

## Clinical-Legal Issues in Psychiatry

### Introduction:

Forensic psychiatry deals with legal principles in relation to disorders of the mind. Forensic psychiatrists evaluate cases and testify in court about legal matters such as competency, involuntary hospitalization, criminal responsibility, & malpractice litigation.

### Psychiatric practice is influenced by four major factors:

- (1) the psychiatrist's professional, ethical, and legal duties to provide competent care to patients;
- (2) the patients' rights of self-determination to receive or refuse treatment;
- (3) court decisions, legislative directives, governmental regulatory agencies, and licensure boards;
- (4) the ethical codes and practice guidelines of professional organizations.

### Medical Malpractice

- Medical malpractice is a tort, or civil wrong. It is a wrong resulting from a physician's negligence. Simply put, negligence means doing something that a physician with a duty to care for the patient should not have done or failing to do. Negligence is the direct cause of harm to an individual (physical, psychological, or both). e.g. exceeding recommended dosages or failure to treat adverse effects of drug.
- Usually, the standard of care in malpractice cases is established by expert witnesses. The standard of care is also determined by reference to journal articles, professional textbooks, professional practice guidelines, and ethical practices promulgated by professional organizations.

To prove malpractice, of evidence that

- (1) a doctor-patient relationship existed that created a duty of care,
- (2) a deviation from the standard of care (e.g., patient, family, or estate) must be established by a preponderance of evidence that a deviation from the standard of care occurred,
- (3) the patient was damaged.
- (4) the deviation directly caused the damage.

These elements of a malpractice claim are sometimes referred to as **the 4 Ds** (duty, deviation, damage, direct causation).

In addition to negligence suits, psychiatrists can be sued for

- the intentional torts of assault,
- false imprisonment,
- defamation,
- fraud or misrepresentation,
- invasion of privacy,
- and intentional infliction of emotional distress.
- In an intentional tort, wrongdoers are motivated by the intent to harm another person or realize, or should have realized, that such harm is likely to result from their actions. For example, telling a patient that sex with the therapist is therapeutic perpetrates a fraud.

### Common causes of malpractice lawsuit in psychiatry:

- **1-Suicide**—It is the most common basis for malpractice lawsuit in psychiatry.
- **2-Improper somatic therapy**— the negligent administration of medication or ECT therapy. It is the 2<sup>nd</sup> most frequent basis for malpractice suit in psychiatry. Some concerns include tardive dyskinesia as an adverse effect of pharmacotherapy and fractures as an adverse effect of ECT.
- **3-Negligent diagnosis**—although this is a relatively rare basis for a lawsuit, it may be used when a psychiatrist fails to assess properly a patient's dangerousness to others.
- **4-Sexual activity with a patient**—a crime in number of states. sexual activity with patient has been deemed unethically.
- **5-Informed consent**—the alleged failure of a psychiatrist to obtain proper informed consent is often the basis of malpractice.

### Preventing liability:

- 1-Clinician should provide only the care they are qualified to offer.
- 2-The decision-making process, the clinician's rationale for treatment, and an evaluation of the costs and benefits should all be documented.
- 3-Consultations help guard against liability because they provide a 2<sup>nd</sup> opinion and allow the clinician to obtain information about the peer group's standard of practice.

### Privilege:

Privilege is the right to maintain secrecy or confidentiality in the face of a subpoena. Privileged communications are statements made by certain persons within a relationship such as husband wife, priest penitent, or doctor patient that the law protects from forced disclosure on the witness stand. The right of privilege belongs to the patient, not to the physician, and so the patient can waive the right.

### Confidentiality:

- A long-held premise of medical ethics binds physicians to hold secret all information given by patients. This professional obligation is called confidentiality. Confidentiality applies to certain populations and not to others; a group that is within the circle of
- confidentiality shares information without receiving specific permission from a patient. Such groups include, in addition to the physician, other staff members treating the patient, clinical supervisors, and consultants.

