NORTH CAROLINA LAW REVIEW

Volume 62 | Number 6 Article 35

8-1-1984

# Mazza v. Huffaker: Sex with the Patient's Spouse is Negligent Psychiatric Treatment

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# *Mazza v. Huffaker*: Sex with the Patient's Spouse is Negligent Psychiatric Treatment

Psychiatric malpractice is one of the fastest growing areas of professional liability.[1] Although patients long have been able to sue their doctors for injuries occurring during the course of their medical treatment,[2] psychiatrists traditionally have been free from malpractice litigation.[3] This relative immunity has existed for several reasons. The psychiatric profession's diverse therapeutic techniques have made it difficult to establish definite standards of care. In addition, trials involving psychiatric treatments often involve complex medical, legal, and factual issues and rely on conflicting expert testimony.[4] This complexity and confusion, which reflects the subjectiveness of mental health standards, has made it difficult for a patient to win a verdict from a jury of laypersons.[5] The recent surge in psychiatric malpractice litigation, however, has included many cases involving factual issues that any juror could comprehend and malpractice issues that do not generate conflicting expert testimony.[6] These latter cases have included the prescription, as medical treatment, of sexual relations between the psychiatrist and the patient.[7]

Sexual relations between patient and psychiatrist always have been recognized as a violation of medical ethics.[8] Civil liability, however, was established only recently by the 1968 case of *Nicholson v. Han*.[9] Since *Nicholson* such civil litigation has increased; there now exists an established malpractice cause of action for a patient whose psychiatrist has sex with her as part of prescribed therapy.[10] Although in the early 1970s sexual relations were some-

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1. Wilkinson, *Psychiatric Malpractice: Identifying Areas of Liability*, TRIAL, Oct. 1982, at 73.

2. J. GUNTHER, THE MALPRACTITIONERS 3 (1978).

3. Rothblatt & Leroy, *Avoiding Psychiatric Malpractice*, 9 CAL. W.L. REV. 260, 260 (1973).

4. *Id.*

5. *Id.*

6. For example, in some cases the jury has had to determine whether the psychiatrist actually had sex with his patient. *See infra* notes 12-13 and accompanying text.

7. Gentry, *Psychiatric Liability: Abuse of the Therapist-Patient Relationship*, TRIAL, May 1980, at 26; *see infra* notes 9-15 and accompanying text. One recent survey indicated that five to ten percent of the nation's psychotherapists have had some form of physical contact with female patients under the guise of medical treatment. Dietz, *Pyschotherapists, Patients and Sex*, Boston Globe, Jan. 31, 1982, at 1, col. 1.

8. The Hippocratic Oath of the Physician states, "Whatever houses I may visit, I will come for the benefit of the sick, remaining free of all intentional injustice, of all mischief and in particular of sexual relations with both female and male persons . . . ." (quoted in 1982 MED. TRIAL TECH. Q. 201, 203). The ethical code of the American Psychiatric Association expressly states, "Sexual activity with a patient is unethical." Lange & Hirsh, *Legal Problems of Intimate Therapy*, 1982 MED. TRIAL TECH. Q. 201, 203.

9. 12 Mich. App. 35, 162 N.W.2d 313 (1968) (recognizing cause of action but denying recovery because the action had been abolished); *see* Annot., 33 A.L.R.3d 1393 (1970).

