



# NEGLIGENCE AND THE PSYCHOTHERAPIST

by Debbie Hegarty

This article is intended as an introductory guide on the issue of negligence and the psychotherapist. It outlines fundamental strategies that apply to psychotherapy and the law. It includes the topics of negligence, ethics, data protection, note keeping, contracting, the role of the expert witness, the legal system, attendance in court, the court procedure and potential risk concerns. It is by no means an authoritative or definitive interpretation of this topic. Rather it is intended to engage psychotherapists in a dialogue.

**T**here are four fundamentals in negligence: duty of care, failure to conform to the required standard, actual loss or damage to the plaintiff and close causal connection between the conduct and the resulting injury. A simple way of looking at negligence is to think of it as the failure to do something which a

reasonable person in ordinary circumstances would do, or something a reasonable person in ordinary circumstances would not do. Four additional fundamentals to take into consideration include: recording sessions, data protection, the expert witness and the court experience.

Duty of care by the psychotherapist also refers to the ability for self-care while seeing clients. The ability to make good, sound judgements in terms of conceptualising an appropriate treatment plan for the client can be significantly impaired if mind altering substances such as alcohol, prescribed drugs or non-prescription drugs are being

abused. Even excessive use of coffee to combat exhaustion can impair judgement. It has been well documented that burn out can occur without the awareness of the person affected by it (Lee et al., 2011; Skovholt, 2001; Somerville, 2009) and thus can result in apathy towards clients in our care. The most effective method of ensuring safe practice is to attend regular supervision with an experienced and accredited supervisor. Objective professional supervisors can spot the symptoms of burnout and potential addiction in us that we may be unable or unwilling to take responsibility for.

In addition duty of care applies to being transparent in terms of the treatment plan being provided. A key question for every psychotherapist is "how suitable am I to work with this client?" If there is any doubt the client should be referred on to a more appropriate psychotherapist.

In principle if the psychotherapist does not utilise the appropriate standard of care and the client suffers additional stress, injury or loss then the psychotherapist could find himself on the receiving end of a claim in damages for negligence as well as in breach of contract. It is the obligation of the psychotherapist, in so far as is possible, to ensure that that client is in a fit state prior to leaving the consulting room. In the event that the psychotherapist finds himself as a witness in court proceedings brought by a third party and not the client, the psychotherapist will have to be able to present evidence of procedures adopted and utilised which meet the required standard of the profession. Hence psychotherapists should ensure that comprehensible, legible and contemporaneous notes are kept safe and secure. While the psychotherapist has no legal

requirement to keep notes after each session she has an ethical requirement to do so. Therefore it is incumbent on the psychotherapist to record all attended sessions in a legible, concise, accurate and factual manner. Records should show the presenting issue, past history, medication history, planned interventions and care plans, tasks given and goals agreed upon and results obtained and any referrals or discharge letters. I find it helpful to include a comment in my initial intake session that states that psychotherapy is not a diagnostic model, that I keep very brief sessional notes and am no expert witness. I also include the following three conditions in my initial intake sheet which pertain to the three areas where confidentiality might be breached. Firstly, I may need to discuss my work with my supervisor. This is standard practice for all psychotherapists and my supervisor is bound by his association's Code of Ethics. Secondly, if I suspect a client is at risk of self harm or harm to another I would seek suitable professional help and would make every effort to discuss the situation with the client in advance. Finally I would break confidentiality if required to do so by the law.

When writing up sessional notes keep in mind that a judge and a client's legal representative might end up reading them. I would suggest all psychotherapists write their notes with their client on one shoulder and a judge on the other. Most psychotherapists are not in a position to make a diagnosis unless they have clinical training so be mindful of descriptions of the client's presenting problem or any subsequent observations. It may be preferable to write, "my client presented with the **symptoms** of depression", or "my client was

referred by her GP who diagnosed depression" rather than "my client is depressed". Legal action can be taken by a client for up to two years after any case of negligence and we are obliged to hold the notes and intake sheet of our clients for six years minimum and seven years maximum. Finally I suggest that there should be no identifiable information in the sessional notes apart from first names. The sessional notes can be stored separately from the initial intake sheet with a coded system linking the two.

This raises the question of when notes can be used in court and what privilege is attached to these notes. Currently, the only privilege that exists in Irish courts is that between the confessor and priest. So if a client is involved in court proceedings and the other party serves a witness summons on the psychotherapist, the psychotherapist is obliged to attend court, does not talk to the other side and is not obliged to talk to them. Generally in a court lawyers do not call a witness without knowing what answers would be given to any particular question. However there are occasions when this does happen. If called to give evidence in such circumstances, firstly ask your client for permission to give evidence and if the client permits then answer the questions. But if client does not give permission then explain this to the judge hearing the case and he will direct on the matter.

The **Data Protection Guidelines** regarding the storage of sensitive personal data ensures that the privacy rights of individuals are safeguarded in relation to the processing of all personal data. The Data Protection Acts 1988 and 2003 confer rights on individuals as well as placing responsibilities on those persons processing personal data.

Disclosure of confidential material can occur in certain circumstances, where the client consents by order of a court or tribunal, where the interest and safety of the public requires appropriate disclosure, or under statutory powers of investigation.

**Data Controllers** are those who, either alone (in private practice) or with others (as part of an agency), control the contents and use of personal data. Data Controllers can be either legal entities such as companies, government departments or voluntary organisations, or they can be General Practitioners or sole traders such as psychotherapists. If you, as an individual or an organisation, collect, store or process any data about living people on any type of computer or in a structured filing system, then you are a data controller. In order to establish whether a psychotherapist is a Data Controller, ask yourself do you decide what information is to be collected (Client Intake Sheets, sessional notes etc.), stored, when it should be deleted or altered? If the answer is yes then you are a Data Controller.

As a **Data Controller** you have certain key responsibilities in relation to the information you process. You must

- obtain and process information fairly,
- keep such information only for one or more specified, explicit and lawful purpose or purposes,
- use it and disclose it only in ways compatible with these purposes,
- keep it safe and secure,
- appropriate security measures must be taken against unauthorised access to, or alteration, disclosure or destruction of, the data and against their accidental loss or destruction
- keep it accurate, factual,

- complete and up-to-date
- ensure that it is adequate, relevant and not excessive
- retain it for no longer than is necessary for the purpose or purposes. As mentioned we are obliged to retain notes for six years minimum and seven years maximum.
- give a copy of his/her personal data to an individual, upon request. On making an access request, any individual about whom you keep personal data is entitled to a copy of the data you are keeping about him/her. To make an access request the data subject must apply to you in writing (which can include email). In response to an access request you must supply the information to the individual promptly and within 40 days of receiving the request. You must also explain any coding system applied.

A restriction to the right of access of the data subject is possible should the information you provide about him/herself cause serious harm to his or her physical or mental health or emotional well-being. Should you ascertain that an access request can be restricted then you must notify the data subject in writing within 40 days of their request and you must include a statement of the reasons for the refusal. A Data Controller found guilty of an offence under the Acts can be fined amounts up to €100,000 on conviction on indictment and/or may be ordered to delete all or part of the database.

### Expert Witness

According to Caroline Conroy (2004), a witness in any court procedure is limited to giving evidence of fact, i.e. what he/she saw, experienced or learned. The evidence of an expert witness is in two parts, written and oral. This principle is subject to certain exemptions, one of which allows

experts who have the required expertise to give their opinion on issues within their field (Conroy: 2004:8). The onus of proof on the question of the expert's expertise lies with the party who calls that expert. An expert witness is a person qualified and experienced in a certain field who is asked to give an independent opinion to the court on facts arising within their field. The expert witness' view needs to be independent, impartial and objective even if involved by one side in the case. Integrity is essential and it is important not to jeopardise objectivity or independence. In short the duty is to tell the truth and assist the court by doing so. The court is relying on the expert witness to educate and assist the decision maker with the benefit of expert knowledge.

Every witness, whether an expert or otherwise, must tell the truth, the whole truth and nothing but the truth. Lawyers are not allowed to influence witnesses in respect of their evidence. To do so puts them in breach of their professional conduct rules and may result in them being struck off. The expert witness might be prosecuted for perverting the course of justice if any coaching or manipulation is evident. In proceedings, a potential witness must not discuss her evidence with other potential witnesses in the case.

If a client is involved in a litigious process then it is ethical practice for the psychotherapist to inform them of the following:

- A subpoena is a court order to attend and testify in court.
- The client has the right to release the obligation of confidentiality when involved in litigation.

Should the psychotherapist's sessional notes be subpoenaed, disclosure of all relevant

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confidential material pertaining to the case is a legal requirement, provided the psychotherapist is satisfied the client has consented to the release of the material.

It is the responsibility of the psychotherapist to inform the client that they cannot choose what is disclosed and what is withheld and therefore it is ethical and good practice to inform the client of the possible implications of giving his consent to release the material. If the client has **not** given consent then the psychotherapist is **not** obliged to release any material requested by a solicitor or a member of the Garda Síochana. However the psychotherapist may be compelled to release sessional notes by virtue of a Court Order for Discovery.

If, as a psychotherapist, you have concerns about disclosure in an open court you can request the judge hear you in his private chambers.

Being subpoenaed as an expert witness appears to engender fear among psychotherapists. Appearing in court can be, and often is, a daunting experience for all those involved. In my opinion the most effective way to allay fear is to become informed which is why I outline that process in the next section.

### The Legal System

The following information was given me during training as a Mediator with Friarylaw MCM and I have sought and been given permission to use it. I also referred to a document entitled

'Irish Judicial System' which I ordered from the Department of Justice, Equality and Law Reform. Irish law is based on Common Laws modified by subsequent legislation and by the Constitution of 1937. Statutes passed by the British Parliament before the formation of the Irish Free State in 1922 have the force of law unless repealed by the Irish Parliament. Common law is enacted by judges whereas civil law is enacted by legislators. Justice is administered in public in courts established by law. Judges are appointed by the President on advice of the Government. Judges are guaranteed independence in carrying out their functions but can be removed from office for misbehaviour or incapacity only by resolution of both Houses of the Oireachtas. There are two legal systems, **Inquisitorial** consisting of Coroners Court, Tribunals, Inquiries and **Adversarial** consisting of Criminal and Civil Courts. In order to succeed or win your case you must first prove it by providing evidence which is open to be challenged.

The legal profession is divided into solicitors and barristers. Solicitors deal mostly with legal issues outside the Courts. They can attend Court for the right of audience before the Courts in either the District Court or in making appeals to the Circuit Court. In higher courts cases are normally conducted by barristers. Barristers are advised by and retained by solicitors. Free legal aid is available in criminal and civil cases.

### Attendance in Court

The following guidelines will prepare you for the witness box:

- Meet with your lawyers as early as possible
- Tell your lawyers the questions to ask you, do not presume what they know about psychotherapy/counselling/psychology practices
- Review your files, particularly your own records that were discovered
- Have all your notes and records in order
- Clarify what the issues are and what aspects of the case you are dealing with
- Establish the strengths and weaknesses in your case
- Anticipate likely questions and your answers in cross-examination
- Update yourself on recent developments in your area
- Practice your introduction
- Dress appropriately
- Arrange transport
- Identify venue
- If possible pay a visit to the court before to watch another hearing
- Ask about anything you do not understand

Lawyers use many techniques during cross-examination to test and undermine their opponent's witness. **During this process remember at all times that you are not on trial.** Your role as an expert witness is to assist the Judge in making a decision. You are not there to win the case but merely to present your information. It is the lawyer's job to test you.

The following guidelines will help you when you are in the witness box:

- Listen carefully to the question being asked
- Use all questions as opportunities to clarify explain and present information that will help
- Refer back to the original point if you have been deviating
- Stay as composed and grounded as is possible. It helps to place your feet firmly on the ground aligned toward the Judge. Using your breath also helps (even reminding yourself you have breath!) when attempting to quieten inevitable disquiet.
- Do not take it personally. After all you are not your evidence
- Don't argue with the lawyer
- Remember you are there to **assist** the court
- Don't read from notes as you are talking but do refer to them briefly to make sure you are disclosing facts
- Address all answers, whether asked by the lawyer, barrister or Judge, to the Judge. This is a

mark of respect but it is also because ultimately the decision maker in all courtrooms is the Judge. With that in mind position yourself so that you are facing the Judge, turn to the lawyer for the question, and then turn back to the Judge. If there is a Jury present then they will also become decision makers therefore direct your answers to them as well as the Judge but never the lawyer or barrister.

- The Judge is always referred to as Judge no matter which court you are subpoenaed to. Barristers are referred to as Counsel or by their last name
- Finally Court Procedure will include an Oath, an Introduction, an Examination, Cross-examination, Re-examination and Conclusion.

I hope this can be helpful to the reader. As already stated it is by no means a complete research piece. Upon reflection, experience has allowed me to conclude that that which frightens and threatens us

most is that which we do not know. I spent time as a volunteer member of the Garda Síochana Reserve ranking and part of my training and duty was to attend criminal cases in the District Court. I learned how easily a witness can be rumbled when they present to the court ill-prepared and uninformed. ☀

Note: An earlier edition of this article appeared in the IAHIP journal, *Inside Out*.



**Debbie Hegarty**, MIAHIP, MIACP, works with individuals, couples, families and groups in Cork city. She also presents workshops on Couples Therapy. She

became interested in the legal implications of practising privately as a therapist while serving on the Ethics Committee of IAHIP. Currently she is a member of IAHIP Governing Body. She is also an accredited mediator. Email:debyhegarty@gmail.com

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