### Exceptions to the duty of confidentiality:

**1-Duty to warn;** the most important exception to confidentiality. It requires psychotherapists to warn potential victims of their patient's expressed intention to harm the victim (Tarasoff1,1974).

The ruling was broadened by the Tarasoff2 decision in 1976 to require that the therapist take some action in the face of a threat of harm to another (the duty to protect).

#### **2-Third-Party Payers and Supervision**

an insurance carrier must be able to obtain information with which it can assess the administration and costs of various programs

#### **3-Discussions about Patients (case conference)**

#### **4-Child Abuse**

5-Release of information; to other party by permission only.

6-Disclosure to safeguard; A physician must report to the authorities in situations specifically required by law. Such mandatory reporting would include, for example, a patient with epilepsy who is operating a motor vehicle, a patient abusing a child, or a patient engaging in sexual activity with a child.

## Hospitalization:

Hospitalization is taken when psychiatric patients present a danger to themselves or others in their environment to the extent that their urgent need for treatment in a closed institution is evident. Certain states allow involuntary hospitalization when patients are unable to care for themselves adequately.

Four procedures of admission to psychiatric facilities.:

1. Informal Admission :

Informal admission operates on the general hospital model, in which a patient is admitted to a psychiatric unit of a general hospital in the same way that a medical or surgical patient is admitted.

2. Voluntary Admission

In cases of voluntary admission, patients apply in writing for admission to a psychiatric hospital. The patient is free to leave, even against medical advice.

3. Temporary Admission :

for patients who are so acutely disturbed that they must be admitted immediately to a psychiatric hospital on an emergency basis. The procedure is temporary because patients cannot be hospitalized against their will for more than 15 days.

4. Involuntary Admission

Involuntary admission involves the question of whether patients are suicidal and, thus, a danger to themselves or homicidal and, thus, a danger to others. Because these persons do not recognize their need for hospital care, the application for admission to a hospital may be made by a relative or a friend. Once the application is made, the patient must be examined by two physicians, and if both physicians confirm the need for hospitalization, the patient can then be admitted..

Involuntary admission allows a patient to be hospitalized for 60 days.

## Civil Rights of Patients:

❖ Least Restrictive Alternative

The principle holds that patients have the right to receive the least restrictive means of treatment for the requisite clinical effect. Therefore, if a patient can be treated as an outpatient, commitment should not be used; if a patient can be treated on an open ward, seclusion should not be used.

❖ Visitation Rights

Patients have the right to receive visitors and to do so at reasonable hours (customary hospital visiting hours). Allowance must be made for the possibility that, at certain times, a patient's clinical condition may not permit visits. This fact should be clearly

documented, however, because such rights must not be suspended without good reason.

Certain categories of visitors are not limited to the regular visiting hours; these include a patient's attorney, private physician, and members of the clergy.

❖ **Communication Rights**

Patients should generally have free and open communication with the outside world by telephone or mail, but this right varies regionally to some degree.

Specific circumstances affect communication rights. A patient who is hospitalized in relation to a criminal charge of making harassing or threatening phone calls should not be given unrestricted access to the telephone.

❖ **Private Rights**

Patients have several rights to privacy. In addition to confidentiality, they are allowed private bathroom and shower space, secure storage space for clothing and other belongings, and adequate floor space per person. They also have the right to wear their own clothes and to carry their own money.

❖ **Economic Rights**

Apart from special considerations related to incompetence, psychiatric patients generally are permitted to manage their own financial affairs.

## Seclusion and Restraint :

Seclusion and restraint raise complex psychiatric legal issues.

- ☒ **Seclusion:** refers to placing and keeping an inpatient in special room for the purpose of containing a clinical situation that may result in state of emergency
- ☒ **Restraint;** involves measures designed to confine a patient bodily movement, such as the use of leather cuffs and anklets or straitjackets.

