Court Rulings on Psychotherapists

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A review of court rulings on psychotherapists reveals that: privilege of communication may be overruled; lawsuits may be brought against psychiatrists because they were unable to curb their countertransference and because they had had sexual encounters with patients, psychiatrists were found not guilty if their patients committed suicide; involuntary psychotherapy might be ordered by the court; abusive language does not constitute malpractice; and psychotherapists, records are private material and should not be published.

The fifth edition of *A Psychiatric Glossary* of the American Psychiatric Association defines psychotherapy as "a process in which a person who wishes to relieve symptoms or resolve problems in living or is seeking personal growth enters into an implicit or explicit contract to interact in a prescribed way with a psychotherapist."[1] Malpractice has been defined as "any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice or illegal or immoral conduct."[2]

These definitions indicate that therapists are highly vulnerable to malpractice lawsuits. Many therapists may be, however, unaware that they are also legally liable for their comments during therapeutic sessions. The use and abuse of words can emerge as the core issue in legal cases, and as there is usually no witness to the conversation between therapist and patient, the burden of proof lies with the therapist.

I shall list below some court rulings that are of interest to anybody who practices psychotherapy and touch on various vital areas in the relationship between therapist and patient.

CONFIDENTIALITY

It is common belief that psychotherapist/patient communications are privileged and absolutely confidential, but the fact is that psychotherapists may be legally compelled to reveal information.[3] Privilege of communication may be sacrificed if the judge determines that it is more important to serve the

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interests of justice than those of the patient. If the therapist then refuses to divulge confidential material, he may be jailed for contempt of court.[4]

The case of Schaffer vs Spicer illustrates the prevailing legal opinion. The defendant psychiatrist revealed confidential information to the plaintiff's husband. The plaintiff and her husband subsequently had a legal dispute over custody of their child, where the husband used the psychiatrist's information to support his claim that his wife was unsuited to have custody of the child. The wife sued the psychiatrist for breach of confidentiality. The court ruled that "the defendant is protected from liability for his patient by the fact that he acted in what he thought was the best interest of the child." The same court further recognized that the "patient-physician privilege must yield to the paramount right of the infant."[5]

Therapists may also find themselves in court for refusing to disclose certain confidential information to interested parties. The Tarasoff case illustrates the problem.

Tatiana Tarasoff, a student at the Berkeley campus of the University of California, was murdered by Prosenjit Poddar in 1969. The murderer, a graduate student, had been in voluntary, outpatient psychotherapy at Berkeley's Cornell Memorial Hospital. Poddar had confided to his therapist, Dr. Caesar, that he intended to kill Tatiana Tarasoff. At the request of the therapist, campus police briefly detained Poddar and, before releasing him, subjected him to questioning. Eventually the troubled student killed Tatiana Tarasoff, and her parents filed suit against the University of California Regents, hospital officials, the psychotherapist, and campus police, claiming that psychotherapists have a legal duty to warn the intended victims of patients, and that such warnings are not a breach of therapist-patient confidentiality.

In the case just described, four justices ruled in favor of the decision, two opposed, and one expressed opposition to the verdict itself, but not the underlying rationale. The dissenting justices argued that confidentiality was important to the practice of psychotherapy and that the duty to warn might cripple the use and effectiveness of treatment. As a result, the dissenters stated, many persons who were potentially violent yet susceptible to treatment might be deterred from seeking aid, and those seeking aid might be inhibited from making revelations necessary to effective treatment.[6]

The above ruling by the Supreme Court of the State of California has been challenged in the U. S. Court of Appeals.