10. *See* Cotton v. Kambly, 101 Mich. App. 537, 300 N.W.2d 627 (1980) (psychiatrist liable for medical malpractice after inducing the patient to have sex under the guise of psychiatric treatment); Roy v. Hartogs, 85 Misc. 2d 891, 381 N.Y.S.2d 587 (1976) (psychiatrist who had sexual intercourse with patient as part of treatment was liable for medical malpractice). *See also* 25 ATLA L. REP. 98 (1982) (discussing cases involving malpractice claims based on psychiatrists sexually abusing their patients); Gentry, *supra* note 7, at 26-29. Because the reported cases dealing

times advocated as proper therapy,[11] the American Psychiatric Association has adopted[12] the view of experts in the psychiatric field today that sexual contact between patient and psychiatrist harms the patient and departs from accepted standards of medical practice.[13] The courts have recognized the mental damage resulting from this type of treatment[14] and have granted relief to patients injured by it.[15]

The North Carolina Court of Appeals recently decided its first malpractice case based on a psychiatrist's sexual endeavors.[16] Unlike most recent cases in other jurisdictions,[17] however, *Mazza v. Huffaker* involved sexual relations between the psychiatrist and the patient's spouse. *Mazza* involved Dr. Huffaker, a psychiatrist who for four years had been treating Mr. Mazza for manic depressive psychosis. During this continuing treatment, Huffaker also began to see Mrs. Mazza on a professional basis. Eventually, this relationship became personal. Shortly thereafter, Mr. Mazza moved out of his home, but continued treatment with Huffaker. One night, he went home and discovered Huffaker having sexual intercourse with Mrs. Mazza. It was out of this incident that the lawsuit arose.[18] The jury found Huffaker liable for medical malpractice for having sex with his patient's wife.

The court of appeals affirmed.[19] In holding that a patient can suffer mental and emotional harm sufficient for a malpractice action by witnessing the psychiatrist's private sexual actions with another, the court extended the rationale in most sexual intimacy cases.[20] Furthermore, as a result of the jury instructions and special verdict, the decision may have substantial effects on general medical malpractice principles in North Carolina.

The jury was instructed to find malpractice if it determined that any one of the following was true: (1) that defendant violated the standard of care;[21]

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with sexual relations between psychiatrist and patient have involved male psychiatrists and female patients, this note will refer to psychiatrists as men and patients as women.

11. *See* Lange & Hirsh, *supra* note 8, at 204-05; Riskin, *Sexual Relations Between Psychotherapists and Their Patients: Toward Research or Restraint*, 67 CALIF. L. REV. 1000 (1979).

12. Roy v. Hartogs, 85 Misc. 2d 891, 895, 381 N.Y.S.2d 587, 590 (1976) (Markowitz, J., concurring).

13. *Id.*; Riskin, *supra* note 11, at 1012.

14. Sex as treatment aggravates a patient's mental condition. Roy v. Hartogs, 85 Misc. 2d 891, 902, 381 N.Y.S.2d 587, 596 (1976); Anonymous v. Berry, No. 78-8182-CA, Division H (Fla. Duval County Cir. Ct. Mar. 14, 1979), *noted in* 22 ATLA L. REP. 447, 473 (1979). The sexual abuse also can destroy the patient's family and married life. Walker v. Parsons (Cal. App. San Diego Super. Ct. July 7, 1981), *noted in* 68 A.B.A. J. 1353, 1354 (1982). The sex also delays the patient's recovery from her original mental illness. Combs v. Silverman, No. LE 596 (Va.-Richmond Cir. Ct. Feb. 5, 1982), *noted in* 25 ATLA L. REP. 98, 98-100 (1982).

15. *See* cases cited *infra* note 14. *See generally* 25 ATLA L. REP. 98 (1982).

16. Mazza v. Huffaker, 61 N.C. App. 170, 300 S.E.2d 833 (1983).

17. *See supra* notes 6-14 and accompanying text.

18. *Mazza*, 61 N.C. App. at 175-76, 300 S.E.2d at 837.

19. 61 N.C. App. 170, 300 S.E.2d 833 (1983).

20. An argument can be made that the "other person" must be a relative because the trial testimony was limited to references to sexual acts between the psychiatrist and the patient's relative. *Id.* at 177, 300 S.E.2d at 838.

