

Supervising workplace counsellors: accountability and duty of care

How far does responsibility stretch within organisations? **Peter Jenkins** investigates

Supervisors are working in an increasingly wide range of therapeutic settings, and are having to develop increased skills and competence in working 'with complex organisational and interprofessional situations'¹. Supervision provides a key role in policing and sustaining standards of safe, competent and ethical practice on the part of therapists. However, there is increasing uncertainty as to just how far their responsibilities lie. Are supervisors responsible for the mistakes, errors or malpractice of their supervisees? And is this responsibility a purely professional one, or does taking on the role of supervisor to another practitioner open the door to the supervisor becoming vulnerable to action in the courts by an aggrieved client or agency? The situation applying to supervision in the UK is perhaps made more complex and anxiety-provoking by the awareness that some supervisors in the US are indeed legally liable for the practice of their supervisees. The concern may well be that legal trends in the US offer supervisors in the UK a prospect of an uncertain and increasingly litigious future.

Accountability and liability

The concept of accountability relates to the stakeholders who have a legitimate concern or interest in the work of the supervisor. The supervisor is accountable for their practice via a number of different routes, such as via a complaint to their professional association(s), assuming that they are, in fact, a member of such an association.

If the supervisor is employed, or works as a volunteer for an agency, then there may be an additional form of accountability via the organisation's system of line management, potentially leading to disciplinary action. In statutory settings, supervision is seen as an integral part of the process of holding professionals to account for their practice and decision-making. This is particularly evident in settings such as social services departments, where child abuse inquiries have commented adversely on the failure of supervisors to maintain required standards of work, as in the Jasmine Beckford and Victoria Climbié Inquiries²⁻³.

Legal liability

The separate concept of liability relates to the process of a legal challenge. This can take two main forms, depending on the supervisor's particular situation. The supervisor can be subject to a challenge in law for a breach of contract, assuming that a legal contract exists with the supervisee, or with the agency contracting for their services. The second route of legal challenge can be via action for breach of duty of care, again either to the supervisee, or to the agency concerned. In plain terms, this is where the supervisor is being sued by the supervisee, or by the agency for which they are providing a service.

The concept of 'duty of care' is used much more widely nowadays in discussions about professional responsibilities. It is often used in a rather inaccurate way, as a kind of aspirational term, embracing broad ethical responsibilities and moral duties. Hence it has been claimed, for example, that therapists have a duty of care to report child abuse⁴, or to have regular supervision⁵. In fact, these requirements would be more accurately described as ethical or professional ones, but they do not necessarily constitute legal requirements as such. The legal term 'duty of care' tends to be defined by the courts in narrow, rather than broad, terms. Existence of such a duty of care implies an actual liability in law, and therefore the potential for another party to sue for breach of that duty.

Ethical duty

The supervisor clearly retains a professional and ethical duty 'to protect clients from poor practice'⁶. This might, for example, involve the supervisor in reporting a supervisee for engaging in a sexual relationship with a client. Alternatively, it might relate to a supervisee attempting to use techniques, such as regression therapy, for example, which were unsuitable, or even risky in the case of a highly suggestible or vulnerable client.

A final aspect of legal liability might concern action by a supervisee or agency for the provision of negligent advice. This is a fairly specialist aspect of law, mainly concerning financial or expert advice. Here, the professional concerned has a responsibility

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to ensure that the advice given as part of their services is accurate and well informed. Of course, one argument could be that supervisors do not actually give advice as such, but instead offer consultative support. From this point of view, the responsibility therefore lies squarely with the supervisee, in deciding whether or not to pursue a particular line of activity, for example, in deciding to offer a client further sessions, or whether to refer a client to another practitioner who is better able to specialise in post-trauma work. It will be up to the courts to decide whether supervisors are potentially liable for negligent advice to a supervisee or agency. The likelihood is that this remains a fairly remote possibility at present.

The employment context of the supervisor is a crucial variable affecting the supervisor's accountability and liability. If the supervisor is self-employed, then they carry personal liability for any breach of duty of care to the supervisee, or to an agency relying on their services. If, however, the supervisor is employed, then the employing agency carries vicarious liability for the actions of the supervisee as an employee. In practice, the divisions between self-employed status and employed status are not always clear or self-evident. In the NHS, for example, it has been argued forcefully by therapists' organisations that counsellors who are on substantial self-employment contracts should be deemed to be employed. The term 'self-employed', it is argued, is, in fact, a device used by some NHS trusts to escape their proper responsibilities as employers.