In arguing against the decision, Dr. Caesar (petitioner) stated that the "California Evidence Code" denies protection of psychotherapist-patient privilege to communications relevant to the issue concerning the mental or emotional condition of the patient, if the issue has been tendered by the patient. Such denial, he claimed, is unconstitutional. In reply, the 9th Circuit U. S. Court of Appeals ruled that the right of communication between therapist and patient is conditional rather than absolute, and limited impairment of that right may be allowed if properly justified. Dr. Caesar,

argued that the state impermissibly discriminates between those who seek a clergyman for counseling and those who consult a psychotherapist. The U. S. Court of Appeals, however, decided that such a "distinction did not render the California statutes unconstitutional" and that the legitimate interest of the state must be protected. Interestingly, the court compared the patient/therapist relationship to a client/lawyer relationship in which the lawyer is retained to defend the client against criminal charges and is therefore exempt from the rule of confidentiality![7]

TRANSFERENCE AND COUNTERTRANSFERENCE

The problem of transference and countertransference is no longer a concern merely of therapist and patient or supervisor and supervisee in psychoanalytic training. Courts of law want to know whether or not the therapist is able to handle a patient's transference, as well as his own countertransference. Lawsuits have been brought against psychiatrists because they were not able to curb their own countertransference.

In the case of Anclote Manor vs. Wilkinson, the plaintiff, Mr. Manor, sued the therapist, Dr. Wikinson, after Mrs. Manor had committed suicide. Though the Manors had been divorced at the time of Mrs. Manor's death, Mr. Manor brought suit for recovery of $28,672.90 (the cost of his former wife's two-year treatment), claiming that the doctor had failed to render proper and standard treatment. Mr. Manor also claimed breach of contract, because his wife had revealed to him after their divorce, that during the treatment Dr. Wilkinson had promised he would get a divorce and marry the patient.

At the trial the expert witness testified that the therapist "acted out" and was unable to control his countertransference. The court rendered the following judgment: "Plaintiff is entitled to full reimbursement for monies paid under the contract on the theory that there is a breach of contract on the part of a physician which destroys the possibility of any benefit which could have been anticipated under skillful treatment."[8]

In another somewhat colorful case, a Missouri psychiatrist was sued by a female patient because he had mishandled the patient's transference. The highlights of this case are as follow:

The patient, Mrs. Zipkin, began treatment with Dr. Freeman, a psychiatrist, because of headaches, diarrhea, and other psychosomatic problems. The petition by the patient (plaintiff) indicates that, as part of her planned treatment, the physician had arranged for her to join him at social gatherings and skating parties and to travel with him on trips outside the state. In addition, he urged the patient to invest her own money in his (the doctor's) enterprise. On one occasion, during the course of psychotherapy, Dr. Freeman invited Mrs. Zipkin into his home for a "group swimming party." She testified that a number of patients and their spouses were present and some of those who attended, including the doctor, were nude. As her therapeutic sessions continued Dr. Freeman reportedly informed the patient that he had reached the conclusion that she had "a desire to be a male; that she thought she had

to compete with males in order to be anything and that she did not know what it was to be a woman."

On Dr. Freeman's advice, Mrs. Zipkin sought to divorce her husband in order "to get completely well," but the divorce action was denied. Later, court records indicate, she brought a lawsuit against her brother for estate monies and in other financial matters—again, on the advice of her doctor.

Dr. Freeman explained, however, that Mrs. Zipkin was suffering from "neurosis with an inferiority complex." Her attempts to seek legal redress in these two instances had merely been a way of ridding herself of the pent-up hostility that she felt toward members of her family.

At the trial Dr. Thomas Flynn, an expert witness, examined Mrs. Zipkin and testified on her behalf in the damage suit. He told the court that for a psychiatrist to invite patients to nude swimming parties does not constitute group therapy and is in fact "improper treatment" and mismanagement of transference.

In defense of the physician, counsel for Dr. Freeman argued that the issue at hand was not whether Dr. Freeman managed or mismanaged transference and counter-transference, "the fact is that she came to him for treatment of headache and diarrhea by means of psychotherapy and was treated and cured."

The court found the doctor guilty and awarded $18,029.47 to Mrs. Zipkin, the plaintiff.

