point 61)

It follows that a wide range of law will apply to the role of supervision, the main areas of which relate to contract, tort (duty of care and negligence), insurance and employment. All these areas of law cannot be covered in detail here, but this resource highlights some of the areas to be considered when entering a supervisory relationship.

This resource will hopefully enable practitioners to think through dilemmas, spot any legal 'elephant traps' and recognise when we need to seek legal or other professional advice. It also includes a list of resources and contacts that may be helpful. If you know of more useful supervision resources, please do let the author or BACP know, and they can be considered for inclusion.

1 Supervision and contract law

1.1 Contracts

Contracts are legally enforceable agreements; these include contracts that regulate the provision of advice or services for an agreed price. Legally enforceable contracts embody a number of essential ingredients, which may be explicit or implied:

- an offer (e.g. to do or supply something)
- an acceptance of the offer (e.g. by making use of the offered services or paying for them), and
- an exchange (e.g. of money in return for goods or services).

A supervisor has a contract with their supervisees. Employees should have a written contract of employment with their employer. A counselling agency or organisation is legally liable to their clients for the service provided by their employee counsellor. This is based on the principle of vicarious liability. This principle has been extended by the courts to cover the work of volunteer counsellors, even though they are not formally employed.

Legal liability can therefore exist in law on the part of an organisation, including charities, for the actions of both their employees and their volunteers, so that their placement organisation may be liable for professional negligence, even if that counselling is provided to the client free of charge (see 2.2.). A placement that uses students as volunteer counsellors during their training therefore has a high level of responsibility to its clients for the standard of service provided, which it may share with the counsellor's supervisor and with the training organisation. Under the *Ethical Framework*, there is a shared ethical responsibility, and legal liability may also be shared as a duty of care to the client, (see Good Practice, point 66).

A supervisor will enter into a contract with the supervisee, and has an ethical responsibility to the supervisee, but will normally have no direct contractual relationship with the supervisee's client(s). When negotiating the supervisory relationship, it may be wise, therefore, to be clear with a supervisee the extent of the duty of care and the respective liability of both supervisor and the supervisee.

The supervisor owes a legal and ethical professional duty of care both to the supervisee and to the supervisee's clients and has a responsibility to provide competent professional oversight of the supervisee's practice for the benefit of the clients. This duty of care will exist, legally, both in the law of contract and under the law of tort (see section 2, *Tort and the duty of care in the context of supervision*). This duty of care may be shared in a multi-way contract, see 1.2.

1.2 Multi-way contracts

The term 'multi-way contracts' here means either a single contract that forms an agreement between several parties, all of whom are bound by the same terms; or a number of separate contracts, each contract containing terms that are compatible with those of the others.

Some examples of multi-way contracts might be:

- supervisor/therapist
- supervisor/therapist/employing agency or placement organisation
- supervisor/training organisation/practice placement/trainee.

Where there are multi-way contracts, the terms of each contract should be compatible – that is, they should not conflict with each other. For example, the agency policies of the therapist's employing organisation and the policies of the therapist's professional body should be reflected in the therapist's client agreements and the therapist's supervision contract.

To give an idea of how complex multi-way contracts can become, here is an example of the range of potential contractual relationships that may co-exist for a trainee counsellor in a practice placement who is also receiving external supervision... the supervisor may have a contract both with the training organisation and possibly also with the trainee's placement, as well as their contract with the trainee as a supervisee, see the *Ethical Framework*, Good Practice, point 66. The trainee will have contracts with their training organisation, their placement and with their clients, in addition to the contract with their supervisor. Both supervisor and trainee will have their own professional contracts with their respective professional organisation(s) (e.g. BACP), which will provide the ethical framework within which they will work together in supervision. All these contracts need to be compatible. For trainees, there is a specific requirement as to compatibility of contracts, (see the *Ethical Framework*, Good Practice, point 83d)

1.3 Contract terms

In order to create an effective and mutually acceptable contract, both parties must first reach a mutual understanding of the scope and terms of their relationship.

When contracting for supervision, therapists and supervisors need to consider ethical and professional issues, legal requirements, and any relevant agency policies and procedures. Where supervision is carried out alongside separate line management, the supervisee, supervisor and line manager(s) should discuss and agree their respective responsibilities for the service provided (see *Ethical Framework*, Good Practice, points 60-73).

The parties to a contract can exclude specific duties or liabilities, provided these are reasonable and in 'plain, intelligible language' (see Regulation 7(1) of the Unfair Terms in Consumer Contract Regulations 1999 (UTCCR 1999)).