21. Record at 198, *Mazza*, 61 N.C. App. 170, 300 S.E.2d 833 (1983) (the jury was asked to determine whether defendant failed to use that degree of professional learning, skill, and ability

(2) that defendant failed to recognize and guard against the transference or counter-transference phenomena in his treatment of Mrs. Mazza; (3) that defendant abandoned Mr. Mazza as a patient; or (4) that defendant continued to treat Mr. Mazza after becoming emotionally and sexually involved with Mr. Mazza's wife.[22] The jury rendered a special verdict finding that defendant committed medical malpractice in his treatment of Mr. Mazza,[23] but the verdict did not reveal the basis of the finding. Thus, each of the grounds enumerated in the jury instructions arguably constitutes malpractice in North Carolina. Such a decision could have a profound effect on North Carolina malpractice principles. First, by finding no error in the jury's determination that Huffaker's conduct violated the standard of care, the court created a stricter duty and higher standard of care for psychiatrists than for other medical doctors. Psychiatrists now may be held liable for private actions, unrelated to the treatment of the claimant.[24] Second, allowing a jury to determine that Huffaker was liable in malpractice to Mr. Mazza for treatment rendered to Mrs. Mazza created a unique cause of action on behalf of a third person.[25] Finally, the remaining grounds for malpractice coupled with certain rulings represent an unprecedented liberalization of the court's attitude toward a malpractice claimant.

*Mazza*'s primary impact on North Carolina law is the adoption of a higher standard of care for psychiatrists than for other doctors. To establish liability for malpractice, a plaintiff must prove that the psychiatrist's care was not in accordance with the standards of practice among members of his profession with similar training and experience in the same or a similar community.[26] Traditionally, malpractice has been based on the negligent "treatment or care" administered to the plaintiff by the psychiatrist.[27] *Mazza*, however, did not involve allegations of negligent "treatment" of plaintiff. Rather, the negligent conduct was private, unrelated to any medical treatment, and was exercised with a person other than plaintiff. Thus, *Mazza* differs from cases in other jurisdictions in which courts have held that negligence only arises from conduct performed as part of the treatment or employment.[28] For example, in

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that others similarly situated ordinarily possess or whether defendant used his position of trust and confidence to harm his patient).

22. *Id.* For a definition of transference, see *infra* text accompanying note 36.

23. *Mazza*, 61 N.C. App. at 173, 300 S.E.2d at 836.

24. *See infra* notes 26-34 and accompanying text.

25. *See infra* notes 35-41 and accompanying text.

26. N.C. GEN. STAT. § 90-21.12 (1981) provides:

> Defendant shall not be liable for the payment of damages unless the trier of fact is satisfied . . . that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities.

27. *See supra* notes 10-15; *see generally* Furrow, *Defective Mental Treatment: A Proposal for the Application of Strict Liability to Psychiatric Service*, 58 B.U.L. REV. 391 (1978).

28. *E.g.*, City of Green Cove Springs v. Donaldson, 348 F.2d 197 (5th Cir. 1965) (police officer stopped plaintiff for speeding and then raped her in his police car; held that the officer's employer was not vicariously liable since the rape was not within the scope of the officer's employment); Hess v. Frank, 47 A.D.2d 889, 367 N.Y.S.2d 30 (1975) (psychiatrist had uttered abusive

*Hess v. Frank*[29] a New York court held that although the psychiatrist's conduct would cause mental anguish to the patient, he could not be guilty of malpractice if the conduct of which he complained was unrelated to the medical treatment being rendered.[30]

*Mazza* cited the unique psychiatrist-patient relationship and the corresponding psychiatrist's duties as justification for its ruling that Huffaker's conduct was malpractice.[31] The psychiatrist's duty to maintain the patient's trust and confidence was recognized as absolutely essential to the effectiveness of the therapy rendered.[32] Although all doctors have the duty to maintain a patient's trust and confidence,[33] this trust is not as essential to the effectiveness of physical treatment as it is for mental therapy. Thus, a breach of trust arising out of conduct unrelated to the treatment should not make a nonpsychiatrist liable for malpractice.[34] Similarly, a doctor's personal activities should not be restricted by the threat of malpractice unless the activities would harm the professional treatment being rendered. Limiting *Mazza* to psychiatrists would adhere to this proposition.