In his closing remarks, the presiding judge added that the acts of Dr. Freeman had been willful, malicious acts and had no reasonable connection with professional services, etc.[9]

SEXUAL ENCOUNTERS BETWEEN PATIENT AND THERAPIST

It has been reported that a number of therapists have had sexual relations with their patients. In a sample study, 10 percent of the psychiatrists surveyed acknowledged their participation in erotic activities with patients, and 5 percent acknowledged sexual intercourse.[10] Commenting on this phenomenon, Masters and Johnson have suggested that if a therapist becomes sexually involved with a patient, regardless of whether the seduction was initiated by the patient or by the therapist, the therapist should initially be sued for rape rather than malpractice; that is, the legal process should be *criminal* rather than civil.[11] Some lawyers claim an even wider application of the law by arguing that the charge of rape or sexual assault should not preclude a civil action by the victim for monetary damage; in other words, the legal process should be civil *as well as* criminal.

The Hartogs case, which received world-wide publicity and which gained further notoriety as a result of NBC's TV version, reveals the trend of court rulings in these matters.

Julie Roy (the plaintiff) testified that she had consulted Dr. Renatus Hartogs (the defendant) because of her sexual problems. During the course of psychotherapy, she said, Dr. Hartogs had suggested that they have sexual relations as a part of her therapy. As a result of his suggestion, it was claimed, the parties had sexual relations

over a 13-month period, and during this time the defendant continued to treat the plaintiff. In voicing her grievance, the plaintiff argued that, because of her sexual relationship with her psychiatrist, her mental illness had been aggravated to the extent that twice she had to be confined to a mental hospital.

In his defense, Dr. Hartogs asserted that the plaintiff was suffering from paranoid delusion with wishful thinking. Furthermore, he testified, he could not have had a sexual relationship with the plaintiff (nor in fact with anyone) because his testicles had been damaged and were atrophied!

The court found the psychiatrist guilty on the following count: "Allegation in complaint in action by patient against psychiatrist who allegedly had sexual relations with patient as part of prescribed treatment for patient's sexual problems was sufficient to state causes of action grounded on forcible sexual intercourse as an assault" (Penal Law 1969, Sections 130, 34, 130.60 and 130.69). The court further stated that the "relationship between psychiatrist and patient is analogous to the guardian-ward relationship [i.e.] . . . that a guardian cannot claim that a ward is capable of consenting."[12]

SUICIDAL PATIENT IN PSYCHOTHERAPY

Many practitioners are reluctant to work with suicidal patients for fear that if the patient commits suicide, the practitioner might be held liable. Decisions by the courts, however, state that if the psychiatrist maintains adequate care for the patient he can not be held liable.

In the case of Brand vs Grubin, the Superior Court of New Jersey rendered judgment on a physician sued for malpractice. The physician was found not negligent and not liable for the decedent's death by suicide, although he allegedly failed to assess the patient's situation adequately, or to inform the patient's family.[13]

In another case the plaintiff sued a psychiatrist after her husband died from a drug overdose. The psychiatrist was not held liable. However, the court summarized that a psychiatrist might be held liable for a suicide if "he negligently or intentionally discloses confidential communications made to him by the patient in situations where it is foreseeable that the disclosure might cause the patient to harm himself and the disclosure is a factor in the decedent's decision to commit suicide."[14]

INVOLUNTARY PSYCHOTHERAPY

Can a court of law order an individual to submit to involuntary psychotherapy and to what extent can such therapy be beneficial to the patient? The following court ruling illustrates the problem:

In the dissolution of a marriage, the wife in question was directed by the court to undergo psychotherapy with a court-appointed psychiatrist. The duration of therapy was to be determined by the psychiatrist, and the wife's full cooperation and compliance, as requested by the physician, was included in the directive. Since the

right of child custody was at issue because of the dissolution of her marriage, the wife did not challenge the authority of the court to order a mental examination. However, she argued that to require her to submit to psychotherapy for an indefinite period was beyond the authority of the court since it constituted a violation or restriction of her liberty.

