Sexual Assault in Healthcare Facilities: Protecting the Vulnerable

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WHAT WE KNOW

STATISTICS

According to a survey in 2012, patients have disclosed that sexual relations between physicians and adult patients involve approximately 10% of all medical specialists who care for adults.

A study of patients who got psychiatric or counseling care after a former health care provider performed sexual acts upon them found 51% of the care providers were clergy, and 49% were health care professionals. Of those health care professionals, 85% were from various counseling professions, 7.3% were physicians in medical specialties, and 3.7% were nurses.

STATISTICS

In Ontario, Canada, in the 80s, 25% of the health care providers who had been legally charged with patient sexual contact were psychiatrists. Surveys of psychiatrists revealed that 7% to 10% reported that they had had previous sexual contact with patients.

A Canadian task force on sexual abuse of patients found that patients younger than 14 years accounted for 8.7% of these reports, whereas 80% of patients subjected to sexual contact were adult women. Male providers were responsible for 91% of the sexual contacts. Among 567 physicians disciplined by their state medical disciplinary boards between 1989 and 1996 for sexually related offenses involving patients, pediatricians accounted for 14 disciplinary events (2.9%), although they represented 7.8% of all physicians.
Allegations of Sexual Assault Against a Health Care Services Provider under Texas Law

The defendant is a health care service provider who causes the other person, who is a patient or former patient of the defendant, to participate or submit by exploiting the alleged victim’s emotional dependency on the defendant. Under Texas’ sexual assault statute, a health care services provider is defined as:

1. a physician licensed under Subtitle B, Title 3, Occupations Code;
2. a physician assistant licensed under Chapter 204, Occupations Code;
3. a physical therapist licensed under Chapter 453, Occupations Code;
4. a registered nurse licensed under Chapter 301, Occupations Code;
5. a vocational nurse licensed under Chapter 301, Occupations Code;
6. an advanced practice nurse licensed under Chapter 301, Occupations Code;
7. a chiropractor licensed under Chapter 201, Occupations Code;
Cont’d

Allegations of Sexual Assault Against Mental Health Services Provider in Texas

The defendant is a mental health care services provider who causes the alleged victim, who is a patient or former patient of the defendant, to submit or participate by exploiting the alleged victim’s emotional dependency on the defendant.

Under the Texas sexual assault statute, a "mental health services provider" is defined as a person, licensed or unlicensed, who actually performs or purports to perform mental health services, including a:

1. psychologist offering psychological services as defined by Section 501.003, Occupations Code; or
2. licensed marriage and family therapist as defined by Section 502.002, Occupations Code;
3. chemical dependency counselor as defined by Section 504.001, Occupations Code;
4. licensed professional counselor as defined by Section 503.002, Occupations Code;
5. licensed social worker as defined by Section 505.002, Occupations Code; or
6. Certified special officer for mental health assignments under Section 1701.404, Occupations Code.
Due to the difficulty that ‘consent’ brings, some states have enacted legislation making sexual abuse against patients a specific crime including statements that consent by the victim is not a defense.

For example, in California, where this is a misdemeanor for “any person holding himself or herself out to be a psychotherapist” having any sexual contact with a patient or former patient, the statute specifically states that, “in no instance shall consent of the patient or client be a defense.” North Dakota’s criminal statute, which is similar to California’s, bars only sexual contact “during any treatment, consultation, interview, or examination,” also states that consent by the patient is not a defense.
Under Texas law, the prosecutor may be able to establish a "lack of consent" even when:

- no violence or threat of violence is used, and
- the alleged victim is aware that the act is occurring; and
- the alleged victim is able to appraise the nature of the act.

In those cases, the prosecutor can allege a lack of consent because of the professional relationship of the parties that allows the defendant to use an occupation license to exploit a client or former client.
CASES

- 2017 – former nurse at Houston Methodist charged with raping a patient in his care – fondled her groin while attended to her central IV line – rape kit and DNA tests backed up her story
- 2015 – Pennsylvania physician who prescribed “candy” (oxycodone) to patients to get them addicted, was found to have raped at least 12 female patients
- 2012 – A 71-year-old woman who was sexually assaulted in her hospital room by a nurse assistant sued for gross negligence. She was diagnosed with gastroenteritis and a urinary tract infection. A certified nursing assistant who entered her room was supposed to change her adult diaper and clean her, but instead he sexually assaulted her. A medical and forensic examination was conducted, where semen was found. The employee was arrested and charged with aggravated sexual assault of an elderly or disabled person. Civil suit followed against the hospital.
- 2012 – A doctor from the Dallas accused of sexually assaulting patients is set to plead guilty to the charges. He was indicted for the sexual abuse of at least 12 women. Investigators said the abuse happened at the Mid-Columbia Medical Center while the victims were sedated for surgery.
- 2012 - A California gynecologist has been charged with sexually assaulting a patient on two occasions while examining her. “The victim was smart enough to take the bed sheet and turn it into police,” Deputy Attorney General Cindy M. Lopez wrote.
2012 – Police have arrested a Connecticut **doctor** on multiple charges of sexual assault, charging that he sexually abused three patients in his Clinton office.