Forms of duty of care

The existence of a duty of care implies liability towards the person receiving the service. The duty of care is determined by the nature of the professional relationship, such as between a doctor and patient, a therapist and client, and also by the nature of the employment relationship of the professional concerned. Given that supervisors often work in a wide variety of contexts, this can make for a confusing range of differing forms of liability. This can shift on an almost daily basis, depending upon whether the supervisor is working one day via a contract with a fee-paying supervisee, to working on another day on a freelance basis for an organisation, and, on yet another, to being directly employed by an organisation to provide supervision to its staff. The three main types of employment pattern are set out below, indicating the ways in which the corresponding duty of care also may vary (see Figures 1-3).

In the first type, shown in Figure 1, the supervisor is engaged in a classic private practice relationship with a supervisor, who pays a fee for their supervision, on the basis of a legal contract. Of course, many

supervision arrangements tend to be fairly informal, but the arrangement, even if only based on a verbal agreement, involves an exchange of supervision for payment. The supervisor owes a duty of care to the supervisee, namely to work to the appropriate professional standard for this kind of work. The supervisee, as therapist, in turn owes a duty of care to the client, to work according to the standard of care to be expected of a practitioner, according to 'competent, respected professional opinion', under what is termed the Bolam test. Perhaps controversially, the supervisor does not owe the client a duty of care. This is so for two main reasons. Firstly, the client is not a party to the original supervision contract. Secondly, the client is too remote (in a legal sense) from the activity of supervision to be considered as being owed a direct duty of care by the supervisor. Instead, the supervisor owes the client an ethical duty, under professional codes of practice, to safeguard them from harm.

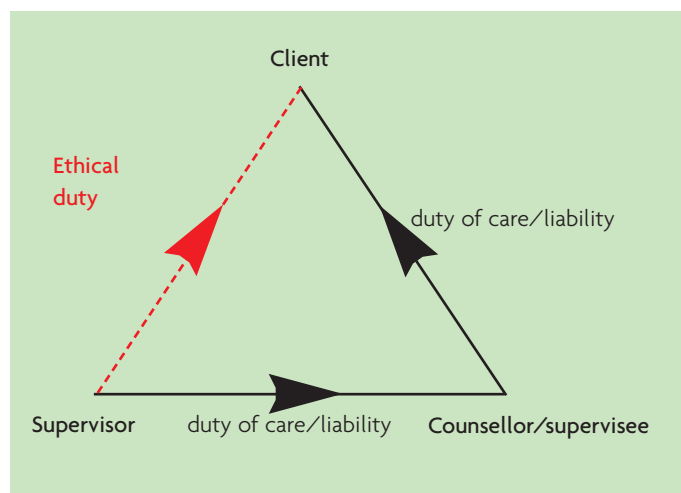


Figure 1: Supervisory responsibility. Type 1: private practice model

In the second type of supervision arrangement, shown in Figure 2, the supervisor is under contract to an organisation to provide supervision to its counsellor. The organisation pays the supervisor for his or her services. The supervisor owes a duty of care both to the counsellor and to the organisation, again to work to generally accepted professional standards. The organisation owes a duty of care to the client in providing the counselling service. Again, the supervisor, arguably, does not owe a direct duty of care to the client in legal terms, for the reasons outlined above. However, the supervisor continues to have an ethical duty, as before, towards the client.