However, some exclusion clauses are deemed in law to be unfair and so are disallowed (see the Unfair Contract Terms Act 1977 (UCTA 1977 and UTCCR 1999). An exemption clause must clearly cover specific eventualities if it is to be effective, and the burden of proving it falls on the person who seeks to rely on the exclusion.

Please note: Under the provisions of UCTA 1977, we, as therapists, cannot exclude our liability for negligence from therapeutic contracts, and neither can we exclude aspects of occupier's liability.

As this area of law is complex, should a therapist wish to try to exclude any part of their liability to a client, he or she is advised to take legal advice on the specific circumstances of the case. Professional insurers may also be able to assist with recommendations.

For further information in respect of supervision, see the Good Practice in Action Resources at <https://www.bacp.co.uk/events-and-resources/ethics-and-standards/good-practice-in-action/>

1.4 Breach of contract

When a contract is broken, the law allows a variety of remedies, including:

- **rescission:** giving and taking back on both sides to restore the situation as it was before the contract took place (examples include exchange, return of goods and refunds)
- **voiding the contract:** cancelling the whole contract
- **damages:** the legal term for a financial award to compensate for some sort of loss; may be awarded for negligence or breach of contract. In order to succeed in a claim for damages for breach of contract, the claimant needs to prove their case on a balance of probabilities (i.e. that it is more likely than not that the facts found in their case justify the claim they are making).

In the case of therapy, the most appropriate remedy for a breach of the terms of the therapy contract would usually be a simple cancellation of the contract and a refund of any fees paid in advance. If the therapist has broken the contract and is at fault, then a court might also award damages to the client by way of compensation. The law concerning damages for breach of contract has many complicated rules and the amount of any damages awarded depends upon the particular circumstances of each case. It is advisable to seek legal and/or financial advice in an action about breach of contract, because most cases are settled out of court and parties need to ensure that they settle for a fair sum.

1.5 Supervision contract – mutual responsibilities

The *Ethical Framework* provides good practice guidance on supervision (see Good Practice, points 60-73), which the parties may wish to be reflected in the supervision contract.

In addition to the usual contractual supervision terms applicable to our professions (e.g. those relating to frequency and duration of supervision sessions, fees, holidays, missed appointments, records, confidentiality, modalities, professional ethics and professional conduct procedures, etc.), the supervisory contract may (if the parties agree) refer to other more specific supervision practice elements, including:

- regular meetings (frequency and/or duration as recommended by BACP, minimum levels of which are specified for trainee and qualified counsellors (see <https://www.bacp.co.uk/membership/supervision/> for more information))

The levels above the minimum for qualified practitioners may vary according to the practitioner's level of practice and experience)

- space to consider the supervisee's professional issues
- duty to consider the impact of any possible conflicts of interest, in light of BACP's *Ethical Framework*
- space to consider the supervisee's personal issues if they impact on good practice (but not to include personal therapy)
- commitment to support the supervisee with appropriate advice when necessary
- commitment to bring awareness and discussion of the *Ethical Framework* into the supervised practice as required by BACP (see Good Practice, point 69).

The *Ethical Framework* (Good Practice, points 60-73) includes other guidance points which could be reflected in the contract:

- the duty of the supervisor to bring ethical or professional concerns to the attention of the supervisee
- Reciprocal duty of the supervisee to be open and honest in supervision about significant difficulties or challenges in their client work (Good Practice, point 72)
- duty to abide by BACP's *Ethical Framework* and to bring ethical or professional concerns to the attention of BACP if there is an ongoing serious risk to a client and no remedial action is being taken by the supervisee (Good Practice, point 11, and BACP's *Professional Conduct Procedure* 2018)
- agreement of supervisors and supervisees to review periodically how the responsibility for work with clients is working in practice and how any difficulties or concerns are being addressed (Good Practice, point 68)

- for trainees – in line with a training organisation's policies, the supervision contract may include a duty for the supervisor to bring ethical or professional concerns to the attention of the supervisee's training organisation if there is ongoing risk to a client and no remedial action is being taken by the supervisee (see the *Ethical Framework*, Good Practice, points 74-80; and BACP's *Professional Conduct Procedure* 2018)
- for trainees – there is an implied responsibility to bring all cases to supervision (i.e. not to be selective about which cases to bring), in order for the supervisor to monitor the trainee's practice effectively. The *Ethical Framework* requires that a trainee is 'open and honest with trainers, placement providers and supervisors about all issues relevant to their selection, training, supervision and professional practice. (See Good Practice, point 83e).

The supervisor cannot fulfil their responsibility to 'collaborate with training and placement providers to ensure that the trainee's work meets professional standards' (Good Practice, point 66), unless the trainee brings all their cases to supervision, and also consents to the necessary collaboration and sharing of information about their work where appropriate and necessary.

