

Notebook on Ethics, Standards, and Legal Issues for Counsellors and Psychotherapists

A Standard of Care and a Case of Malpractice

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As an explanatory demonstration of the meaning of the ethical concept of *Standard of Care* and how it's implicated in a *malpractice* case, I invite readers to consider the following scenario. Let us imagine an academic college such as the College of Basic Studies at which I worked as a graduate student many years ago. This college was established by a university to provide one year of study to upgrade the academic qualifications and scholastic practices of students who had barely met its entrance requirements. This year long preparation was required before these students could begin their university studies.

In our similar and fictional college there is a fairly large counselling centre. To ensure a reasonable distribution of the counsellors' responsibilities each counsellor is assigned a cohort of students. Students in each cohort are expected to see the counsellor assigned to them should they need their services.

During the spring semester one of the counsellors was absent for several weeks. During her absence a female student from her cohort saw another counsellor for a number of counselling sessions. When the counsellor returned this student was transferred to her and she was informed by her counsellor colleague that the student was suicidal. Following this transfer she saw the student for one half-hour session and spoke with her privately but briefly several times in the corridor of the college. Just two weeks after this counsellor's return the student committed suicide. Once the student's parents learned of their daughter's involvement with this counsellor they brought a legal suit against her as well as against the college alleging that she was negligent in the standard of care provided to their daughter.

Should this case go to court as a malpractice suit it will be dealt with as a civil case rather than a criminal one. Civil law is a body of rules that defines and protects the private rights of citizens and deals with disputes between them including negligent acts that cause harm. Such legal offences or wrongs against one individual by another are called **torts**. There are **intentional** (e.g. defamation) and **unintentional torts** and a case of counsellor negligence will be addressed as an unintentional one. The test for liability or guilt in civil law is somewhat less rigorous than for criminal law. It is based on *the balance of probabilities* rather than *guilty beyond a reasonable doubt*. (A note of interest: 5% of malpractice suits against psychologists in the much more litigious United States have to do with suicide, Pope and Vasquez 2016).

This case of malpractice, based on alleged counsellor negligence, will be adjudicated by considering whether or not the evidence meets the four requirements of the protocol that is followed for such judicial decisions. (See CCPA Standards, P. 2015, P. 8). It can be captured in following abbreviated form:

Duty \implies Breach \implies Causation \implies Damage

The expanded version of this abbreviation is as follows:

1. Did the counsellor have a professional duty to provide a standard of care? In this instance the answer will very likely be yes she did. A counselling relationship is a **fiduciary** one in which we commit ourselves to fulfilling a **fiduciary duty**. This duty is an ethical one that has also been recognized in law. It is stated in the CCPA Standards as follows:

Fiduciary Relationship:

A fiduciary relationship is one founded on trust or confidence relied on by one person in the integrity and fidelity of another. A fiduciary has a duty to act primarily for the client's benefit in matters connected with the undertaking and not for their own personal interest. (from Black's Law Dictionary,2004).

2. Given that there is such a duty was this duty breached by the counsellor's failure to provide a normal standard of care? In considering this question it will be necessary to determine what that standard should have been. Should it have been a normal standard or one at the highest level possible. This question appears to been answered a long time ago in the following court decision from 1833:

Standard of Care:

"Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have a higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill...." Lamphier v.Phipos, 1833

The view expressed in this decision so long ago is captured in our present day ethical expectations for a **standard of care** such as the following:

"Render counselling services and care to a degree of skill, knowledge and ethics commonly possessed and practised under similar circumstances in the community by the average prudent reputable member of the profession."

The court will approach its decision in this matter by having an "expert" member of the profession testify in court as to what the normal standard of conduct should be when

dealing with a suicidal client. This witness will not judge the case before the court but only establish criterion against which the counsellor's professional behaviour will be judged.

In this case, as in other malpractice suits, the plaintiff must prove causation. This is sometimes called *a proximate cause*. It means in this example that the counsellor's failure to provide an appropriate standard of care is sufficiently related to the client's suicide as to be considered its cause. A tall order for sure! This is the biggest challenge and often very difficult to prove. The issue could be framed in this instance by the following question: "should the counsellor be held liable for damages in this case if the student was at high risk to commit suicide and therefore it could be seen to have likely resulted from the counsellor's failure to fulfill her professional duty?" Of course, the defense will very likely argue that even with a counsellor's best efforts sometimes a suicide cannot be prevented if someone is really determined to do so.

3. If all of the previous conditions are proven in court and the counsellor is found liable for the student's death then the court must decide how to bring *judicial relief* for the consequences that resulted. Often the only relief possible is a monetary one.

Note: In this fictional scenario there is much we do not know. For example, we do not know whether or not the first counsellor who saw this student conducted the usual risk assessment such as; in addition to suicidal ideation, did she have a plan to take her own life, and did she have the means to carry out this plan? If the answer is affirmative to these questions what did the counsellor do about it or should have done? What information was shared with the second counsellor and what follow-up is reasonable to expect from her? If the risk of self harm was high was there a responsibility to notify the parents under a **duty to warn**. (See CCPA Standards, p. 14, 2015)

I invite readers, if they have or can create an opportunity, to expand on this scenario in their classes and/or workshops. Maybe conducting a mock malpractice trial would contribute additional insights and other learnings. In my experience such pedagogical drama can be a very potent learning opportunity.