Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts § 113 (2d ed.)

Dobbs' Law of Torts
Database updated June 2014
Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick
Part II. Intentional Physical Interference With Person and Property
Subpart B. Defenses to Intentional Interference with Person and Property
Chapter 10. The Complete Bar of Consent and the Partial or Complete Bar of Necessity
Topic A. Consent

§ 113. Consent obtained by abuse of power or position

Some threats are viewed either as inherently coercive or as an abuse of power or position, or both. If the threats are coercive, the "consent" is not genuine as a matter of fact and must be given no legal effect. If the threats are an abuse of power, the profession of consent, whether genuine or not, might be denied any legal effect as a matter of policy. The possibility that consent should be disregarded for either of these reasons is not limited to any particular group of cases because that possibility turns on the facts of the individual case. This section considers the possibility that the profession of consent to sexual relations with one's employer, psychotherapist, doctor, lawyer, or religious leader is ineffective because of the abuse or potential for abuse of such a special relationship. Other relationships, such as those between student and teacher [1] or jailer and prisoner, [2] could raise the same kind of issue.

Job threats and sexual harassment. Demands for sexual favors by employers or supervisors may be implicitly threatening because of the power of employers to affect jobs and job benefits. Such threats present the employee with choices she should not be required to make. Although an employer may properly make implicit or explicit economic threats to gain economic performance, the employer must not suggest that the job or its benefits in any way depend upon the employee's agreement to sexual relations with the employer. To do so counts as quid pro quo sexual harassment under federal job discrimination statutes. [3]

Even a simple invitation by an employer or supervisor to engage in sexually related contact may imply a quid pro quo demand or threat and constitute harassment. [4] The consent professed by the employee in such cases does not bar her claim if the employer's sexual advances were in fact unwelcome. [5] So the employee proves a prima facie case by showing (a) that she was subject to unwelcome sexual conduct and (b) that her reaction to that conduct was used as a basis for decisions affecting compensation, terms, conditions or privileges of employment. [6]

Psychotherapists and counselors. Consent, especially consent to physical touching and sexual activity, is often induced by respect, affection, or dependence. Such a consent is of course perfectly effective and one who consents to sexual activity normally has no claim based on the activity consented to. However, in some cases the defendant owes the plaintiff a duty to avoid a potentially harmful sexual contact even if the plaintiff consents or professes consent. This is most notably the case of psychiatrists and other therapists who routinely confront troubled and vulnerable patients. Such patients often become excessively attached to their therapists and often consent to sexual contact with them. Therapists label this commonly observed phenomenon as "transference" and elaborate a theory to explain it. [7]

The patient's consent in such cases may be the result of diminished capacity or possibly the result of forces outside her control, [8] but even if such a consent is as real as any other, it is usually assumed and always claimed that a patient's sexual behavior with her therapist is ultimately harmful to the patient's recovery and development. [9] If that is in fact so, the therapist who engages in sexual activity with his patient is actually breaching the professional duty of care which includes a duty to avoid the risk of further emotional harm, even if the patient knowingly consents to it. For this reason, and because given the patient's vulnerability the "consent" is highly suspect, courts [10] and legislatures [11] hold or provide that the therapist is liable in spite of the patient's professed consent. [12]

The plaintiff in these cases often asserts the claim on a theory of negligence, no doubt because the therapist's liability insurance will cover negligence but not intended torts. [13] Some cases have suggested that the therapist is liable for breach of fiduciary duty. [14] In none of these cases is the patient's consent a bar to the claim.

Physicians and attorneys. Medical doctors treating patients for medical conditions ordinarily have little role in providing for the patient's mental health. A physician who engages in sexual activity with a patient is thus not in the same position as a therapist. Courts have said that a medical doctor, having no duty to protect the patient from her own consent or even to avoid risk of emotional harm that can result from sexual activities, can rely on the patient's consent in the absence of fraud or duress by the physician or known incapacity on the part of the patient. [15] Lawyers are presumably in a similar position. They may find themselves disciplined for violation of ethical rules if they engage in sexual relations with clients, [16] but the clients, not relying upon lawyers for emotional protection from themselves, are free to consent to sexual activities. [17]

The rules about lawyers and medical doctors, however, do not reflect privileges based upon status or profession. They reflect the professional roles undertaken. If a lawyer or medical doctor were to initiate sexual relations as a form of treatment, [18] or to engage in counseling or therapy, then liability would become appropriate. [19] Similarly, if these doctors or lawyers were to demand sexual favors as a condition of providing their best professional services, [20] or to exact a profession of consent by duress, [21] it seems reasonably clear that the professed consent would present no bar to the plaintiff's claim.