The second major effect of *Mazza* is the creation of a unique third-party medical malpractice cause of action. The court allowed Mr. Mazza to recover on a malpractice claim arising from treatment Huffaker rendered to Mrs. Mazza while she was his patient. The court of appeals found no error in the trial court's instruction that the jury must find Huffaker guilty of malpractice in his treatment of Mr. Mazza if Huffaker "failed to recognize and guard against the transference or counter-transference phenomenon"[35] between himself and Mrs. Mazza while she was a patient.

Transference and counter-transference are common phenomena in psychiatric therapy. Transference occurs when the patient transfers emotions the patient has towards someone else to the psychiatrist. Counter-transference occurs when the psychiatrist transfers feelings that the psychiatrist has towards

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language to patient during a regularly scheduled therapy session; the language was found not to be part of the treatment and thus not professional misconduct).

29. 47 A.D.2d 889, 367 N.Y.S.2d 30 (1975).

30. *Id.*

31. *Mazza*, 61 N.C. App. at 176-77, 300 S.E.2d at 837-38. *See also* D. DAWIDOFF, THE MALPRACTICE OF PSYCHIATRISTS 43 (1973). *Cf.* Whitehurst v. Boehm, 41 N.C. App. 670, 674, 255 S.E.2d 761, 764 (1979) (same rules govern duty and liability for physicians and surgeons). No pre-*Mazza* North Carolina case had held a psychiatrist to a higher standard than other doctors. A special duty for psychiatrists, however, has been advocated by medical experts and other commentators. *Mazza*, 61 N.C. App. at 176-77, 300 S.E.2d at 837-38; D. DAWIDOFF, *supra*, at 43; Dawidoff, *Insanity, Intimacy and Infidelity: Trends in Psychiatric Malpractice*, TRIAL, June 1977, at 27.

32. *Mazza*, 61 N.C. App. at 176-77, 300 S.E.2d at 837-38.

33. *Id.* at 176, 300 S.E.2d at 837.

34. The doctor should be held liable for his actions under other causes of action that would be available to the patient. *See infra* notes 48-52 and accompanying text.

35. *Mazza*, 61 N.C. App. at 180, 300 S.E.2d at 840. The court attempted to justify the jury instruction by claiming that its purpose was to enable the jury to determine whether Huffaker and Mrs. Mazza had sexual relations. *Id.* at 180-81, 300 S.E.2d at 840. If this was the instruction's purpose, however, the instruction could simply have read, "Do you find that Mrs. Mazza and Dr. Huffaker had sexual relations?" Using the phenomenon as a basis for the jury's findings resulted in granting Mr. Mazza a malpractice action for a wrong done to his wife, not to him.

someone else to his patient.[36] The psychiatrist's abuse of the transference phenomena gives the patient a cause of action for malpractice.[37] In *Walker v. Parsons*[38] a California psychiatrist had the female patient transfer her feelings concerning her husband and family to him.[39] He then abused the transference by making the patient believe he loved her and by having sexual relations with her. The patient brought a malpractice claim for this abuse and was awarded 4.6 million dollars in damages.[40]

The transference and counter-transference cases establish that a patient whose psychiatrist abuses the transference has a malpractice action against the psychiatrist. In *Mazza*, however, the psychiatrist-patient relationship existed between Huffaker and Mrs. Mazza, not Mr. Mazza. Mr. Mazza was therefore given the right to pursue a malpractice claim under a cause of action that traditionally belonged to Mrs. Mazza.[41] Thus, *Mazza* expands the scope of transference cases by holding that the spouse of the patient also will have a cause of action for malpractice. This result is unprecedented.

