

Perney v Medical One N.Y., P.C.
2021 NY Slip Op 30476(U)
February 17, 2021
Supreme Court, New York County
Docket Number: 159080/2019
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS PART 56EFM

Justice

-----X

INDEX NO. 159080/2019

THIBAUT PERNEY,

Plaintiff,

- v -

MEDICAL ONE NEW YORK, P.C., ROSE MARIE PHILLIP, M.D.,
and JOHN DOE,

Defendants.

-----X

**DECISION AND ORDER AFTER
INQUEST**

I. INTRODUCTION

This is an action to recover damages for assault and battery, negligent hiring, negligent supervision, and intentional infliction of emotional distress, arising from an alleged sexual assault by a nurse or medical technician upon a patient under sedation or anesthesia. The plaintiff alleges that he was a patient at a physician’s office, and that the nurse/technician committed a sexual assault upon him both while he was under sedation for platelet-rich plasma (PRP) treatment, and as he was in the process of regaining consciousness from the sedation. By order dated August 11, 2020, the court granted the plaintiff’s motion pursuant to CPLR 3215(a) for leave to enter a default judgment against the defendants Medical One New York, P.C. (the P.C.), and Rose Marie Phillip, M.D. (together the medical defendants), to the extent of permitting him to enter a default judgment against those defendants on the issue of liability on the causes of action to recover for negligent hiring and negligent supervision. The court ruled that the plaintiff set forth sufficient proof of the facts underlying those causes of action, and concluded that the medical defendants’ termination of the nurse/technician’s employment immediately after the plaintiff complained to them, without giving the nurse/technician the opportunity to rebut the allegations, could allow a finder of fact reasonably to conclude that the

medical defendants knew or should have known of the nurse/technician's propensity to engage in such behavior. The court thus set the matter down for an inquest on the issue of damages against the medical defendants.

II. FINDINGS OF FACT

The plaintiff, Thibault Perney, testified on his own behalf, and submitted invoices for mental health treatment by a social worker. Based on the credible evidence that Perney adduced, the court makes the following finding of fact:

On February 26, 2019, Perney presented to the medical defendants, who operated a stem cell replacement therapy practice, for a PRP treatment. Perney was seen by Dr. Phillip, who is an anesthesiologist, as well as another doctor and a person he described as a male nurse. Perney did not know, prior to presenting to the medical defendants, that the treatment would involve placing him under sedation or anesthesia. He was nonetheless given an injection that placed him under general anesthesia. As Perney recovered from the anesthesia, and was still somewhat disoriented, he noticed that the nurse had placed his hands inside Perney's underwear, and was fondling Perney's genitals. Perney asked the nurse if he had, in fact, just placed his hand under Perney's underwear, to which the nurse responded that he "couldn't resist" doing so.

Immediately after Perney fully recovered from the effects of the anesthesia, he walked to Dr. Phillips's office, and informed her that her nurse had fondles Perney's genitals as the anesthesia wore off. Dr. Phillips appeared to be appalled by her nurse's behavior. Dr. Phillips informed Perney that the nurse was not a full-time staff member of her medical practice. She further informed Perney that the nurse was a new hire, with respect to whom the medical defendants did not have the time or opportunity to conduct a background check. After this discussion, Perney immediately left the medical defendants' office.

Perney and Dr. Phillips thereafter engaged in communications via text message and telephone over the next several weeks. Over the course of these communications, Dr. Phillips was apologetic.

Perney first attempted to forget about the experience. Nonetheless, as a consequence of his experience, Perney began feeling vulnerable and ashamed, and the assault weighed on his mind. He spoke about the occurrence with his sister and brother-in-law, who were themselves health providers, one a physician and the other a nurse. He became fearful of seeking out regular medical treatment because he was concerned that he might again be sexually abused by a physician, nurse, or medical technician. Perney suffered from a surge of anxiety and stress, was unable to sleep soundly, and began biting his fingernails.