### Indications :

- Prevent clear, imminent harm to the patient or others
- Prevent significant disruption to treatment program or physical surroundings
- Assist in treatment as part of ongoing behavior therapy
- Decrease sensory overstimulation<sup>a</sup>
- Patient's voluntary reasonable request

### Contraindications:

- Extremely unstable medical and psychiatric conditions<sup>b</sup>
- Delirious or demented patients who are unable to tolerate decreased stimulation<sup>b</sup>
- Overtly suicidal patients<sup>b</sup>
- Patients with severe drug reactions or overdoses or who require close monitoring of drug dosages<sup>b</sup>
- For punishment or convenience of staff

## Informed Consent:

- **Informed Consent Form ;**A written document outlining a patient's consent to a proposed procedure or treatment plan. It should include a fair explanation of the procedures and their purposes, including the following ;
- identification of any procedures that are experimental;

- ❑ a description of any attendant discomforts and risks reasonably to be expected;
- ❑ a description of any benefits reasonably to be expected;
- ❑ a disclosure of any appropriate alternative procedures that may be advantageous to the patient;
- ❑ an offer to answer any inquiries concerning the procedures;
- ❑ and an instruction that the patient is free to withdraw patient consent and to discontinue participation in the project or activity at any time without prejudice.

Exception to the rule of Informed Consent;

- ❑ Emergencies. Usually defined in terms of imminent physical danger to the patient or others.
- ❑ Therapeutic privilege. Information that in the opinion of psychiatrist would harm the patient or be antitherapeutic and that may be withheld on those grounds.

## Forensic issues in child adolescent psychiatry

- ❑ Involuntary commitment of minors. In a landmark decision, *Parham v. J. R.* (1979), the Supreme Court held that minors may be involuntarily committed to a psychiatric facility by their parents or guardians. However, such civil commitment of juveniles requires various procedural safeguards, including the right to counsel, housing and treatment must be adequate.
- ❑ Consent of minor. The principles of informed consent apply, except that the issue of competence turns on the state's legal definition of what constitutes a minor for the particular issue involved. An emancipated minor is usually one who is married or financially independent. For particular situations, usually related to contracts, the emancipated minor is treated as adult.

## Child Custody:

- In cases of disputed custody, the almost universally accepted criterion is (the best interest of the child) in that context. The task of the psychiatrist is to provide an expert opinion and supporting data regarding which party should be granted custody to best serve the interests of the child.
- The mental disability of a parent can lead to the transfer of custody to the other parent or to a public agency. When the mental disability is chronic and the parent is incapacitated, a procedure for the termination of parental rights may result. That also is the case when evidence of child abuse is pervasive.
- In the *Gault* decision (1967), the Supreme Court held that a juvenile also has constitutional rights to due process and procedural safeguards (e.g. counsel, jury trials).

## Civil law :

- ❑ Mental competence. Psychiatrists often are called on to give an opinion about a person's psychological capacity or competence to perform certain civil and legal functions (e.g. make a will, manage his or her financial affairs). Competence is context-related (i.e. the ability to perform a certain function for a particular legal purpose). It is especially important to emphasize that incompetence in one area does not imply

incompetence in any or all areas .Aperson may have amental disorder and still be competent.

- ❑ Contract. When a party to an otherwise legal contract is mentally ill and the illness directly and adversely affects the person's ability to understand what he or she is doing (called contractual capacity) ,the law may void the contract . The psychiatrist must evaluate the condition of the party seeking to void the contract at the time that the contract was supposedly entered into . The psychiatrist must then render an opinion as to whether the psychological condition of the party caused an incapacity to understand the important aspect or ramification of the contract .
- ❑ Will. The criteria concerning will ( called testamentary capacity) are whether ,when the will was made , the testator was capable of knowing without prompting (1) the nature of the act ,(2) the nature and extent of his or her property ,and (3) the nature objects of his or her bounty and their claims on him or her ( e. g. , heirs , relatives ,family members) . The mental health of the testator also will indicate whether he or she was in such acondition as to be subject to undue influence.
- ❑ Marriage. A marriage may be void or voidable if one of the parties was incapacitated because of mental illness such that he or she could not reasonably understand the nature and consequences of transaction ( i.e. consent ).
- ❑ Guardianship . Guardianship involves a court proceeding for the appointment of a guardian in case of a formal adjudication of incompetence. The criterion is whether , by reason of mental illness,a person can manage his or her own affairs.