Analogies to the federal employment harassment cases suggest that a lawyer's demand for sexual activities with a client could carry an implicit threat that zealous professional services would depend upon compliance. [22] The analogy would also suggest that the "consent" obtained as a result should be suspect as a matter of reality and ineffective as a matter of policy. But an Illinois case has in effect rejected this idea, holding also that the attorney's fiduciary duty to his client does not extend to personal relationships with the client. [23]

It is also possible that as a matter of public policy a patient's or client's consent should be given no effect when consent would create a professional conflict of interest. In a Canadian case, Norberg v. Wynrib, [24] the plaintiff had become addicted to drugs. When her sources dried up, she sought prescriptions from the defendant, supposedly for her pain. The defendant prescribed drugs and also treated other complaints. Eventually he forced her to admit that she was addicted. Thereafter, he refused to prescribe drugs unless she would engage in sexual touchings. After this arrangement was broken up and the plaintiff rehabilitated, she sued the defendant. The Justices of the Supreme Court of Canada agreed that the plaintiff had a claim, but differed about the reasons for it. One group emphasized the power relationships between the parties as affecting either the reality of consent or the policy grounds for giving it legal effect. Another group thought that the doctor was liable in spite of the implied profession of consent because he acted in violation of fiduciary duty. There were other views as well. It seems clear that at the very least the doctor in Norberg placed himself in a serious conflict of interest. His professional duty was to heal the patient's addiction if he could, but his personal interest would have been to keep her addicted so he could continue his drug-for-sex arrangement. Even if the consent was "real," it would be very bad policy to permit professionals to deny their patients or clients the treatment they are entitled to or even to put themselves in a position of conflict of interest.

Clergy. Serious sexual abuse by members of the clergy has been widely reported and a number of cases have reached the courts. When pastors or priests abuse minors, courts have sometimes imposed liability, [25] although even in the child abuse cases courts have sometimes invoked immunities to protect the religious organization from liability. [26] When a pastor or priest sexually exploits an adult, such as a member of the congregation or parish who seeks religious counseling, courts have sometimes insisted that the adult's consent is a bar, [27] and when the claim is based upon negligence, they have concluded that there is no tort of "clergy malpractice." [28] Such cases obviously reject the analogy to the abusive therapist, [29] even though in most instances the clergy's sexual abuse originates in counseling situations in which confidence is reposed and authority is respected by the victim. However, at this point the cases are not numerous, so they may not represent broadly held views. [30] In any event, some limited authority does support liability of clergy or their religious organization or superiors for battery or for breach of fiduciary duty. [31]

Footnotes

1 Cf. Micari v. Mann, 126 Misc. 2d 422, 481 N.Y.S.2d 967 (1984) (acting teacher induced students to engage in a variety of sexual acts as part of their drama training, held actionable).

2 Grager v. Schudar, 770 N.W.2d 692 (N.D. 2009) (plaintiff sued for battery and other torts based on sexual act with jailer, who asserted consent as a defense; court noted that "consent" procured by jailer's abuse of power would be ineffective, held that jury must be instructed to consider factors bearing on prisoner's ability to control situation and to give consent). See also Graham v. Sheriff of Logan County, 741 F.3d 1118 (10th Cir. 2013) (allowing consent defense by guards in county jail who had sexual intercourse with female prisoner; prisoner never denied she consented to "almost all of the sexual acts that occurred"; on these facts no Eighth Amendment claim was proved).

3 42 U.S.C.A. § 2000e ("Title VII"). Quid pro quo sexual harassment is a form of job discrimination that occurs when an employee's superiors either expressly or impliedly make the employee's sexual conduct a condition of job benefits. See Jin v. Metropolitan Life Ins. Co., 310 F.3d 84 (2d Cir. 2004); Karibian v. Columbia University, 14 F.3d 773 (2d Cir. 1994); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987).

A different form of sexual harassment is the hostile work environment, which does not ordinarily correspond to any of the trespassory torts but does bear some resemblance to, and may encompass, the tort of intentional infliction of emotional distress. See Lutkewitte v. Gonzales, 436 F.3d 248 (D.C. Cir. 2006); 1 MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SCHROEDER & ELAINE W. SHOBEN, EMPLOYMENT LAW § 2.14 (4th Ed. 2009); HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 2.22, at 102–09 (2d Ed. 2004); 1 ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE §§ 3.06 (3d ed. 2000). On intentional infliction of emotional distress, see §§ 385 to 389.

