The Expensive Dalliance: Assessing the Cost of Patient-Therapist Sex

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Today, it is an almost universally recognized legal rule that a psychotherapist's sexual activity with a patient would constitute malpractice as a matter of law. This is so because malpractice is generally defined as an act or omission which deviates significantly from the standards set for treatment of like cases by the professional community in question, whereby harm is proximately caused by that deviation. The professional communities in both psychiatry and psychology have expressly labelled sexual activity by a practitioner with a patient as unethical conduct.[1]

If a therapist were found liable in malpractice for having a sexual relationship with a patient, how much could it cost the therapist and/or the insurance carrier? Monetary damages for physical pain and suffering, which often play a large part in a conventional lawsuit stemming from an automobile accident, are difficult enough to ascertain, but what about damages for intangible injury to the psyche resulting from unwarranted sexual advances by the therapist? Few of these cases have reached the courts, and fewer still have gone up on appeal to become the subjects of published judicial opinions which would shed light upon what criteria juries and judges hearing such cases might use in arriving at monetary damage awards.

However, one noteworthy case that did go through the courts was *Roy v. Hartogs*,[2] tried in New York City in March, 1975, and heard on appeal the following year. As will be seen shortly, the trial and appellate judges not only used traditional legal standards to determine the extent of the therapist's financial liability, but also seemed to predicate their figures on some on-the-spot psychoanalysis in which they themselves engaged – to the therapist's benefit.

The plaintiff-patient, Julie Roy, testified that before she consulted Dr. Hartogs she was very depressed, prone to excessive crying and sleeping, overweight, so self-conscious about her looks that she thought she was grotesque and had only one dress which she wore all the time. Ms. Roy had found sex with her husband unsatisfactory during the last half year that they lived together. About three months after separating from her husband, the plaintiff, in 1964, entered into a homosexual relationship for about a year and one-half.

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In 1968, the plaintiff consulted Dr. Pauline Anderson, a psychologist, who then recommended her to Dr. Hartogs. Dr. Anderson diagnosed the plaintiff's illness as schizophrenia with paranoid ideation. Ms. Roy testified that she began her sessions with Dr. Hartogs in March, 1969, and that within a few weeks Dr. Hartogs suggested a sexual relationship with him as therapy. "It was important to have a sexual relationship with a man in the treatment of homosexuality." Dr. Hartogs assured the plaintiff that she would not get hurt: "If I could love him, learn to love him, then I could love someone more suitable. He tried to explain transference. He gave me a book – a page was marked in it. He said, 'Here, you can even read about it, this is the normal thing.' "

By August, 1969, the plaintiff was finally persuaded that a sexual relationship with the doctor was a necessary part of the prescribed therapy. Thereafter she permitted the doctor to execute this "treatment" over a period of about 14 months from August, 1969, through September, 1970, twice each week at his office, five times at his home, sometimes even as often as two or three times a day. The plaintiff, however, became resentful of paying Dr. Hartogs $10 for the privilege of having him copulate with her, and so, in November, 1969, she stopped paying him his fee. Dr. Hartogs thereupon graciously continued to give her the "treatment" for free.

Even this did not entirely satisfy Ms. Roy, for in August, 1970, she expressed her desire to terminate the relationship and a month later succeeded in discontinuing therapy with Dr. Hartogs. Apparently the plaintiff immediately had qualms about her decision. She testified that she was grief-stricken, depressed and enraged at Dr. Hartogs and thought of suicide and of killing him. In January, 1971, the plaintiff retained her present lawyer and on March 5, 1971, the summons and complaint in this action were served upon Dr. Hartogs.

Thereafter, the plaintiff had two psychiatric admissions to the Metropolitan Hospital (July and December, 1971) under the care of Dr. Paul E. Schneck. Dr. Schneck's first diagnosis of Ms. Roy was "major depression" and his second was "schizophrenia with some elements of conversion reaction or hysteria."[3]

Dr. Hartogs assumed several defenses, not only at trial, but in the form of various pre- and post-trial[4] motions. In *Roy v. Hartogs,* 366 N.Y.S.2d 297, 81 Misc. 2d 350 (March, 1975), defendant's motion to dismiss plaintiff's action in malpractice and assault as barred by statute and public policy was denied. The Court held that the statute in question, the so-called Heart Balm Act, N.Y. Civil Rights Law § 80-a *et seq.*, was meant to outlaw only those suits based on broken promises of marriage or interference with the marital relationship, and not all actions in which sexual intercourse is an element. At trial, Dr. Hertogs did not attempt to refute the plaintiff's contention that a psychiatrist's prescribing and having intercourse with his patient would constitute malpractice *per se.* Instead he adopted the factual defense that because he had been kicked in the testicles by a Nazi guard in a concentration camp in 1940, he was suffering from a hydrocele which made sexual intercourse too painful to endure and therefore impossible. Subsequently the jury of six was allowed to hear testimony of some of Dr. Hartogs' former patients that he had had intercourse with them during the

same time that the plaintiff was a patient. This testimony tended to rebut Dr. Hartogs' and to impeach his credibility as well.