The Court of Appeals in California agreed with the petitioner (wife) and declared that involuntary psychotherapy of an unspecified duration curtails the liberty of an individual and is not within the jurisdiction of a court. At the same time, in a ruling which seems to acknowledge the right of a legislative body to enact a law forcing individuals to submit to involuntary psychotherapy, the court added that it required "legislative authorization" to enforce the action of the lower court.[15]

ABUSIVE LANGUAGE BY THE THERAPIST

What is the therapist's liability if he uses obscene language during a conversation with a patient?

Mr. Hess, the patient, brought a lawsuit against his psychiatrist, Dr. Frank, alleging that, during a regular psychotherapeutic session, the psychiatrist had become abusive and had uttered obscenities. In his claim, the plaintiff demanded $100,000 damages plus $20,000 for fees paid to Dr. Frank for psychotherapy from 1961 to 1969. According to the record, on Sept. 26, 1969, during a regular session, the therapist and patient argued over fees and the patient's appointment schedule. At some point, the therapist lost his control and reportedly cursed the patient. The Trial Court dismissed the claims for the return of $20,000 in fees which had been paid by the patient since the court took the position that the defendant did render the services agreed upon. However, the court sustained the first cause of action (i.e. $100,000 damages) as being justifiable in a malpractice suit.

The Appellate Court, however, took the side of the therapist (defendant), stating that the entire case must be dismissed. According to the Appellate Court, "negligence is the basis of a malpractice action which is tortuous in nature and predicated upon a failure to exercise requisite skill." The abusive language, the court declared, might not be considered as an act of professional misconduct and in fact was not related to medical treatment.[16]

HANDLING OF PATIENT RECORDS

Although it is not uncommon for a patient to ask a therapist to view his own record of treatment, so far the courts have not established patients' legal rights in this regard. In a lawsuit before the Surrogate Court of the State of New York, a judge has made it clear that "the law in New York State indicates that records taken by a doctor in examination and treatment of a patient become property belonging to the doctor" and not property of the patient. On the other hand, the judge states that a copy of those records can be released to an interested party, given the patient's authorization for the release.[17] Whether or not the patient himself is entitled to examine his own records, however, is not addressed.

Another question is the right of a therapist to publish a patient's record in professional journals.

In the case of Doe vs. Roe, the Supreme Court of New York rendered the following opinion: "Preservation of the patient's privacy is not mere ethical duty upon the part of the doctor. There is legal duty as well." The court further stated that in the dynamic of psychotherapy a patient is called upon to discuss in a candid and frank manner personal material of the most intimate and disturbing nature: urges, wishes, sexual fantasies, etc. To reveal such intimacies, the court argued, requires an unusual degree of trust and it ruled therefore that a psychiatrist who publishes such material can be sued for invasion of privacy. The same court added that the "scientific value of publication in the field of psychiatry was not established in this action." The defendant psychiatrist was subsequently found to be liable by the court as invader of the patient's privacy.[18]

SUMMARY

Research on court rulings related to psychotherapy reveals that psychiatrists are not immune to malpractice suits and in a variety of areas, their professional conduct is subject to the jurisdiction of the court. The privilege of communication, for example, may be overruled in the interest of justice, and failure on the part of a therapist to reveal confidential data may result in imprisonment for contempt of court. Therapists are liable for failure to manage patient transference as well as for failure to control their own countertransference. In sexual matters, the trend in court rulings indicates that encounters between patient and therapist may result in criminal and civil action against the psychiatrist involved. The courts seem to indicate, however, that, provided he has rendered adequate care, a therapist is not liable for his patient's suicide. Involuntary psychotherapy may be ordered by a court but the right of a defendant to challenge such action has been upheld. Abusive language, it has been ruled, does not constitute malpractice. Finally, a patient's records are private and publication of such intimate material is legally enjoined.

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