Although a husband should be granted relief if he suffers from his wife's psychiatrist abusing the transference, no justification exists for allowing that recovery under a malpractice claim. The husband does not have a doctor-patient relationship in the rendering of the negligent treatment (the abuse of transference).[42] Allowing the husband to recover for malpractice violates the longstanding principle that a doctor-patient relationship must exist to maintain a malpractice suit.[43] In addition, a third-party action gives rise to the possibility of two parties recovering against a defendant under one cause of action. If the wife and husband both choose to sue a doctor for abuse of the transference phenomenon, they will be able to do so, each recovering under a malpractice claim that should be the wife's alone.[44]

One jurisdiction has allowed a husband to recover against his wife's doctor as a result of the doctor's negligent treatment, but the recovery was not based on malpractice. The California Supreme Court recognized that a hus-

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36. *Id.* at 180, 300 S.E.2d at 840.

37. *See* Zipkin v. Freeman, 436 S.W.2d 753 (Mo. 1968) (en banc) (psychiatrist mishandled the transference phenomenon, stimulated patient's romantic involvement with him, triggering her divorce and destruction of her family life; court held that patient had a malpractice action); Landau v. Werner, 105 Sol. J. 257 (Q.B.) (psychiatrist permitted social contacts to intrude upon his professional treatment of patient, causing her to become suicidal when he stopped the relationship; defendant held guilty of malpractice), *aff'd*, 105 Sol. J. 1008 (C.A. 1961).

38. (Cal. App. San Diego Super. Ct. July 7, 1981), *noted in* 68 A.B.A.J. 1353, 1354 (1982). *See also* Wilkinson, *supra* note 1, at 77; 24 ATLA L. REP. 290, 295-97 (1981).

39. *Id.*

40. *Id.*

41. Mrs. Mazza also was seeing Dr. Huffaker as a patient. Their psychiatrist-patient relationship was independent of the relationship between Mr. Mazza and Huffaker. Thus, if Mrs. Mazza had been subjected to negligent treatment by Huffaker, she, not her husband, should bring the malpractice claim.

42. Although Mr. Mazza and Dr. Huffaker had a psychiatrist-patient relationship, it did not encompass the treatment being rendered to Mrs. Mazza. Thus, Dr. Huffaker did not owe Mr. Mazza a psychiatrist-patient duty.

43. *See* Easter v. Lexington Memorial Hosp., 303 N.C. 303, 305-06, 278 S.E.2d 253, 255 (1981).

44. *See supra* note 41 and accompanying text.

band had a cause of action for negligent infliction of emotional distress when a doctor's erroneous diagnosis that the wife had syphilis resulted in the breakup of their marriage.[45] The court held that the doctor owed the husband a duty to exercise due care in diagnosing his wife since the risk of harm from a misdiagnosis was reasonably foreseeable.[46] The court also held that the husband had a cause of action for loss of consortium occasioned by the emotional injury to his wife that resulted from the negligent diagnosis.[47]

The California case is analogous to *Mazza*. In each, the negligent medical treatment of the wife contributed to a breakup of the marriage, resulting in severe emotional harm to the husband. Neither husband had a doctor-patient relationship related to the negligent medical treatment. Under the *Mazza* analysis, the husband has a malpractice cause of action. Under the California rule, separate tort actions alleging negligent infliction of emotional distress and loss of consortium are the proper causes of action. Mr. Mazza could have sought redress for Huffaker's actions under any of the following claims: (1) negligent infliction of emotional distress;[48] (2) intentional infliction of emotional distress;[49] (3) loss of consortium;[50] (4) criminal conversation;[51] or (5) breach of contract.[52] The North Carolina Court of Appeals, however, has stretched medical malpractice principles unnecessarily by allowing Mr. Mazza to win a verdict by asserting his wife's unasserted claim for abuse of the transference phenomenon.