It is interesting that Dr. Hartogs and/or his attorney chose not to complement the factual "impossibility" defense with the legal defense that having sexual relations with a patient would not necessarily constitute malpractice *per se.* Although the existence of Section 1 of the *Principles of Medical Ethics* might have proven to be an insurmountable barrier, the Court's statement that no psychiatrist or school of psychiatric thought recognized therapist-patient sexual relations as an accepted therapeutic practice was true only if expressly based on and limited by evidence presented at the trial itself. In 1971, Martin Shepard, M.D., published a book entitled *The Love Treatment: Sexual Intimacy Between Patients and Psychotherapists* (Peter M. Wyden, Inc., New York, 1971), claiming many cases of intimacies which have benefitted patients substantially.[5]

In a two-part special verdict the jury first found that the defendant-therapist did in fact have sexual intercourse with the plaintiff-patient, which was held by the Court to be malpractice as a matter of law. Next, the jury considered the question of damages and awarded the plaintiff $250,000 in compensatory damages and $100,000 in punitive damages. In its charge to the jury, the Court defined compensatory damages as (1) the fair and reasonable value of the expenses plaintiff necessarily incurred which she would not have incurred except for the worsening of her condition proximately caused by defendant's malpractice, plus (2) a sum of money which would justly compensate the plaintiff for any worsening of her condition proximately caused by defendant's treatment *and* for any suffering such treatment may have caused. As to punitive damages, the Court instructed the jury that if it found that

> . . . the defendant knowingly, deliberately, and maliciously violated and betrayed the trust placed in him by his patient, and induced her to have sexual intercourse with him on the pretext that it was accepted and recognized standard of treatment for her mental illness, knowing full well that it was not and solely to satisfy his own lust in reckless disregard of the ethics and all recognized standards of his profession, then you may grant punitive damages.
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> Punitive damages are allowed to punish the defendant for his deliberate, wanton and reckless abuse of the doctor-patient relationship for his own ulterior motives and thus to deter him and others from the commission of like offenses.
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> An act is wanton and reckless when it is done in such a manner and under such circumstances as to show heedlessness and an utter disregard of the result upon the rights and well-being of others that may flow from the doing of the act or the manner in which it is done.
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> An act is malicious when it is done deliberately with knowledge of plaintiff's rights and with intent to interfere therewith.
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> There is no exact rule by which to determine the amount of punitive damages. The amount you fix as punitive damages need bear no particular ratio or relationship to the amount you award as compensatory damages.
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> If you find that the defendant's act was wanton and reckless and

malicious, you may fix such amount as in the exercise of your sound judgment and discretion, you find will serve to punish the defendant and deter others from similar acts.

In reporting your verdict, if you find for the plaintiff, you will state separately the amount fixed by you as compensatory damages and the amount, if any, fixed by you as punitive damages.[6]

Defendant made post-trial motions to the Court to set aside or reduce the jury verdict on damages as excessive. The Court denied defendant's motion to reduce or eliminate entirely the punitive damage award:

> When one considers how vital it is both for society at large and, more particularly, for the medical profession that such heinous and atrocious conduct, as was present here, be eradicated . . . it cannot be held as a matter of law that the jury's assessment of $100,000 was excessive. A patient must not be fair game for a lecherous doctor. The penalty must be large enough to cool the ardor of the most lustful. It should not become a mere license fee for the gratification of libidinous desires upon helpless patients.[7]

However, the Court did reduce plaintiff's compensatory damages from $250,000 to $50,000 on motion by the defendant, thereby putting plaintiff to the choice of accepting the reduction or having a new trial on the interrelated issues of compensatory damages and causation. The Court noted that the plaintiff had been suffering from schizophrenia, "an incurable, chronic mental illness of long standing,"[8] when she first consulted Dr. Hartogs; that Dr. Hartogs could be held liable only for any exacerbation or aggravation caused by his wrongdoing; and that the plaintiff had completely failed to prove any permanent worsening of her condition caused wholly or in part by the defendant's conduct. That conduct did, however, allegedly cause her to become psychotic for a time; her condition improved markedly after treatment by another therapist. At this juncture in its decision, the Court went somewhat out of its way and indulged in the following "psychiatric" observations:

> The Court has observed this plaintiff during the trial which lasted almost two weeks.
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> She certainly did not appear to be psychotic. She was well poised and well groomed. She spoke coherently and related her case with precision, clarity, excellent memory, and without inhibition.
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> I could not discern the slightest sign of abnormal behavior during the entire trial even under what must have been harrowing cross-examination.
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> . . . The evidence in this case not only does not warrant any finding that after June, 1972 until the present, the plaintiff was not restored to her pre-existing [before Hartogs] condition, but actually could support a finding that her condition had improved.[9]