4 See 1 ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE § 3.05[B][1] (3d ed. 2000).

5 Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). The Supreme Court's comments are consistent with the view that a professed consent by one whose choice is so constrained is likely to be no real consent at all. Hence, "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." 477 U.S. at 58, 106 S.Ct. at 2401.

6 Karibian v. Columbia University, 14 F.3d 773, 777 (2d Cir. 1994).

7 Some therapeutic theories explain the "transference phenomenon" as a displacement of the patient's feelings about some other persons. Those feelings are then redirected at the therapist. See BARRY R. FURROW, MALPRACTICE IN PSYCHOTHERAPY 33 (1980). The legal theory is that since this is predictable, therapists should be prepared to deal with it in professional ways and that the therapist is negligent in failing to do so. See Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986) ("When the therapist mishandles transference and becomes sexually involved with a patient, medical authorities are nearly unanimous in considering such conduct to be malpractice.") Morgan v. Psychiatric Inst. of Washington, 692 A.2d 417 (D.C. 1997) (expert testimony on transference was sufficient to overturn trial court's grant of summary judgment for defendant in sexual-exploitation case).

8 Cf. Roy v. Hartogs, 81 Misc.2d 350, 366 N.Y.S.2d 297 (1975) (allegations of consent to sexual relations obtained by "coercion by a person in a position of overpowering influence and trust" stated a good claim).

9 Plaintiffs always claim they have been emotionally harmed at the breach of trust, that they feel demeaned, depressive or suicidal and suffer in other ways. Although the American Psychiatric Association condemns sex-with-patients as always unethical, a few therapists have claimed that it can be useful therapy. See MICHAEL PERLIN, LAW AND MENTAL DISABILITY § 3.04 (1994).

10 Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986); cf. McNall v. Summers, 25 Cal. App. 4th 1300, 30 Cal. Rptr. 2d 914 (1994) (psychiatrist's sexual conduct with patient, consent might have resulted from transference phenomenon, semble, and psychiatrist might have induced patient to believe sexual relation was part of therapy); Corgan v. Muehling, 143 Ill.2d 296, 574 N.E.2d 602 (1991) (one holding himself out as a registered psychologist allegedly caused harmful emotional reactions in patient as a result of sexual activities together; the claim is actionable if plaintiff proves negligent handling of transference phenomenon); Bunce v. Parkside Lodge of Columbus, 73 Ohio App.3d 253, 596 N.E.2d 1106 (1991) (counseler at drug rehabilitation center and patient, liability under statute); see Linda Jorgenson, Rebecca Randles & Larry Strasburger, The Furor Over Psychotherapist-Patient Sexual Contact: New Solutions to an Old Problem, 32 WM. & MARY L. REV. 645 (1991).

11 Cal.Civ.Code § 43.93 (b) (patient may recover if there is therapeutic deception); Ill.Comp.Stat. 140/2 (patient may recover if the patient was emotionally dependent or the therapist practiced deception); Minn. Stat. § 148A.02 (similar); Tex. Civ. Prac. & Rem. Code Ann. § 81.002 (patient may recover regardless of emotional dependence or deception); Wis. Stat. Ann. § 895.70 (similar).

12 A substantial number of states criminalize such conduct by therapists. See Timothy E. Allen, Note, The Foreseeability of Transference: Extending Employer Liability Under Washington Law for Therapist Sexual Exploitation of Patients, 78 Wash. L. Rev. 525, 533

n.65 (2003) (listing statutes). Further, many states have adopted regulations that provide for professional discipline of therapists who engage in sex with current or former patients. See S. Wesley Gorman, Comment, Sex Outside of the Therapy Hour: Practical and Constitutional Limits on Therapist Sexual Misconduct Regulations, 56 UCLA L. Rev. 983 (2009).

13 See, e.g., Zipkin v. Freeman, 436 S.W.2d 753 (Mo. 1968). In spite of the "negligence" theory, the therapist's decision to have sexual relations with a patient is obviously intentional. Facts and allegations recited in the cases seem to indicate that the therapist is sometimes cruel, sometimes greedy, and always abusive. So the negligence designation fails to capture the nature of the serious wrongs perpetrated by therapists in these situations.