Mr. Mazza's recovery for a wrong done to him as a result of his wife's psychiatric treatment may indicate that North Carolina is liberalizing its view toward malpractice claimants. The case contradicts North Carolina courts' conservative attitude toward compensating injured persons for adverse medical results.[53] Certain other rulings in *Mazza* also portend a more liberal view toward malpractice claimants and toward malpractice principles in general. One such ruling was the court of appeals' holding that there was no error in the trial court's instruction that Huffaker was liable for malpractice if his conduct was an "abandonment" of Mr. Mazza as a patient.[54]

It is generally recognized that a doctor who abandons his patient is guilty

45. Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 930-31, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980).

46. *Id.*

47. *Id.* at 931, 616 P.2d at 821, 167 Cal. Rptr. at 839.

48. North Carolina long has recognized the torts of negligent and intentional infliction of emotional distress. *See* Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981); Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Morrow v. Kings Dep't Stores, 57 N.C. App. 13, 290 S.E.2d 732, *disc. rev. denied*, 306 N.C. 385, 294 S.E.2d 210 (1982). *See generally* Byrd, *Recovery for Mental Anguish In North Carolina*, 58 N.C.L. REV. 435 (1980).

49. *See supra* note 48.

50. *See* Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

51. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 874-88 (4th ed. 1971).

52. *See* Anclote Manor Found. v. Wilkinson, 263 So. 2d 256 (Fla. Dist. Ct. App. 1972). *See also infra* notes 69-70 and accompanying text.

53. *See* REP. OF THE N.C. PROF. LIABILITY INS. STUDY COMM'N 3 (Mar. 12, 1976).

54. *Mazza*, 61 N.C. App. at 178-79, 300 S.E.2d at 839 (1983); *see supra* note 22 and accompanying text.

of malpractice if injury results.[55] Abandonment is a unilateral act by the medical practitioner and has been found to exist in cases in which the doctor refused to attend a patient,[56] left a patient during an operation,[57] failed to attend to a patient despite a promise to do so,[58] or discharged a patient prematurely.[59] Each of these cases involved a doctor's direct action or inaction in relation to the treatment being rendered. By construing Huffaker's activity with Mr. Mazza's wife as abandonment, the court recognized that "abandonment" also can be inferred from a doctor's actions that are private and unrelated to the patient's treatment.

This holding also could be construed as a rule that a doctor "abandons" his patient by acting in conflict with the patient's interest, since these conflicting actions would not be conducive to providing proper health care. This principle, however, would give the patient a right to restrict his doctor's nonprofessional activity by the threat of a malpractice suit. Such a result unnecessarily expands the scope of negligent malpractice and violates the policies underlying the cause of action.

Another ruling indicating a more liberal attitude toward malpractice claimants was the award of damages. Mr. Mazza was awarded $17,000 in compensatory damages for the cost of medical services rendered to both Mr. and Mrs. Mazza prior to Huffaker's negligent conduct.[60] These damages were upheld on appeal.[61] The court of appeals stated that all medical treatments given by Huffaker were rendered worthless by his subsequent sexual relations with Mrs. Mazza.[62]

This award is unique in two respects. First, prior to *Huffaker* no North Carolina court had awarded as damages the cost of medical treatments *prior* to the negligent act. To the contrary, the North Carolina Supreme Court has held that a plaintiff is not entitled to recover for medical expenses incurred prior to the negligence of which he or she complains.[63] *Mazza* may open a new avenue for plaintiffs seeking malpractice damages. Many innovative arguments now could be made on behalf of plaintiffs suing doctors who have rendered ongoing treatment. A fatal negligent act by the doctor arguably would "destroy or make worthless" all treatment administered up until the negligence.[64]

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55. Wilson v. Martin Memorial Hosp., 232 N.C. 362, 61 S.E.2d 102 (1950).