The Court concluded that the record was barren of any testimony (1) that

the plaintiff's present mental state was in any way worse than before she saw Dr. Hartogs, or (2) that she suffered any further psychotic episodes caused by Dr. Hartogs' conduct beyond the two between October, 1970, and July, 1972 (resulting in two admissions at the psychiatric ward of a local hospital for one and five weeks respectively). Although the Court noted that there was no longer any doubt that psychic trauma producing psychic injury is compensable in tort, citing *Wolf v. Sibley*, –N.Y. 2d–, NYLJ, May 28, 1975, p.2, and *Fuller v. Preis*, 35 N.Y. 2d 425, it held that the most that the record could support was a finding of exacerbation of the plaintiff's mental illness resulting in two psychotic episodes and hospitalizations during the two-year period, followed by improvement in her condition. It thus reduced the compensatory damages from $250,000 to $50,000 because the jury's award appeared to be based upon the jury's finding of a permanent aggravation of the plaintiff's pre-existing condition, for which there was no basis in the record.[10]

On defendant's appeal to the New York Supreme Court, Appellate Term, the compensatory damages were further reduced from $50,000 to $25,000 and punitive damages were disallowed altogether.[11] The Appellate Term gives us no clue why it further reduced plaintiff's compensatory award, since it cites the very same factors enumerated by the court below when it made the initial reduction from $250,000 to $50,000.

Punitive damages were disallowed entirely because, in the words of the Court:

> The jury's finding, implicit in its award of punitive damages, that the defendant was actuated by evil or malicious intentions when the parties had sexual intercourse was against the predominating weight ot the credible evidence. Viewing all the facts and circumstances incident to the occurrences most favorably to the plaintiff as disclosed in this record [citation omitted], the weight of the evidence did not justify the jury's finding that defendant's conduct, while inexcusable, was so wanton or reckless as to permit an award for punitive damages [citation omitted].[12]

Two justices, in a concurring opinion, noted that recovery of punitive damages is permitted where the wrong complained of is morally reprehensible and actuated by evil motives; that punitive damages would serve not only to punish the defendant but also to deter him and others from indulging in similar conduct in the future; but that all that was established in the instant case was professional incompetence, unaccompanied by evil motives.[13] The concurring justices, terming Dr. Hartogs' misconduct "sex under the cloak of treatment," recommended disciplinary action either by state licensing authorities or by professional organizations as preferable to punitive damages for the purpose of rectifying his behavior.[14] Yet, do not the justices' own words – "sex under cloak of treatment" – indicate the existence of some evil, morally reprehensible motive of the defendant that would justify an award of punitive damages? One justice, dissenting, expressed the view that the plaintiff should not be entitled to recover anything at all because (1) she voluntarily consented to Dr. Hartogs' mode of

treatment; (2) if Dr. Hartogs committed a crime, he should be held criminally responsible; (3) for violation of professional ethical standards, he should suffer the sanctions of the Medical Ethics Board; and/or (4) plaintiff's action was so closely related to a conventional action in seduction that it should be outlawed by Section 80-a of the New York Civil Rights Law.[15] In no event, wrote the dissenting justice, should the plaintiff be allowed to recover in a civil action in malpractice.

Thus, while the law of damages in this area of malpractice is just beginning to develop, it would not be inaccurate to say that if the *Hartogs* case stands for anything, it indicates a possible future trend of judicial hostility to large damage awards, perhaps generated by what is known as the contemporary "medical malpractice crisis" or by the concern that intercourse may not constitute malpractice *per se*.

References

1. See the American Medical Association, *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry*, adopted by the American Psychiatric Association in May, 1973, annotation to Section 1; Revised Code of Ethical Standards of Psychologists, adopted by the American Psychological Association in 1976, Principle 6a.
2. *Roy v. Hartogs*, 366 N.Y.S. 2d 297, 81 Misc. 2d 350 (1975), modified on the issue of damages, *N.Y. Law Journal*, Feb. 3, 1976. The case was tried in March, 1975 in the Civil Court of the City of New York, New York County, State of New York.
3. The above recounting of the facts of the case was taken from the *Decision, Dated July 2, 1975* of the Civil Court, City of New York, New York County, Trial Term, by Myers, J., on a post-trial motion by the defendant to reduce the damages awarded to the plaintiff.
4. Record of the Trial in *Roy v. Hartogs*, Civil Court of the City of New York, New York County, Trial Term, March, 1975, p. 45 (colloquy between Myers, J. and Mr. Halpern, attorney for the defendant).
5. Shepard M, M.D.: The Love Therapist. Sexual Intimacy Between Patients and Psychotherapists, 1971, p. 7
6. Court's charge to the jury, *Roy v. Hartogs, supra*, Record, at pp. 1433-1436
7. *Decision Dated July 2, 1975* in *Roy v. Hartogs, supra*, Myers, J., at pp. 16-17
8. *Id.*, p. 17
9. *Id.*, pp. 22-23
10. *Id.*, p. 25
11. *Roy v. Hartogs*, New York L.J, Feb. 3, 1976, pp. 1-2
12. *Id.*, p. 1
13. *Id.*, p. 2
14. *Id.*
15. *Id.*