As a consequence of his experience, Perney began having trouble with his marital relationship, including his approach to sexuality. He began separating his sexual life from his love relationship, and effectively abandoned sexual intercourse with his wife. He became shier, became increasingly less happy, and shut down part of his social life. Perney's previous level of energy was diminished.

Beginning in August 2019, Perney sought mental health services from clinical social worker Christina Harrington-Stutzmann at Samaritan LCSW, P.C. Although Perney made some progress in addressing his mental health issues after his therapy sessions with Harrington-Stutzmann, he regressed somewhat after the sessions were completed. Perney expended the sum of \$391.00 for four therapy sessions with Harrington-Stutzmann.

In November 2019, Perney's employer terminated his employment as vice president of fixed income sales at Société Générale Bank.

Perney sustained no physical injuries.

In his post-trial memorandum, the plaintiff requested this court to award him compensatory damages in the sum of \$75,000 for past pain and suffering, and compensatory damages for future pain and suffering in such amount as the court deems warranted.

III. CONCLUSIONS OF LAW

A defaulting defendant admits all traversable allegations in the complaint, including the basic issue of liability (*see Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, [1985]; *Cole-Hatchard v Eggers*, 132 AD3d 718 [2d Dept 2015]; *Gonzalez v Wu*, 131 AD3d 1205 [2d Dept 2015]). The defaulting defendants are, however, "entitled to present testimony and evidence and cross-examine the plaintiff's witnesses at the inquest on damages" (*Minicozzi v Gerbino*, 301 AD2d 580, 581 [2d Dept 2003] [internal quotation marks omitted]; *see Rudra v Friedman*, 123 AD3d 1104 [2d Dept 2014]; *Toure v Harrison*, 6 AD3d 270 [1st Dept 2004]). The medical defendants elected not to present such testimony or cross-examine witnesses at the inquest here, despite being provided with notice of the inquest.

Even where recovery for damages arising from a sexual assault is based on a theory negligent hiring and supervision or negligent provision of security at apartment buildings, dormitories, and medical/mental health facilities, the compensatory damages that are recoverable for the consequences of a sexual assault include compensation for any physical injuries, conscious pain and suffering (including mental and emotional distress and anxiety that can be based on the plaintiff's subjective testimony), and special damages, which need not be pleaded (*see Laurie Marie M. v Jeffrey T. M.*, 159 AD2d 52, 56-58 [2d Dept 1990]; *De La Cruz v City of New York*, 163 AD2d 163 [1st Dept 1990]; *Deborah S. v Diorio*, 153 Misc 2d 708, 715 [Civ Ct, N.Y. County 1992]).

"The 'reasonableness' of compensation must be measured against relevant precedent of comparable cases" (*Kayes v Liberati*, 104 AD3d 739, 741 [2d Dept 2013]; *see Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 275 [1st Dept 2007]; *Reed v City of New York*, 304 AD2d 1, 7 [1st Dept 2003]; *Halsey v New York City Tr. Auth.*, 114 AD3d 726, 727 [2d Dept 2014]).

"Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (*Miller v Weisel*, 15 AD3d 458, 459 [2d Dept 2005];

see *Garcia v CPS 1 Realty, L.P.*, 164 AD3d at 659 [2d Dept 2018]; *Vainer v DiSalvo*, 107 AD3d 697, 698-699 [2d Dept 2013]; *Reed v City of New York*, 304 AD2d at 7). What constitutes “reasonable compensation” must be assessed with due regard to the “circumstances presented” (*Luna v New York City Tr. Auth.*, 116 AD3d 438, 438 [1st Dept 2014]).