The above list is not exhaustive but it gives an idea of the range of mutual responsibilities that may be included in a contractual supervision agreement.

A supervisee may wish to rely on the advice and support of their supervisor. However, as seen above, a supervisor cannot fulfil their responsibility under the *Ethical Framework* if they are not made aware of specific cases creating problems or dilemmas of good practice for the supervisee. The supervisee would therefore have to agree either to present all their cases in supervision or to present at least all those cases giving rise to difficulties or dilemmas. Since an inexperienced supervisee may not always at first recognise a practice issue that requires assistance, it may be regarded as safe practice for a trainee to agree to bring all their cases to supervision while they are in training.

2 Tort and the duty of care in the context of supervision

The law of tort in England, Wales and Northern Ireland is the general law of civil liability (in Scotland, it is called 'delict'). The word 'tort' (colloquially meaning injustice) was probably imported into law from old French, having evolved from the medieval Latin 'tortum' (derived from 'torquere', to twist) and 'tortus' (meaning twisted, crooked, untrustworthy).

A tort is therefore a wrong of some kind. It may be in relation to land, property or people. In the case of therapy, it would include the breach of a therapist's or supervisor's duty of care to provide a professional and competent service to a client or to provide a professional supervision service to a supervisee. Tort law does not include employment, contract or commercial law, which are separate areas of law governing work, business and service agreements, including therapeutic contracts (see section 1.1, *Contracts*).

The principal remedies available for breach of the law of tort are injunctions (orders to do, or not to do, something) and damages (financial awards by the court).

Tort is a complicated area of law, and legal liability does not always depend on malicious intent. A person might be liable in tort without deliberately having intended to cause any harm, perhaps through a reckless or inadvertent act or omission, which, although unintentional, may nevertheless constitute a lack of the required standard of professional care.

The House of Lords considered the issue of the duty of care in the case of *Phelps v Hillingdon London Borough Council* [2000] 3 W.L.R. 776. This was part of a group of four appeals, all heard together, to decide whether a duty of care was owed by an educational psychologist to a child (and/or the child's parents) concerning their failure to diagnose dyslexia. The damage claimed arose from the impact of this failure upon the children concerned.

Lord Slynn of Hadley commented:

...it is long and well-established, now elementary, that persons exercising a particular skill or profession may owe a duty of care in the performance to people who it can be foreseen will be injured if due skill and care are not exercised, and if injury or damage can be shown to have been caused by the lack of care. Such duty does not depend on the existence of any contractual relationship between the person causing and the person suffering the damage. A doctor, an accountant and an engineer are plainly such a person. So in my view is an educational psychologist or psychiatrist and a teacher including a teacher in a specialised area, such as a teacher concerned with children having special educational needs.

By analogy with the educational psychologist in that case, counsellors, psychotherapists, coaches, and so on, all owe a duty of care to their clients and supervisees to carry out the task of therapy with due skill and professional competence.

In *Phelps v Hillingdon London Borough Council*, the House of Lords made it clear that not only is a duty of care owed to those in a direct contractual relationship but, in some circumstances, it will also be owed to third parties (i.e. those not in a direct contractual relationship with the person claimed against).

Considering the responsibility of the educational psychologist, Lord Slynn of Hadley commented:

It must still be shown that the educational psychologist is acting in relation to a particular child in a situation where the law recognises a duty of care. A casual remark, an isolated act may occur in a situation where there is no sufficient nexus between the two persons for a duty of care to exist. But where an educational psychologist is specifically called in to advise in relation to the assessment and future provision for a specific child, and it is clear that the parents acting for the child and the teachers will follow that advice, prima facie a duty of care arises. It is sometimes said that there has to be an assumption of responsibility by the person concerned [...]

There can be no doubt that if foreseeability and causation are established, psychological injury may constitute damage for the purpose of the common law. But so in my view can a failure to diagnose a congenital condition and to take appropriate action as a result of which failure a child's level of achievement is reduced, which leads to loss of employment and wages.

This case highlights the particular responsibility of an educational psychologist but it could equally apply to any person who might be relied upon to make a formal diagnosis. Therapists would be very unwise to take responsibility for any formal diagnosis unless they have the specific qualifications, training and experience to do so. This principle has in other legal cases been extended to cover a duty of care in providing other forms of action or authoritative advice. Page and Wosket state: 'The supervisor may have to give authoritative action or advice about best practice when a client is at risk and a supervisee needs guidance or direction' (1998:22). Supervisors should therefore be very careful about the nature and quality of any advice that they give to a supervisee. If the supervisee acts on advice given by the supervisor, on which the supervisor ought to have realised that the supervisee might rely, and a client suffers damage as a result, the supervisor may have a certain level of liability in tort. However, please refer to the *Ethical Framework*, Good Practice, points 60-73 for guidance on the respective responsibilities.