14 Roy v. Hartogs, 81 Misc. 2d 350, 351, 366 N.Y.S.2d 297 (1975) ("This case involves a fiduciary relationship between psychiatrist and patient and is analogous to the guardian-ward relationship…. 'Consent obtained under such circumstances is no consent, and should stand for naught.'").

15 Atienza v. Taub, 194 Cal.App.3d 388, 239 Cal.Rptr. 454 (1987); Odegard v. Finne, 500 N.W.2d 140 (Minn. 1993); Iwanski v. Gomes, 259 Neb. 632, 611 N.W.2d 607 (2000) (consensual sexual relation with patient-employee not medical malpractice; transference has no role in suits against a physician treating a physical condition). A distinct but related issue is whether the plaintiff's claim against her physician is to be classed as one for battery or one for medical malpractice. The classification will be important on issues such as the statute of limitations, perhaps on issues such as special rules for malpractice cases. Claims against therapists are often treated as malpractice claims, while those against physicians are not because the scope of their professional undertaking is different. See McCracken v. Walls-Kaufman, 717 A.2d 346 (D.C. 1998), discussing the distinction.

16 See ABA Model Rules of Prof. Conduct 1.8(j); Cal. Rules of Prof. Conduct 3-110; In re Rinella, 175 Ill.2d 504, 677 N.E.2d 909, 222 Ill.Dec. 375 (1997) (divorce lawyer suspended for 3 years for engaging in sex with clients).

17 Suppressed v. Suppressed, 206 Ill. App.3d 918, 565 N.E.2d 101, 105 (1990) (lawyer, although fiduciary, owed no duty comparable to a therapist's duty to improve patient's emotional well-being); cf. Vallinoto v. DiSandro, 688 A.2d 830 (R.I. 1997) (rejecting a malpractice claim on the ground that client was not coerced and emotional harm claim on the ground that emotional harm may not have been caused by sexual relationship with attorney). Legal malpractice is covered in Chapter 55.

18 See Atienza v. Taub, 194 Cal.App.3d 388, 239 Cal.Rptr. 454 (1987) (citing cases imposing liability and distinguishing them on the grounds that in those cases sexual relations were "initiated by the physician purportedly in furtherance of his treatment of the patient").

19 Dillon v. Callaway, 609 N.E.2d 424 (Ind. App. 1993) (medical doctor began providing "therapy" for patient, which turned into sadomasochistic sexual activities that eventually triggered severely harmful reactions in the patient; the patient's compensation fund was subject to liability because the doctor was acting as a therapist and the transference phenomenon theories applied).

20 McDaniel v. Gile, 230 Cal.App.3d 363, 281 Cal.Rptr. 242 (1991) (client claimed lawyer reduced or eliminated his representation of her divorce claim when she refused to have sexual relations and that he stated or implied he would represent her zealously if she "played the game the right way"; error to give summary judgment for defendant on the claims for intentional infliction of emotional distress and malpractice); see Doe v. Roe, 756 F.Supp. 353 (N.D. Ill. 1991), *aff'd*, 958 F.2d 763 (7th Cir. 1992) (lawyer for divorce-suit plaintiff, caught in sexual situation with his client, lost ability to collect his fee from the client's husband and demanded the fee from the client; the federal racketeering claim failed, but the court noted that the plaintiff might have good state-law claim for breach of fiduciary duty).

21 See Doe v. Roe, 756 F.Supp. 353 (N.D. Ill. 1991), *aff'd*, 958 F.2d 763 (7th Cir. 1992) (threats of bodily injury unless fee was paid).

22 In divorce cases in particular, the lawyer who seeks sexual relations with a client may have a conflict of interest, first because he may consciously or unconsciously oppose his client's reconciliation with her spouse, and second because he may delay an expeditious conclusion in order to maintain the sexual status quo. See Tante v. Herring, 264 Ga. 694, 453 S.E.2d 686 (1994). Other possible conflicts can be seen in Suppressed v. Suppressed, 206 Ill. App.3d 918, 565 N.E.2d 101 (1990) (allegation that after client's husband caught lawyer in sexual situation with client, husband refused to pay attorney fees, which lawyer then demanded from client). Clouded judgment might be a significant result as well. On conflict of interest, see Margit Livingston, When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations, 62 FORDHAM L. REV. 5, 15 ff. (1993).