#### Competence to Be Executed :

The requirement for competence in this area is believed to rest on three general principles.

- ❑ First, a person's awareness of what is happening is supposed to heighten the retributive element of the punishment. Punishment is meaningless unless the person is aware of it and knows the punishment's purpose.
- ❑ Second, a competent person who is about to be executed is believed to be in the best position to make whatever peace is appropriate with religious beliefs, including confession and absolution.
- ❑ Third, a competent person who is about to be executed preserves, until the end, the possibility (admittedly slight) of recalling a forgotten detail of the events or the crime that may prove exonerating.

it is unethical for any clinician to participate, in state-mandated executions; a physician's duty to preserve life transcends all other competing requirements.

#### Criminal Responsibility( the insanity defense).:

The criteria for criminal Responsibility involve two separate aspects –whether ,at the time of the act , as aconsequence of mental disorder , the defendant

- (1) did not know what he or she was doing or that it was wrong (a cognitive test) or
- (2) could not conform his or her conduct to the requirements of the law (a volitional test).

#### M'Naghten Rule

- for determining legal responsibility was established in 1843 in the British courts. The so-called M'Naghten rule, which, until recently, has determined criminal responsibility in most of the United States, holds that:
- persons are not guilty by reason of insanity if they labored under a mental disease such that they were unaware of the nature, the quality, and the consequences of their acts or if they were incapable of realizing that their acts were wrong. Moreover, to absolve persons from punishment, a delusion used as evidence must be one that, if true, would be an adequate defense. The M'Naghten rule is cognitive test. And is known commonly as the right-wrong test

#### Irresistible Impulse

- In 1922, a committee of jurists in England reexamined the M'Naghten rule. The committee suggested broadening the concept of insanity in criminal cases to include the irresistible impulse test, which rules that a person charged with a criminal offense is not responsible for an act if the act was committed under an impulse that the person was unable to resist because of mental disease.
- the court grants an impulse to be irresistible only when it can be determined that the accused would have committed the act even if a policeman had been at the accused's elbow. To most psychiatrists, this interpretation is unsatisfactory, because it covers only a small, special group of those who are mentally ill.

#### Durham Rule:

- The accused is not criminally responsible if his or her unlawful act was the product of mental disease or mental defect.
- This rule derived from the case of Durham v. United States, Judge Bazelon expressly stated that the purpose of the rule was to get good and complete psychiatric testimony.,
- in cases using the Durham rule became mired in confusion over the terms product, disease, and defect. .
- In 1972, 18 years after the rule's adoption, the Court of Appeals for the District of Columbia, in United States v. Brawner, discarded the rule. to adopt in its place the test recommended in 1962 by the American Law Institute in its model penal code, which is the law in the federal courts today.

#### Model Penal Code:

- the American Law Institute recommended the following test of criminal responsibility: Persons are not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, they lacked substantial capacity either to appreciate the criminality (wrongfulness) of their conduct or to conform their conduct to the requirement of the law. The term mental disease or defect does not include an abnormality manifest only by repeated criminal or otherwise antisocial conduct.
- Subsection 1 of the American Law Institute rule contains five operative concepts: mental disease or defect, lack of substantial capacity, appreciation, wrongfulness, and conformity of conduct to the requirements of law.
- The rule's second subsection, stating that repeated criminal or antisocial conduct is not, of itself, to be taken as mental disease or defect, aims to keep the sociopath or psychopath within the scope of criminal responsibility.

#### Guilty but Mentally ill:

- Some states have established an alternative verdict of guilty but mentally ill. this alternative verdict is available to the jury if the defendant pleads not guilty by reason of insanity. Under an insanity plea, four outcomes are possible: not guilty, not guilty by reason of insanity, guilty but mentally ill, and guilty.
- The court must still impose a sentence on the convicted person. Although the convicted person supposedly receives psychiatric treatment, if necessary.