Note that the levels of responsibility for the supervisee's practice are flexible and the weight of responsibility will change in accordance with the qualification and experience of the supervisee. We have already seen that for trainees, the supervisor has a duty to:

'collaborate with training and placement providers in order to ensure that the trainee's work with clients satisfies professional standards'
(Ethical Framework, Good Practice, point 66).

For qualified practitioners, the requirement shifts the weight of responsibility on to the practitioner: *'When supervising qualified and/or experienced practitioners, the weight of responsibility for ensuring that the supervisee's work meets professional standards will primarily rest with the supervisee.'* (Ethical Framework, Good Practice, point 67)

The focus of supervision is necessarily on the needs and interests of the supervisee's clients (Page and Wosket, 1998). The appropriate sharing of information among professionals is essential here, and good professional practice necessitates that the supervisee is honest and open in bringing difficulties in their work to supervision. This information-sharing should happen in the context of the confidentiality agreements of both client contracts and supervision contracts, therefore client contracts and expectations should be compatible with supervision requirements.

2.1 Negligence

The law of tort includes the legal concept of negligence, which in the case of the counselling and psychotherapy professions would be based on a breach of a duty of care that has caused some sort of quantifiable damage. In law, in order to prove a case of negligence, lawyers refer to the 'nexus of causation', meaning the degree of connection between the negligence that has been alleged and proof that the damage suffered by the claimant was actually caused by the negligence.

In order to establish a case against a therapist or supervisor, the claimant (the plaintiff, or person making the claim) would have to prove certain elements against the defendant (the person claimed against), i.e.:

- that a duty of care exists
- that there has been a breach of that duty of care (conduct falling below the standards that the law demands)
- in the case of advice, that the defendant could have foreseen that any advice they gave would be relied upon (known as foreseeability)
- that as a result of the action/omission complained of, the plaintiff suffered damage
- that the actions/omissions complained of were the cause of the damage.

The court would need proof of damage that could be redressed somehow by financial compensation or an injunction. Damage might include financial loss as a result of loss of work through psychiatric illness, or a misdiagnosis, for example, but may not necessarily include hurt feelings (i.e. 'mere grief, distress and upset'; see *McLoughlin v O'Brian* [1983] 1 AC 410 at 431).

Many instances of alleged therapeutic negligence are the subject of complaints to professional bodies, and some are the subject of legal claims. It seems that many, if not most, of the legal claims that could be brought before the courts are settled out of court. Of the few court cases that proceed to a full hearing and judgment, only a few will be included in the main UK law reports. All this means that we have very few reported UK court cases on negligence in the context of therapy to provide us with guidance. By looking at the experience of insurers, however, we can at least gain some insight into the type of actions or omissions that might give rise to complaints or legal claims.

As we have already seen, depending on the practitioner's particular therapeutic approach and modality, advice-giving may sometimes form an essential part of therapy (for example, CBT may include recommendations for homework) and sometimes it may not. A claim in contract or in tort may potentially arise in respect of an economic loss allegedly resulting from acting upon advice or information that has been given negligently by a therapist, but it is more usual to find that claims in tort for negligent advice are brought against solicitors, financial advisers or bankers (see the leading case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 3 WLR 101, [1964] AC 465).

Generally, it is easier to establish direct lines of relationship and liability between a therapist and their client, than it is between clients and their therapist's supervisor, when causal links have become more distant and possibly less clearly defined. In a claim, a number of different factors may intervene in the chain of causation of an alleged loss or damage, for example contributory negligence by one or more of the parties concerned (see 2.3).

2.2 Vicarious liability

An employer may be held liable for the actions of an employee when that employee is acting in the course of their duty as an employee. This is known as 'vicarious liability.' For example, an agency, company or organisation employing therapists or supervisors may be held liable for the actions of each employed counsellor acting in the course of their employment. Similarly, although volunteers are not formally employed, they should have a volunteering agreement setting out what is expected of them, the terms of their voluntary service and their rights. Volunteers' actions are likely to be regarded in law as under the control and responsibility of the organisation using their services, for which the organisation will be in law vicariously liable.

The organisation needs to hold professional indemnity insurance and/or public indemnity insurance as necessary to cover this liability. The individual professional indemnity insurance of the employed or volunteer counsellors may cover the practitioner, but not necessarily protect the organisation itself. It is important for all parties to check this with their respective insurers. (See Mitchels and Bond, 2010, Chapter 6 for further discussion of insurance matters and Chapter 9 for employment law.)