With respect to awards compensating a victim of sexual assault, a finder of fact must consider include the frequency, nature, and severity of the assault or assaults, the force employed by the assailant, the relationship between the assailant and victim, the relative power of the assailant over the victim, and the level of consciousness of the victim. Thus, in cases of forcible rape, as opposed to statutory rape, courts have concluded that awards of \$400,000 (see *Miller v State of New York*, 110 AD2d 627 [2d Dept 1985]) and \$450,000 (see *Feldman v Knack*, 170 AD3d 667 [2d Dept 2019]) constituted reasonable compensation for emotional distress and physical injury. In *Dupree v Giugliano*, (87 AD3d 975 [2d Dept 2011], *mod. other grounds* 20 NY3d 921 [2012]), the Court upheld awards of \$150,000 for past emotional distress and \$50,000 for future emotional distress where the plaintiff had a consensual affair with her mental health therapist. In *A.A. v State of New York* (43 Misc 2d 1004, 1014 [Ct Claims 1964]), the court awarded \$90,000 to a minor who had been sexually assaulted at a State mental health facility, based on proof that the assault aggravated the minor’s existing psychiatric disorders. In *Laurie Marie M. v Jeffrey T. M.* (159 AD2d at 53, 60-61), the Court reduced a jury’s compensatory damages award to a minor plaintiff, against her grandfather, from the sum of \$200,000 to the sum of \$100,000, where the plaintiff claimed that there had been more than 20 incidents over a period of several years in which the grandfather rubbed and touched the plaintiff’s breasts and genitals. In *Roy v Hartog* (85 Misc 2d 891 [App Term, 1st Dept 1976]), the court directed a new trial unless the plaintiff---who had an affair with her psychiatrist after he recommended sex with him as part of her therapy---stipulated to an award of \$25,000. In *Micari v Mann* (126 Misc 2d 422 [Sup Ct, N.Y. County 1984]) several minor plaintiffs each were

awarded between \$100,000 and \$150,000 in compensatory damages for sex abuse by a teacher that spanned a period of four years.

In what appears to be an outlier, the court, in *"Jane Doe" v Sharma* (62 Misc 3d 627 [Sup Ct, Nassau County 2018]) denied a defendant's post-trial motion to set aside a \$700,000 award in favor of the plaintiff and against her physician, where the physician masturbated in front of the plaintiff patient, while gesturing to her to touch or lick his genitals. In that case, the physician's conduct had been recorded on video, and the plaintiff adduced expert testimony establishing that she suffered from post-traumatic stress disorder as a direct consequence of the physician's conduct.

The court concludes that Perney established that, as a proximate result of the conduct of the nurse/technician employed by the medical defendants, Perney sustained compensable mental and emotional distress and anxiety, continues to suffer from those conditions, and will continue to suffer from them into the near future. The court further concludes that, as a proximate result of the conduct of the nurse/technician, Perney was compelled to expend money for mental health therapy by a certified social worker. Perney, however, did not establish that the nurse/technician's conduct, or the mental and emotional injuries engendered thereby, caused him to lose his employment.

In light of the comparable awards described above, and the fact that several of the reported decisions were rendered 30 to 55 years ago, when the amounts of awards for all categories of personal injury were significantly less than they are today for similar injuries, the court concludes that Perney is entitled to recover the sum of \$75,000 for past pain and suffering, the sum of \$25,000 for future pain and suffering over the period of two years, and the sum of \$391.00 in special damages for therapeutic expenses, for a total award of \$100,391.00.

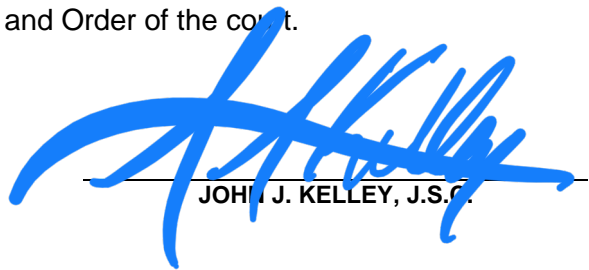
Accordingly, it is

ORDERED that the Clerk of the court shall award judgment to the plaintiff, Thibault Perney, 268 Bowery, Apt #3, New York, New York 10012, and against the defendants Medical

One New York, P.C., 20 East 46th Street, 9th Floor, New York, New York 10017, and Rose Marie Phillip, M.D., 20 East 46th Street, 9th Floor, New York, New York 10017, jointly and severally, in the principal sum of \$100,391.00, plus statutory interest at the rate of 9% per annum from August 11, 2020.

This constitutes the Decision After Inquest and Order of the court.

2/17/2020
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE