

Statement on the duties of doctors and other professionals in investigations of child abuse

In order for children to be safeguarded from abuse and neglect it is essential that medical staff and other practitioners are willing to take action where they have concerns about a child's welfare.

However, some practitioners have faced legal action as a result of actions taken to protect children and there is a risk that professionals' behaviour in dealing with some cases of suspected child abuse, and recruitment to specialist roles, could be affected by a concern for personal consequences.

As this note seeks to explain, the Government's view is that where professionals are undertaking child protection work, their first duty is to the children concerned. As far as the children's parents are concerned, professionals must simply act in good faith, exercising reasonable skill and care.

The professional and legal framework within which professionals work

Professionals involved in child protection work are, of course, bound to meet all the requirements of the law and there may be occasions where they will need to be able to demonstrate that they have done so. It is therefore important that they identify and consider carefully the relevant legal issues and record how they have addressed them when carrying out their work.

In the context of child protection, the most important issues will include those relating to having the necessary authority to examine and treat a child, sharing information about the child with relevant authorities¹, controlling access to the child, and dictating who is to have care of a child and what that care should be². However, in all cases,

¹ See the Government's non-statutory guidance on this subject, "Information sharing: practitioners' guide".

² See, generally, the Government's guidance "Working together to safeguard children".

professionals will need to act reasonably and within the limits of their legal powers and will need to comply with any statutory and other legal requirements.

As all public authorities and the professionals who work for them are bound to act in accordance with the Human Rights Act, professionals will also need to be particularly alive to the way in which their actions might impact on the human rights of the children they are seeking to protect and of those connected to them. As the interpretation of the Act and the rights it protects is likely to evolve over time, professionals should ensure that they keep abreast of changes in the areas that most affect them.

Finally, professionals will also need to bear in mind any other duties they owe under the law, for example any duty of care, and be clear about who exactly it is to whom these duties are owed.

Professionals' duty of care

Generally speaking, there is no conflict of interest between parents or carers, children and the professionals involved with them. On the contrary, all will work together for the good of the child. For example, where paediatricians are concerned, they will look to parents to help them both with diagnosis, through accurate reporting of symptoms, and by playing a vital role in supporting children's treatment and recovery. It is precisely because this is the norm that it becomes so difficult when a professional has concerns that a parent or carer may be responsible for harm to a child. Where a conflict does arise, however, the professional needs to be clear about what is required of him. He must consider exactly who it is to whom he owes a duty of care (not to act negligently) and to what extent any other duties arise. These issues were central in the case of D v East Berkshire Community Health NHS Trust; MAK v Dewsbury Healthcare NHS Trust; RK v Oldham NHS Trust [2005] UKHL 23 ("the D case").

The D case

Duty of care

In this case the House of Lords gave judgment on whether a duty of care was owed to parents not to make negligent allegations of child abuse. The judgement focussed on the work of paediatricians and concluded that the paediatrician's duty of care is to the child and that there is no competing duty of care owed to the child's parents or carers.

Importantly, this does not mean that there is any diminution of the duty on the paediatrician to undertake their work in a competent and professional manner and in accordance with current guidelines and the professional and legal framework referred to above. Indeed, failure to do so may breach other duties both to the child and to their parents or carers. Paediatricians and other professionals who work with children may therefore find it helpful to note some of the comments made in this case.

Their Lordships noted that the fundamental duty of healthcare professionals is to:

“...exercise reasonable skill and care in taking an accurate history and then form such professional opinion as, subject to further investigation, may be appropriate” (paragraph 39)

In doing so, whilst they might sometimes have to take emergency action, there was no reason why this:

“...should displace a general rule that they should have close regard to the interests of the parents as people with, in the ordinary way, the closest concern for the welfare of their children” (paragraph 44)

Ultimately, however, the duty recognised as being owed to parents was a limited one:

“In principle the appropriate level of protection for a parent suspected of abusing a child is that clinical and other investigations must be conducted in good faith” (paragraph 90)

Given the seriousness of child abuse as a social problem, their Lordships were concerned that healthcare and other child care professionals should not be subject to conflicting duties to a child and its parents or carers when deciding whether a child

might have been abused and what further steps should be taken. It was therefore held that:

“A doctor is obliged to act in the best interests of his patient. In these cases the child is his patient. The doctor is charged with the protection of the child, not with the protection of the parent. The best interests of a child and his parent normally march hand-in-hand. But when considering whether something does not feel ‘quite right’ a doctor must be able to act single-mindedly in the interests of the child. He ought not to have at the back of his mind an awareness that if his doubts about intentional injury or sexual abuse prove unfounded he may be exposed to claims by a distressed parent” (paragraph 85)

And, more strongly:

“The well-being of innumerable children up and down the land depends crucially on doctors and social workers concerned with their safety being subjected by the law to but a single duty: that of safeguarding the child’s own welfare.” (paragraph 138)

Whilst their Lordships therefore held that no duty of care of was owed to a parent in these circumstances, it was acknowledged that attempts to try to protect a child may often interfere with the rights of both the child and its parents under Article 8 of the European Convention on Human Rights.

Article 8 provides that everyone has the right to respect for his private and family life. It is important to note that there is no right to privacy or to family life – the right is to respect for these matters. Interference with this right is permitted only insofar as it is proportionate being in accordance with the law and necessary in the interests of, amongst other things, the prevention of crime and disorder, the protection of health and morals or the protection of the freedoms of others.

In the D case, professionals were reminded that:

“Interference with family life requires cogent justification...So public authorities should, so far as possible, co-operate with the parents when making decisions about their

children [and] should disclose matters relied upon by them as justifying interference with family life.”

and it was suggested that:

“Parents should be involved in the decision-making process to whatever extent is appropriate to protect their interests adequately” (paragraph 73).

Involving parents and ensuring that they are not kept in the dark will certainly help to ensure that any interference with their rights under Article 8 is justifiable. Indeed, when making assessments of need and risk of harm, professionals should be mindful of the Convention rights of everyone involved, including parents, carers and significant family members, and act accordingly. However, it would be a mistake to see Article 8 (and Convention rights generally) as a hindrance, providing no more than an excuse not to act to be used for fear of getting it wrong. On the contrary, Human Rights legislation may actually give professionals and agencies even greater leverage to take action to protect children from harm.

The impact of Article 8 on the exercise of functions concerned with the protection of the vulnerable was very well summed up by the Court of Appeal in an earlier case in which the Court made it clear that the purpose of the Article is to promote protection and not to inhibit it:

“The family life for which Article 8 requires respect is not a proprietary right vested in either parent or child: it is as much an interest of society as of individual family members, and its principal purpose, at least where there are children, must be the safety and welfare of the child”³

So it is clear that far from preventing professionals doing their jobs well, the Human Rights Act can actually underpin current good practice. By working in partnership with parents and carers, sharing information and concerns with them (unless this would place a child at risk of harm), and involving them to the fullest extent possible,

³ *Re F (Adult: Court's Jurisdiction)* [2000] 1 Fam 38, per Sedley LJ.

professionals will at the same time be meeting their own high standards and putting themselves in the best position to ensure that their actions meet the requirements of the Human Rights Act.

Reaching sound professional judgements

In clarifying just what the law does and does not demand of professionals, it is helpful to consider the means by which the soundness of judgements and conclusions are challenged and undermined in proceedings before the courts. To be sound the approach must be demonstrably reasonable in the sense that it has been properly reasoned. The following list sets out the issues commonly explored and against which the forming of judgements or making of diagnoses may be measured. If integrated into practice these principles will raise the quality of judgements and leave them less exposed to successful challenge:

- Demonstrate proper reasoning.
- Take account of all relevant factors.
- Give each factor appropriate weight.
- Consider all the options or alternatives.
- Keep an open mind until it is appropriate to close it.
- Know and act in accordance with the law.
- Know and apply procedures or know why deviated.
- Consider human rights implications.
- Consider any relevant guidance.
- Consult appropriately.
- Acknowledge lack of expertise and its impact.
- Acknowledge lack of information and its impact.
- If the position is provisional, identify what is required to make final.
- Ensure full and accurate recording of these issues.

Giving evidence and acting as an expert witness

Doctors and other healthcare professionals, including psychologists may sometimes be required to appear to give evidence in public or private law proceedings, when the

future welfare of a child is at issue, or in criminal proceedings. The obligation of a professional witness is to assist the court to reach an appropriate decision by ensuring that it has all the relevant information and benefit of relevant expertise, by virtue of his/her professional qualification and experience. Professional witnesses are called to act as 'witnesses of fact' where they are involved in the care of the child or as 'independent' expert witnesses because of their particular and individual knowledge or skills. The competences needed to do court work in family proceedings, are set out in the Chief Medical Officer's report *Bearing Good Witness*.⁴

Implications

It is the Government's view that the current legal position, taking account of the judgement in the D case, is that when investigating allegations of child abuse or assessing injuries or symptoms which may arise from child abuse professionals' first duty should be owed to the child:

- They should not be distracted from that duty by a parallel duty to anyone else including the parents or carers

- There are good reasons for the law to protect doctors from the risk of negligence claims where they have to raise concerns about injuries or symptoms which may be indicative of abuse.

- However they are not protected where they fail to act in good faith or where they fail to exercise reasonable skill and care.

- Professionals should not feel inhibited in reporting their concerns. They would not be liable for defamation of the person suspected, unless it could be proved that they had acted maliciously.

⁴ *Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in family law cases.* A report by the Chief Medical officer. Department of Health. October 2006.

Doctors should have regard to parents' interests and should, as is their normal practice, involve the parents fully in decision making regarding the child, so far as is consistent with the best interests of the child. It is also vital, in these difficult situations, for doctors to work as part of the multi-disciplinary child protection team. They should expect support, advice and challenge from other members of the team. The multi-agency child protection process is designed to help everyone involved, including parents and carers, find the best way to meet the child's needs and ensure children are safeguarded from harm.