2.3 Contributory negligence and voluntary assumption of risk

A client who makes a claim against their therapist may, by their own actions, have exacerbated the loss that they allege may have resulted from the therapist's (and/or supervisor's) negligence. This is called in law the claimant's own 'contributory negligence'. In a claim for damages made against the therapist or supervisor, any proven contributory negligence on the part of the client may therefore significantly reduce any damages that might be awarded to a successful claimant. Professional codes of practice (part of what is colloquially referred to as the 'soft law', which include government guidelines) not only create a protective environment for clients, but if practitioners have acted within these guidelines, they can also be supportive for practitioners in a court case. When clients' own actions are taken into account, and where practitioners have complied with relevant guidelines, there may be considerable legal difficulty for clients in holding therapists and possibly supervisors accountable for the outcome of events in their life.

This highlights the varying level and range of responsibility in therapy and supervision. Therapists will usually feel that they owe a duty of care to clients but that, at the same time, they cannot be considered fully responsible for the outcome of the independent actions of their clients, who remain in charge of their own lives. In supervision, similar principles may apply. [The supervisor of a qualified practitioner may offer space for discussion and perhaps may offer information or advice, but the weight of responsibility for the client work remains with the supervisee. *'When supervising qualified and/or experienced practitioners, the weight of responsibility for ensuring that the supervisee's work meets professional standards will primarily rest with the supervisee.'* (BACP 2018: Good Practice, point 67)

By contrast, a trainee in supervision may expect to rely more heavily on their supervisor to collaborate with the training organisation, placements, etc and give appropriate advice and guidance to ensure that the trainee's work satisfies professional standards (BACP 2018: Good Practice, point 66).

2.4 Measurement of the standard of care expected of a therapist

Standards of care are measured in part according to the 'reasonableness' of the actions taken in the circumstances of the case. Professional responsibilities will, of course, raise the standard of care expected. Lawyers traditionally defined the concept of an ordinary, reasonable person as 'the man on the Clapham omnibus' (thought first to have been used in court by Lord Bowen in the *Tichbourne v Lushington* case in 1871). The concept was more recently revisited by the Supreme Court with some entertaining comments about other possible season ticket holders on the bus, which might now also include officious bystanders, reasonable parents and landlords, fair-minded and informed observers, and additional passengers from the EU (see *Healthcare at Home Limited v. The Common Services Agency* [2014] UKSC 49, in paragraphs 1 to 4).

An ordinary, reasonable person needs to take an ordinary level of care in what they do in their daily life, for example, in driving. Therapists are regarded in law as 'ordinary people' in their daily lives and 'professionals' when at work. Professionals are expected to exercise the appropriate ethical and professional standards of skills in their field when undertaking their professional activities; for example, a counselling practitioner should take ordinary care when driving home from work but a professional level of care when working therapeutically with clients or supervisees, writing reports, making referrals and so on. The courts will assess professional standards from the published standards and guidance currently available and in use in the profession. For this reason, in assessing the level required, the courts may look at the standards set by particular modalities, the guidance issued by professional associations, and government guidance, which may include that of NICE (see 2.5).

2.5 The National Institute for Health and Care Excellence (NICE) guidelines

In the November 2003 issue of *MedEconomics* (page 2), Sir Michael Rawlins (Chairman of NICE) said, 'NICE guidelines are likely to constitute a responsible body of medical opinion for the purposes of litigation... Doctors are advised to record their reasons for deviating from the guidelines.'

NICE also provides guidelines for counselling and psychotherapy, such as recommendations for the treatment of specified mental conditions (e.g. post-traumatic stress disorder, depression and anxiety), which influence referrals and treatment programmes offered within the NHS.

Although, of course, many therapists work independently of the NHS, should a legal action be brought against a therapist or supervisor for negligence or breach of a duty of care to the client, and if the case is based on the specific techniques or modality used by the therapist, any failure to comply with the guidelines appropriate for that modality or the NICE guidelines is likely to need explanation and/or justification. This could possibly create issues for any therapists involved whose therapeutic approach is not one of the NICE recommended treatment modalities for a specific issue (see, for example, the NICE guidelines for anxiety, depression and PTSD).

2.6 Management of risk and the standard of care expected of a supervisor

2.6.1 Duty of care to the supervisee

A supervisor owes a duty of care to the supervisee both in contract and in tort.

Complaints may be made by a supervisee about the actions of their supervisor, and then both the supervisor and their employer may be brought into the disciplinary procedure by the counsellor's professional organisation on the basis of vicarious liability (see section 2.2 of this resource). In assessing liability, the organisation may need to ascertain the precise nature of information shared, advice given and actions taken, and may also discuss respective ethical responsibilities. **Supervision notes are therefore essential.** Under the *Ethical Framework*, a supervisor is now required to keep 'accurate records of key points discussed in supervision' (Good Practice, point 71). As we have seen, both contract and tort law are complex, and if any legal case that alleges professional negligence is brought against a supervisor, legal advice should be sought on the specific circumstances of that case.

2.6.2 Duty of care to the supervisee's clients

As seen in the discussion of tort earlier in this section, the supervisor of a trainee practitioner has a professional responsibility to ensure that the supervisee's work satisfies professional standards (*Ethical Framework*, Good Practice, point 66). The level of responsibility is different for the clients of a qualified and experienced practitioner, where the 'weight of responsibility for ensuring that the supervisee's work meets professional standards rests primarily with the supervisee.' (*Ethical Framework*, Good Practice, point 67).

In theory, therefore, in the law of tort, as we have seen in 2.1 to 2.3, a supervisor could potentially be held liable in the context of their role in relation to a client who has been brought to supervision and in respect of whom the supervisor has provided defective advice and guidance, which was then acted upon by the supervisee to the detriment of the client. Such a claim would be difficult to bring, because it would depend upon proof of a chain of legal causation directly linking the supervisor's advice with any relevant subsequent actions by the supervisee, then directly linking the actions of the supervisee with any resulting damage to the client. A complicating factor is that somewhere along this chain of events may lie the actions of the client (claimant) or other individuals, which may have contributed in varying degrees to the cause of the damage, or exacerbated the damage or loss suffered. The chain of causation is, for all these reasons, likely to be tenuous and may be difficult to establish in law. However, it might also be possible for the supervisee to bring a claim against the supervisor for breach of the supervisor's duty of care to the supervisee (see later in this resource).

In situations such as peer group supervision in which the advice given (and therefore the legal responsibility for it) may be collectively shared in different ways, depending on the nature of the group, the legal responsibility of a specific individual in the group would be even more difficult to establish.

2.6.3 Ethical dilemmas in supervision

In supervision, discussion of ethical dilemmas needs to be founded on solid ethical principles e.g. the *Ethical Framework* and also should follow ethical problem-solving guidelines (Good Practice, points 92-94).

2.6.4 Maintaining professional boundaries

Supervisors need to maintain appropriate ethical boundaries, for example in confidentiality and relationship. Breaches of these professional boundaries may result in grounds for claims and complaints. The *Ethical Framework* gives clear guidance on boundaries: see (Good Practice, points 33-37). See also Good Practice in Action GPiA 014 *Managing Confidentiality* for more information.

2.6.5 Advice-giving

We have seen that supervision may involve giving advice, guidance and support. A supervisor should be aware that a supervisee may decide to implement any guidance given in supervision. A less-experienced supervisee may perhaps be more likely to accept and implement advice given. If implementation of the advice given by a supervisor results in clear and quantifiable detriment to a client, it is possible that a legal action, for example, in tort for breach of a duty of care, may result if direct links can be proved between the advice given, the actions of the supervisee and the cause of the damage to the client.

The case would have to be proved in court on a balance of probabilities, and proof is subject to the nexus of causation, (see 2.1). Damages awarded may also be affected by the client's actions. i.e. contributory negligence, (see 2.3).

2.6.6 References

Supervisors may be asked to provide references for supervisees.

In the spirit of openness and transparency embodied in the *Ethical Framework*, it is ethically wrong to provide a reference that is incomplete and hides awkward information or is in any other way deliberately (or even carelessly) inaccurate. If a job is offered on the basis of an inaccurate reference, legal liability may also ensue.

Supervisors should therefore be very careful about the provision of job or other references for supervisees. Particular care should be taken to ensure that the reference covers only those areas of the supervisee's skills, work experience, or qualities that are within the supervisor's direct knowledge. Questions applicable solely to the workplace such as honesty and integrity, time keeping, being a good team member, etc, may be more appropriately answered by a former employer or a work colleague.

We have to remember that, often, we can only know about the life of the supervisee from their own reported actions and perspectives, unless we have additional direct knowledge of them (e.g. if we are in a line management role). If asked for a reference, it might require a proviso that the supervisor's direct knowledge of the supervisee's work and character is limited to the nature and scope of the supervisory relationship.

If a reference contains information provided in supervision by the supervisee, or obtained from others, the supervisor should clearly acknowledge that the information is from reported material, and not from their own observation.

Equally, a supervisor should not get drawn into an assessment of the suitability of a supervisee for a particular role, unless the supervisor is qualified to give that specific assessment.

2.6.7 Reports

Many professional organisations, for example BACP, sometimes require reports from a supervisor for accreditation, registration, fellowship or disciplinary purposes.

In all these situations, the supervisor is legally responsible to the supervisee and to the organisation concerned for the accuracy and professional competency of their reports.

In a report, be careful to clarify which of the facts reported are derived from your direct observation, experience or knowledge. An example might be: 'The supervisee has never arrived late for an appointment with me and has always paid my fees on time'.

Distinguish these observed facts from opinions and comments that are derived from information given by the supervisee or others and, where appropriate, it helps to clarify the source rather than presenting reported facts as your own. An example of a questionable statement might be: 'The supervisee is an excellent timekeeper'. This looks at first like a fact, but it could just be an opinion based on the supervisee's own statement to you that she is 'an excellent timekeeper and never late for work'. A more accurate statement might be: 'The supervisee reports that she is an excellent timekeeper, and I can confirm that she has never been late for an appointment with me'. For reports for courts, see Bond and Sandhu (2005), Mitchels and Bond (2010, Chapter 10) and Mitchels and Bond (2012, Chapter 10).

2.6.8 As a supervisor, how do I protect myself against a claim?

No supervisor (or therapist) can ever be totally 'bullet proof' against complaints and legal claims for breach of their duty of care or negligence, since clients may at any time decide to complain or litigate, with or without justification, about any aspect of their therapy. However, when the disciplinary procedures of professional organisations operate fairly, they provide a substantial measure of protection for therapists and supervisors against unjustified and spurious complaints. The legal system and court procedures also provide defendants with some protection against erroneous claims or those claims which are maliciously brought. If a professional complaint or claim is made, insurers should be informed immediately; also, in the event of a legal claim, it is wise to seek legal advice quickly. Many insurers will provide legal advice and assistance for practitioners as part of their policy cover. Remember that negotiation between the parties may take place alongside the court proceedings, and that most claims are settled out of court.

Mediation is also a great way forward in many situations, if the parties can accept the principles of a mutually acceptable negotiated solution. The new *Professional Conduct Procedure* of BACP ((B2018a) available at www.bacp.co.uk) allows for 'consensual disposal' of a complaint with the agreement of the parties and the consent of the Investigation and Assessment Committee (IAC).

3 Insurance

Within the *Ethical Framework* (Good Practice, point 19) BACP requires that all members and registrants 'will be covered by adequate insurance when providing services directly or indirectly to the public'.

The reason for this requirement is that therapists and supervisors cannot exclude liability for negligence or breach of their duty of care (which would be an unfair contract term) and for the protection of practitioners and clients it is vital that all supervisors and therapists providing a therapeutic service must be covered by appropriate insurance with a reputable professional insurance provider. It is well worth checking with your insurer whether, in the event of a legal dilemma or possible complaint, etc., they will cover free legal advice and assistance under their policy.

4 Confidentiality

Confidentiality is a responsibility based both on contract (see section 1 of this resource) and on the law of tort (see section 2). For more detail on the law relating to confidentiality, see BACP (2018b); Bond and Mitchels (2015).

A supervisor owes a duty of confidentiality to the supervisee and also to the supervisee's clients. The General Data Protection Regulation (GDPR) and the Data Protection Act 2018 will apply to all sensitive personal data held by counselling practitioners electronically or manually in a 'relevant filing system,' including supervision records.

For details of the application of data protection, see the Good Practice in Action 105 Legal Resource: *The General Data Protection Regulation (GDPR) legal principles and practice notes for the counselling professions* (BACP 2018c). Supervision practice should be in harmony with the confidentiality agreement reached by the supervisee therapist with their clients. Clients will need to know that a therapist has supervision, and they also need to know the boundaries of confidentiality within which they are working.

Sometimes a conflict of interest can arise in practice, e.g. where the client may know the supervisor privately or professionally in some way that generates a conflict of interest. We do not usually identify clients to a supervisor, but a supervisor may come to know a client through practice, for example, where a counselling trainee is working with a therapist in personal therapy there is a risk that the trainee may start in practice and choose a supervisor who they later find also supervises his or her personal therapist.

Where there is a potential risk that a client may for any reason know the supervisor socially or professionally and that the client's identity might be guessed from circumstances (for example if the therapist, client and supervisor are all in a small community or workplace counselling situation), it might be helpful for the client to know who the supervisor is and then decide for themselves whether this risk is acceptable to them, and if so, how it might be managed.

Where a practitioner or their supervisor discover that the supervisee has inadvertently chosen a supervisor who also supervises their personal therapist, etc., the ethical dilemma should be addressed by the supervisor and the supervisee practitioner together in discussion, with attention to the *Ethical Framework*.