56. Cortez v. Macias, 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (1980); Vann v. Harden, 187 Va. 555, 47 S.E.2d 314 (1948).

57. Burnett v. Layman, 133 Tenn. 323, 181 S.W. 157 (1915).

58. Fortner v. Koch, 272 Mich. 273, 261 N.W. 762 (1935).

59. Collins v. Meeker, 198 Kan. 390, 424 P.2d 488 (1967).

60. *Mazza*, 61 N.C. App. at 187-88, 300 S.E.2d at 844.

61. *Id.*

62. *Id.*

63. Blaine v. Lyle, 213 N.C. 529, 196 S.E. 833 (1938) (girl who had been treated by doctor for over one year could not recover expenses incurred for treatment rendered prior to negligent act).

64. A hypothetical situation can demonstrate this point. A patient with a heart condition must receive treatment regularly over the course of four years. During the last treatment, the doctor negligently injects the wrong medicine into the patient. As a result the patient must incur a

The court failed to recognize one important factor in its affirmation of the award for past medical fees—plaintiff had benefitted from receiving those psychiatric treatments. He was able to work, carry on a family life, and engage in a relatively normal life during the course of Huffaker's four year treatment. The award should have been set off by the benefits received by Mr. Mazza. No subsequent act can make worthless what already was received.[65]

The second unique aspect of the compensatory damages award was the inclusion of Mrs. Mazza's medical expenses.[66] The expenses incurred by Mrs. Mazza were for treatments she received as a patient of Huffaker, independent of the treatments Mr. Mazza was receiving.[67] Thus, the award compensates Mr. Mazza for expenses incurred by another. Here again, the court granted Mr. Mazza relief under a claim exercisable by his wife, not him.[68]

Although husbands long have been able to recover their spouse's medical expenses, a malpractice claim is not the proper vehicle. Florida allowed a husband to recover expenses in a breach of contract action when the psychiatrist was found guilty of abusing the counter-transference phenomenon and causing the wife's suicide.[69] The court held that because the psychiatrist breached a contract with a patient and destroyed the benefit anticipated from skillful treatment, the party paying for the patient's care was entitled to recover payments made under the contract.[70] Recovery also was conditioned expressly on proof that the psychiatrist's breach destroyed the possibility of rendering beneficial treatments—the wife's subsequent suicide was proof that the treatments were not beneficial.[71] In *Mazza*, however, there was no finding that Mrs. Mazza did not benefit from Huffaker's treatments. To the contrary, testimony at trial tended to show that the treatments received by Mrs. Mazza were helpful.[72]

The award of damages for permanent injury also embodies a more liberal view toward malpractice claimants. Traditionally, North Carolina has maintained a high threshold of proof to warrant permanent damage instructions.[73] The evidence must show with reasonable certainty that the injury is permanent.[74] The plaintiff must overcome this burden by the greater weight of the

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heart transplant or die. In either situation, *Mazza* would allow the patient or his estate to recover all medical expenses that the patient had incurred up to that last treatment.

65. In Hess v. Frank, 47 A.D.2d 889, 367 N.Y.S.2d 30 (1975), the court denied a patient's claim for the cost of past psychiatric treatments. The court held that payments made for treatments rendered were not recoverable.

66. *Mazza*, 61 N.C. App. at 187-88, 300 S.E.2d at 844.

67. *See supra* note 41 and accompanying text.

68. *See supra* note 41 and accompanying text.

69. Anclote Manor Found. v. Wilkinson, 263 So. 2d 256 (Fla. Dist. Ct. App. 1972).

70. *Id.* at 257.

71. *Id.*

72. Record at 131. The testimony tended to show that the treatment was instrumental in Mrs. Mazza's reconciliation with her father.

73. *See, e.g.*, Caison v. Cliff, 38 N.C. App. 613, 248 S.E.2d 362 (1978).

