

1983: **Barbara A. v. John G. (1983) 145 Cal.App.3d 369, 193 C.R. 422.**

Relevant to:
[1:21a] Confidential Relationship
[3:3] Scope of Duty Defined by Relationship (later)
[3:14] Duty of Preference

Appeal from order granting judgment on the pleadings

John G.'s first mistake was that he was Barbara A.'s lawyer; his second mistake was that he told Barbara that he was sterile, and then slept with her; and his third mistake was that he was not sterile. Barbara suffered an ectopic pregnancy, had to undergo surgery, and nearly died. She sued John for fraud, alleging that she trusted him because he was her lawyer, that he lied to her about his sterility, that in reliance she slept with him, and that the damage flowed proximately, as it were.

The trial court threw her case out: it held that the anti-heart balm statute barred her claim. C.C. Sec. 43.5 provides that no cause of action arises for seduction. The court of appeal reversed and sent the matter back for further proceedings. It pointed out that the ancient cause of action for seduction—which required the plaintiff woman to prove, as an element of her claim, that she was "virtuous" and "chaste" at the time of the seduction—had gone out on the last stagecoach. But Barbara's action was held not to be covered by that statute, since the gravamen was not the injury to her reputation but rather the physical injury she suffered.

Just before the trial court ruled, the court of appeal handed down *Stephen K. v. Roni L.*, 105 Cal.App.3d 640, in which it held that no cause of action lies with a man who, in reliance on a woman's representation that she was taking birth-control pills, sleeps with her and impregnates her. Stephen had lost his paternity suit, and then cross-complained against Roni. The court of appeal affirmed the dismissal of his case, on the ground that "to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct . . . would encourage unwarranted governmental intrusion" and that as a matter of policy, birth control is a matter best left to the individuals involved. This principle was held not to bar Barbara's case against John because the privacy right is not absolute and may not be asserted as a shield to insulate defendants from the consequences of their torts.

Barbara asserted that John was her fiduciary and that his conduct violated his fiduciary duty. John countered that the duty ran only to his legal services and did not permeate his entire, out-of-the-office relationship with his client. The court disagreed. Lawyers have been held to have violated their fiduciary duty when they gained financial advantage over clients [*Gold v. Greenwald, supra; Clark v. Millsap, supra*]; why not then when they gain some other kind of advantage? The court further held that it was a question of fact, into which the trial court should inquire, whether there was a

confidential relationship between the parties which would justify Barbara in relying on John's statements. This would depend, at trial, on whether John was somehow dominant over Barbara, or whether their relationship was on an equal footing.

As to the issue of whether John's sexual transaction with Barbara was a breach of his professional obligation, the matter was not considered by the court, which thought it was for the disciplinary unit of the bar to consider.

Comment: New Civil Code Sec. 51.9 would probably have given Barbara a cause of action for sexual harassment, but her timing, like John's, seems to have been bad.