Ethical dilemmas can occur when a supervisor guesses the identity of a client from circumstances and the supervisor realises that they have information about that client derived from other sources (which the therapist does not have). That information might potentially create an ethical dilemma regarding disclosure of that information by the supervisor, or referral. See the disclosure checklists in BACP 2018b; Bond and Mitchels (2015); and for ethical problem-solving, see Bond (2015) and Reeves (2015). BACP has an active ethics hub for practitioner members who are experiencing an ethical dilemma and a consultation service for supervisors, for details and the contact number, see <https://www.bacp.co.uk/events-and-resources/ethics-and-standards/ethics-hub/>

For references in the *Ethical Framework* relevant to supervision of trainee and qualified practitioners, see (Good Practice, points 60-73). Also search for the Good Practice in Action resources in respect of supervision. Both the *Ethical Framework* and the Good Practice resources can be found on the BACP website at: www.bacp.co.uk.

About the author

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The Ministry of Justice (www.justice.gov.uk) publishes policy regarding the courts and tribunals in England and Wales.

Northern Ireland Government publications are available from the Department of Health, Social Services and Public Safety (www.dhsspsni.gov.uk).

Welsh Government publications, see (www.wales.gov.uk).

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Statutes

General Data Protection Regulation

Data Protection Act 2018

Unfair Contract Terms Act 1977 (UCTA 1977)

Statutory instruments

Unfair Terms in Consumer Contract Regulations 1999 (UTCCR 1999)

Conventions and protocols

European Convention for the Protection of Human Rights and Fundamental Freedoms

Protocols made under the European Convention for the Protection of Human Rights and Fundamental Freedoms

Resources, information, guidance and reference works

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Useful contacts

Legal

British and Irish Legal Information Institute (BAILII, www.bailii.org).

Publishes all High Court, Court of Appeal and Supreme Court judgments
Care Council for Wales (www.ccwales.org.uk/child-law). Publishes *Child law for social workers in Wales* in English and Welsh, with regular updates
Justis (www.justis.com).

Online resource UK statute law (www.legislation.gov.uk)

UK statutory instruments (www.opsi.gov.uk/stat.htm)

Disclosure and barring services (DBS) England and Wales

Disclosure and Barring Service
(DBS) customer services, PO Box 110, Liverpool, L69 3JD
Tel: 0870 90 90 811; Minicom: 0870 90 90 344
Email: customerservices@dbb.gsi.gov.uk
Transgender applications: sensitive@dbb.gsi.gov.uk
Website: <https://www.gov.uk/dbb-update-service>
Welsh language scheme: <https://www.gov.uk/government/organisations/disclosure-and-barring-service/about/welsh-language-scheme>
(accessed 5 February 2018)

Northern Ireland

Information on the application process: www.nidirect.gov.uk/accessni

Information on the disclosure and barring programme in Northern Ireland:
www.dojni.gov.uk/accessni

England

For a list of the courts and links to regional courts' contact details, see
<https://www.justice.gov.uk/contacts/hmcts/courts>

CAFCASS (Children and Family Court Advisory and Support Service)

National Office, 3rd Floor, 21 Bloomsbury Street, London WC1B 3HF
Tel: 0300 456 4000, Fax: 0175 323 5249
Website: www.cafcass.gov.uk
Local offices are listed on the website or available from National Office.

**NAGALRO (The Professional Association for Children's Guardians,
Family Court Advisers and Independent Social Workers)**

PO Box 264, Esher, Surrey KT10 0WA
Tel: 01372 818504, Fax: 01372 818505
Email: nagalro@globalnet.co.uk
Website: www.nagalro.com

Northern Ireland

See www.courtsni.gov.uk for contact details of all courts, publications,
judicial decisions, tribunals and services.

The Northern Ireland Guardian Ad Litem Agency

Email: admin@nigala.hscni.net

Wales**Children and Family Court Advisory and
Support Service (CAFCASS) Cymru:**

National Office, Llys y Delyn, 107–111 Cowbridge Road East, Cardiff, CF11
9AG; Tel: 02920 647979, Fax: 02920 398540
Email: Cafcasscymru@Wales.gsi.gov.uk
Email for children and young people:
MyVoiceCafcassCymru@Wales.gsi.gov.uk
Website: <http://new.wales.gov.uk/cafcasscymru>

Republic of Ireland (EIRE)**An Roinn Slainte: Republic of Ireland Department of Health**

Hawkins House, Hawkins Street, Dublin 2, Ireland;
main switchboard: 01 6354000
(dial +353 1 6354000 from outside Ireland).

Ombudsman for Children's Office:

Millennium House, 52–56 Great Strand Street, Dublin 1,
Ireland; Tel: 01 865 6800 (dial +353 1 865 6800 from outside Ireland)
Email: oco@oco.ie; Fax: 01 874 7333
Website: www.oco.ie