2012 – A South Florida **nurse technician** was arrested on charges he raped a patient in his care at Kendall Regional Medical Center.

2011 – On the heels of allegations that a former Austin State Hospital **psychiatrist** sexually abused children in his care, an American-Statesman investigation found that the state hospital system currently employs three doctors with a documented history of inappropriate and in one case criminal sexual behavior.

2010 – The state Medical Quality Assurance Commission found that a former Richland **anesthesiologist** committed unprofessional conduct when he touched the breasts of two unconscious women just prior to surgery.
CURRENT CASE

- Patient has surgical procedure; nurse (male) began massaging her back after she complained of stiffness.
- Patient alleges that the “massage” migrated to her breasts, buttocks and his hand brushed her vagina.
- Patient also alleges that the nurse asked if she wanted him to massage her “foley” area.
- Nurse returned to her room on 3 separate occasions to perform “massage”.
- Nurse surrenders his license for 1 year following an investigation by the Texas Board of Nursing.

- Hospital sued for negligence and gross negligence
- Claims were failing to monitor and supervise and negligent hiring
- Defenses: outside of course and scope; criminal act; no duty to train employees on not engaging in criminal acts
OUTCOME

- Motion to Dismiss based on Chapter 74 denied despite the “Chapter 74 report” being a forensic examination
- Motion for Summary Judgement granted as to hospital
Numerous Texas courts are in agreement and have concluded that assault or sexual assault are not within the course and scope of an employee’s duties.

- **Buck v. Blum**, 130 S.W.3d 285, 288 (Tex. App.—Houston [14th Dist.] 2004). Thus, the court held that “[a]s a matter of law, Yen’s (placing his penis in the hand of a patient during a neurological exam) alleged conduct did not arise out of the course and scope of his employment, and, thus, his employers cannot be held liable under respondeat superior.”

- **See NCED Mental Health, Inc. v. Kidd**, 214 S.W.3d 28, 34 n.8 (Tex. App.—El Paso 2006) (noting that the plaintiff recognized that her alleged sexual assault complaints against an employee would not be within the course and scope of his employment);

- **Mackey**, 935 S.W.2d at 454 (“simply no connection between [food service managerial] duties and the alleged sexual assaults directed towards Mackey”);

- **Kelly v. Stone**, 898 S.W.2d 924, 929 (Tex. App.—Eastland 1995) (sexual harassment and sexual advances were not work-related and were motivated by personal obsession and was in pursuit of his own personal gratification);

- **Kendall v. Whataburger, Inc.**, 759 S.W.2d 751, 755 (Tex. App.—Houston [1st Dist.] 1988) (employee who struck customer with french-fry basket was not within course and scope): **Sylvester**, 1998 WL 130341 at *2 (“Because there is no factual connection between the sexual assault and Sylvester’s job, we hold, as a matter of law, that Sylvester’s sexual assault of Houser was not within the scope of his duties.”).
6 women/3 nursing homes/1 man

Assailant appeared to be the perfect nurse aide

Victims:

- 83 y/o Alzheimer’s patient
- Another assistant spotted a fellow NA in her room with her bare legs on either side of his hips
- Her adult diaper lay on the floor
- NA plead guilty to 3rd degree criminal sexual misconduct and was sentenced to 8 years
- NA had been suspended 3 times as the facility officials investigated repeated accusations of sexual abuse at the facility.
- Including 2 wherein he was the main suspect.
- 2008 – alleged he engaged in sexual intercourse with a 65 y/o resident with multiple sclerosis’.
- 83 y/o blind/deaf woman was raped multiple times (always at midnight).
- None of the previous allegations were substantiated by the facility or the state.
OTHER CASES

• 3rd rape of Texas NH resident, the assailant ejaculated on her mouth and on her breasts – she kept the evidence by spitting in a cup and not washing her bra for 3 weeks

• In Iowa a patient who used a walker to get around and could not bathe herself, was sexually assaulted in the shower by an aide

• 88 y/o California woman awoke to find her catheter removed and bed wet – the NA had told her “this is why I love my job”

• Some cases are taking explicit photos to embarrass residents or patients (nude/putting embarrassing memes about them on social media)
PROTECTING OUR PATIENTS

- Training – sexual assault and how to identify, how to report, steps to follow, who to call
- Policy and procedures – need to be in place, need to be accessible, need to be reviewed and updated annually at the least
- Staff training with real life scenarios
- Protect staff from false allegations – what is your system
- Take all allegations seriously and react promptly and professionally
- Zero tolerance for social media/HIPAA violations