23 Suppressed v. Suppressed, 206 Ill. App.3d 918, 565 N.E.2d 101 (1990). The opinion is much shaped by the court's view that the claim was a claim for "malpractice" with characteristics of a negligence claim rather than one for an intentional tort. It discusses the requirement that the defendant owe a "duty of care" and proof of actual damages both reflecting negligence thinking. Barbara A. v. John G., 145 Cal.App.3d 369, 193 Cal.Rptr. 422 (1983), held that if the client could prove a "confidential relationship" on the facts of her case, the lawyer would have the burden of showing that the client's consent to sexual acts was fully informed and freely given but refused to recognize that such a relationship is always involved in lawyer-client cases.

24 Norberg v. Wynrib, 92 D.L.R.4th 449 (Can. 1992).

25 See Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409 (2d Cir. 1999) (recognizing claim for diocese's breach of fiduciary duty to boy parishioner, but remanding for error in instruction on the statute of limitations); Fontaine v. Roman Catholic Church of Archdiocese of New Orleans, 625 So.2d 548 (La. App. 1993) (priest allegedly sexually abused a 17-year-old and later

published photographs in a magazine and circulated video tapes; held, these allegations state a privacy invasion claim); Mrozka v. Archdiocese of St. Paul & Minneapolis, 482 N.W.2d 806 (Minn. App. 1992).

26 See Schu1tz v. Roman Catholic Archdiocese of Newark, 95 N.J. 530, 472 A.2d 531 (1984) (forcible sexual acts against a member of priest's Boy Scout group, resulting in boy's suicide; held, the Archdiocese is a charity and immunity from tort liability for its negligence in failing to prevent such things). (The New Jersey Court has held that charitable immunity bars only negligence claims, not claims based on more egregious conduct. Hardwicke v. American Boychoir School, 188 N.J. 69, 902 A.2d 900 (2006).) Cf. Foreign Mission Board of Southern Baptist Convention v. Wade, 242 Va. 234, 409 S.E.2d 144 (1991) (controlling employer of missionary had no duty to protect children from molestation by their missionary-father, even though employer knew of the sexual abuses).

27 Jacqueline R. v. Household of Faith Family Church, Inc., 97 Cal.App.4th 198, 118 Cal.Rptr.2d 264 (2002) (reasoning also that the plaintiff's consent to touching demonstrates that is was not "offensive" to her, thus negating an element of battery); Schieffer v. Catholic Archdiocese of Omaha, 244 Neb. 715, 718, 508 N.W.2d 907, 911 (1993): ("What is involved in this case is conduct between consenting adults. There is no allegation that the defendant used force or fraud to accomplish his sexual relations"); but cf. F.G. v. MacDonell, 150 N.J. 550, 696 A.2d 697 (1997) (clergy sexual abuse of counseling situation is breach of fiduciary duty; "troubled parishioners should be able to seek pastoral counseling free from the fear that the counselors will sexually abuse them. Our decision does no more than extend to the defenseless the same protection that the dissent would extend to infants and incompetents."). When the adult is not in counseling with the minister, the consenting adults rule is clearly applicable. See Bladen v. First Presbyterian Church of Sallisaw, 857 P.2d 789 (Okla. 1993).

28 See § 330.

29 See Hertel v. Sullivan, 261 Ill.App.3d 156, 160, 633 N.E.2d 36, 39 (1994) ("We reject plaintiff's suggestion that the duties of a priest to his parishioner or of a minister to his congregation should be equated with the duties of a psychologist to his patient. A priest or minister is not required to possess and apply the knowledge and use the skill and care ordinarily used by a reasonably well-qualified psychologist.").

30 See John Wagner, Jr., Annotation, Cause of Action for Clergy Malpractice, 75 A.L.R.4th 750 (1990).

31 See Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993) (no separate tort of clergy malpractice but church might be liable for negligent hiring, negligent supervision, and breach of fiduciary duty when it neither sought to prevent nor to ameliorate the effects of priestly sexual behavior with vulnerable parishioners); Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988) (clergyperson giving marriage counseling to husband and wife and having sexual intercourse with one of them); F.G. v. MacDonell, 150 N.J. 550, 696 A.2d 697 (1997) (fiduciary duty); contra, e.g., Petrell v. Shaw, 453 Mass. 377, 901 N.E.2d 401 (2009) (church diocese and bishops owe no fiduciary duty to members of parish to protect them from sexual exploitation by rectors). See also Paz v. Weir, 137 F.Supp.2d 782 (S.D. Tex. 2001) (jail chaplain allegedly engaged in sexual activities with inmates, consent no defense in civil rights claim).

End of Document