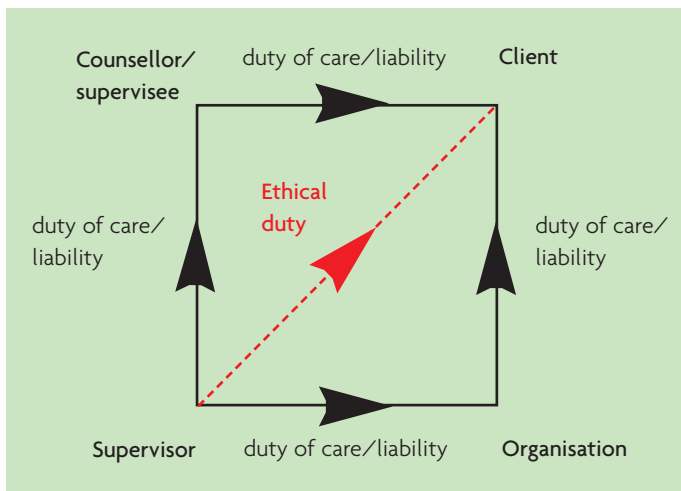


Figure 2: Supervisory responsibility. Type 2: freelance contract

In the third type of arrangement, shown in Figure 3, the supervisor is directly employed by the organisation, which is providing counselling to the client. The organisation has a duty of care to the client and carries vicarious liability in this situation for the professional activity of both the counsellor and supervisor. If the client has a grievance against the counsellor or supervisor, essentially he or she will need to sue the organisation, together with the latter. While protected to some extent by the vicarious liability of the organisation, the supervisor continues to owe an ethical duty towards the client.

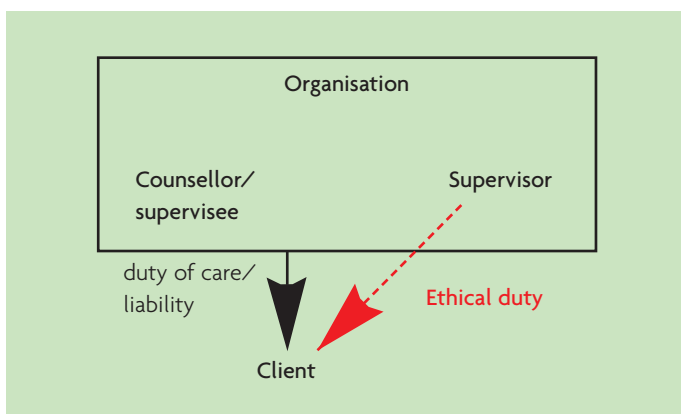


Figure 3: Supervisory responsibility. Type 3: organisational employee

Prospects of court action

If the liability of organisational supervisors is so varied, what is the actual likelihood of them being the subject of hostile legal proceedings? Tehrani⁷ has suggested that supervisors working with

organisations may be at risk of being sued, in the event of workplace counselling being seen to be ineffective. In the context of the NHS, Curtis-Jenkins⁸ has suggested that, given the insidious transfer of US litigation culture to the UK, it is only a matter of time before supervisors are sued for vicarious liability in this country. Other commentators on supervisory liability, such as Griffin⁹ and Leonard and Beazley Richards¹⁰, have argued that liability is a practical consideration to be borne in mind by supervisors when drawing up contracts and agreements. However, in reality, it seems that supervisors working with organisations are rarely involved as the target of hostile legal proceedings for breach of duty of care. Solicitors may now be acutely aware of the significance of some crucial aspects of counselling culture, such as the existence of 'second sets' of 'personal' counselling notes. However, in the main, they have perhaps yet to follow the paper trail of counselling recording back far enough to fully implicate supervisors in the web of litigation, at least for the time being. ■

References

- Hawkins P, Shohet R. Supervision in the helping professions. 2nd ed. Buckingham: Open University Press; 2003.
- Report of the Panel of Inquiry. A child in trust: the report of the panel of inquiry into the circumstances surrounding the death of Jasmine Beckford. Middlesex: London Borough of Brent; 1985.
- Lord Laming. The Victoria Climbié inquiry. Cm 5730. London: Stationery Office; 2003.
- Sher M. Ethical issues for psychotherapists working in organisations. In: Solomon HF, Twyman M (eds). The ethical attitude in analytic practice. London: Free Association; 2003.
- Copeland S. Counselling supervision in organisations: professional and ethical issues explored. London: Routledge; 2005.
- British Association for Counselling and Psychotherapy. Ethical framework for good practice in counselling and psychotherapy. Rugby: British Association for Counselling and Psychotherapy; 2002.
- Tehrani N. Counselling in the Post Office: facing up to the legal and ethical dilemmas. British Journal of Guidance and Counselling. 1996;24(2):265-75.
- Curtis-Jenkins G. Counselling supervision in primary health care. In: Carroll M, Tholstrup M (eds). Integrative approaches to supervision. London: Jessica Kingsley; 2001.
- Griffin G. Vicarious liability. Counselling and Psychotherapy Journal. 2001;12(4):8-9.
- Leonard G, Beazley Richards J. How supervisors can protect themselves from complaints and litigation. In: Carroll M, Tholstrup M (eds). Integrative approaches to supervision. London: Jessica Kingsley; 2001.

Legal references

- Bolam v. Friern HMC [1957] 2 All ER 118