74. Gillikin v. Burbage, 263 N.C. 317, 326, 139 S.E.2d 753, 760 (1965); Caison v. Cliff, 38 N.C. App. 613, 616, 248 S.E.2d 362, 363 (1978).

evidence.[75] The only evidence in *Mazza* tending to prove a permanent injury was testimony by plaintiff's expert that Mr. Mazza never again would be able to form a medical relationship with a psychiatrist.[76] No expert testified that this would harm plaintiff's mental health permanently.[77] No doubt the *Mazza* evidence implies some pain and suffering. It is doubtful that the limited expert testimony met the North Carolina Supreme Court's strict standard of proof of a reasonable certainty of permanent injury.

Two additional rulings by the court of appeals were incorrect. First, the court of appeals upheld the trial court's decision to allow an expert witness to state an opinion concerning the professional ethics of Huffaker's conduct.[78] It is well established that in a malpractice action the psychiatrist's liability is conditioned on a violation of the standard of care.[79] Testimony on ethical standards is irrelevant to establishing negligence and should have been omitted.[80] Also, it is possible that the expert's unnecessary testimony on the ethical standard confused the jurors and caused them to attribute greater credibility to the expert's other testimony concerning the proper standard of care. The court's failure to omit the evidence denied defendant's statutory right to a judgment based on the standard of care in the community,[81] and was prejudicial error.

The final error in *Mazza* was the trial court's instruction that the jury must find malpractice if it determined that Huffaker continued to treat Mr. Mazza after becoming emotionally and sexually involved with Mrs. Mazza.[82] This instruction preempted the jury's role by conclusively establishing that the sexual conduct violated the standard of care. The jury was left with only a factual question whether the couple had sex, not whether having sex violated the standard of care. Thus, Huffaker was denied his right to a jury determination of whether he violated the standard of care. Because the instruction had the same effect as a directed verdict conditioned on a factual finding that the psychiatrist had sex with the patient's wife, the instruction should have been ruled prejudicial error.

*Mazza* significantly expanded medical malpractice principles. Several of the changes are welcome. Raising the standard of care for psychiatrists, awarding past medical expenses if offset by the benefits consumed, and decreasing the burden of proof for permanent injury will provide more protec-

75. Dolan v. Simpson, 269 N.C. 438, 442, 152 S.E.2d 523, 526 (1967).

76. *Mazza*, 61 N.C. App. at 185-86, 300 S.E.2d at 843.

77. The North Carolina Supreme Court historically has required expert testimony to establish a reasonable certainty of permanent injury. *See, e.g.*, Gillikin v. Burbage, 263 N.C. 317, 326, 139 S.E.2d 753, 760 (1965).

78. The court did not find error in this testimony because the ethical standard was equivalent to the standard of care. *Mazza*, 61 N.C. App. at 183-84, 300 S.E.2d at 842.

79. *Id.* at 174-75, 300 S.E.2d at 837; N.C. GEN. STAT. § 90-21.12 (1981).

80. *Cf.* Logan v. District of Columbia, 447 F. Supp. 1328 (1978) (doctor's breach of the confidentiality of the doctor-patient relationship not recognized as malpractice even though the conduct was found to be an ethical violation).

81. N.C. GEN. STAT. § 90-21.12 (1981), *quoted supra* note 26.

82. *Mazza*, 61 N.C. App. at 179-80, 300 S.E.2d at 839; *see also supra* notes 26-34 and accompanying text.

tion for claimants. Granting third parties a cause of action, defining "abandonment" of the patient broadly, allowing an expert to prejudice the jury's decisionmaking role, and giving the trial judge a right to preempt needlessly the jury's charge, however, are not desired results. The supreme court should take action to overrule these aspects of *Mazza*. If the court is unwilling to do so, it should at least limit application of the less desirable results to unique factual situations such as that occuring in *Mazza*. Such a limited interpretation would diminish their effects on North Carolina malpractice principles since a similar factual pattern is unlikely to occur frequently.

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