Old Duties and New: Recovered Memories and the Question of Third-Party Liability

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This article addresses how courts have analyzed the question of third-party liability in a class of cases that has recently challenged settled law. In these cases a patient recovers apparent memories of sexual abuse during the course of a therapy. Based on these memories and perhaps with the therapist's aid and encouragement, the patient identifies a family member as the perpetrator, often in a legal or other public forum. The accused family member then brings a lawsuit against the therapist for negligent treatment of the patient. The legal question to be determined is whether the therapist owes a duty of care to the third-party family member. The article first examines the concept of duty from a historical perspective. The article next looks at the method of analysis courts have used to approach the question of third-party liability in recovered memory cases. The article's third section examines how several state courts have applied this analysis to actual cases. Finally, the article evaluates the most compelling arguments on both sides of the issue and raises additional arguments suggested by the state court analyses.

A group of cases has emerged that has pushed against the contours of settled law. In these cases, an individual enters a therapy and appears to recover memories of sexual abuse perpetrated by a family member, often a parent. Accusations against the family member ensue and perhaps are made public. An action in civil or criminal court against the accused individual may follow. That family member, in turn, brings a lawsuit against the therapist. The claim is that the therapist has acted negligently—by helping to create, nurture, or publicize false memories of past sexual abuse—and has harmed the family member as a result.

The question for the court is whether the therapist owes a duty of care to the non-patient family member or, in legal parlance, whether there is third-party liability for negligent treatment. The success of the claim against the therapist hinges on the answer to this question, because *duty of care* is one of the four essential elements of an action in negligence. In the absence of a duty, a lawsuit based in negligence will fail. The novelty of these

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claims has challenged the legal landscape; only in the rarest instances have courts allowed one individual to succeed in bringing a malpractice action against a health care provider for negligently treating someone *else*.*

This article discusses how courts have analyzed the question of third-party liability for negligence in recovered memory† cases. The article first examines the concept of duty from a historical perspective. This perspective is important because it shows how courts have traditionally determined the scope of an actor's duty. The scope of an actor's duty defines the extent of his liability in negligence and hence in malpractice, which is a specific form of negligence. The article next looks at how courts approach the question of third-party liability in recovered memory cases. This discussion sets the stage for the article's third section, which takes an in-depth look at how several state courts have analyzed the question of whether a health care provider owes a duty of care to a non-patient family member. Finally, the article critically evaluates the most compelling arguments put forth by the state courts in favor of and opposed to third-party liability, and raises additional arguments suggested by the state court analyses.

Duty from an Historical Perspective: How Far Can the Eye See?

The law develops in many ways. A distinction is sometimes made between the role of legislatures, whose job it is to *write* the laws, and courts, whose job it is to *interpret* the laws. But this difference is only part of the story. Each case that comes before a court potentially presents a novel question that no law written by a legislature completely addresses, explains, or resolves. When confronted with such a case, the court must decide what to do; its decision often has the effect of creating new law, if only because the specific question has never before presented itself in a legal forum. Negligence is an area in which much law has developed through court decisions. One court decision of enormous importance, known to law students everywhere, is the *Palsgraf* decision written by Justice Cardozo in 1928. The *Palsgraf* decision made a hugely significant ruling on the scope of one's duty in a negligence action. Yet the *Palsgraf* case is notable as much for *how* New York state's highest court reached its decision as for *what* the court eventually decided.

Mrs. Palsgraf was on her way to the beach. She had purchased her ticket and walked to the platform of the Long Island Railroad (the Railroad) to wait for her

*These cases are similar, but not identical, to *Tarasoff* cases. *Tarasoff* cases are not based on a claim that the treatment was negligent—rather, the claim is that something occurs in a treatment (which may have been conducted in a perfectly competent fashion) that gives rise to a duty to protect a third party. As a consequence, negligence in a *Tarasoff* situation concerns whether the therapist met the standard of care *in protecting a third party*. The cases discussed in this article, on the other hand, are based on a claim that the *treatment itself* was negligent in some respect, and that the negligent treatment harmed a third party. That is to say, unlike *Tarasoff* cases, the cases discussed in this article have negligent treatment as an essential aspect of the claim against the therapist. Negligent treatment is the foundation upon which these cases are built.

†Dr. Thomas Gutheil has pointed out that the term "recovered memory" is somewhat misleading when applied specifically to these cases, insofar as any exploratory therapy, competently conducted, may result in the patient's recovering forgotten memories (T. Gutheil, personal communication).

train. As she waited, another train stopped, picked up its passengers, and began to head on its way. Two men came bounding toward the train, determined not to miss it; the first was able to jump onto the train safely. The other, carrying a small package covered by newspaper, was not so steady. As he jumped onto the moving train, one employee of the railroad reached forward to help him aboard, while another tried to push him on board from behind. The push from behind knocked the package from the passenger's arms; as the package hit the ground it exploded. Nothing on the outside of the package had betrayed its contents—a stash of fireworks. The explosion sent a shock through the station and rattled the structure. The force of the blast was such that a tile fell on Mrs. Palsgraf from above. She sued the Long Island Railroad for her injury. Her claim was that the employees had been negligent in their duties and that their negligence had caused her injury.

Mrs. Palsgraf's case went all the way to New York state's highest court. In deciding how to rule on her claim of negligence, the Court explained that it would first consider whether the Railroad owed Ms. Palsgraf a duty of care. The question was important because *duty of care* is one of the four essential elements in a claim of negligence.[‡] If no duty were owed, an essential element of the negligence claim would not be present, so the lawsuit would necessarily fail. Put another way, even were the Railroad's employees negligent (and there seemed little doubt they had been—pushing a ticket-holder onto a moving train was generally not considered a good way to board passengers), a lawsuit based in negligence could not survive unless the Railroad owed Mrs. Palsgraf a duty of care.

How would the Court go about deciding whether the Long Island Railroad owed Mrs. Palsgraf such a duty? There seemed something strange about the case to begin with—after all, how could one possibly have known that a helpful push would land a tile from the roof on some person's head many feet away? To put the matter a bit differently, could a duty of care arise when there seemed to be no apparent connection between an (even concededly negligent) act and the harm that resulted?

Speaking for the Court, Justice Cardozo answered with a resounding "No." Justice Cardozo based his reasoning not on laws written by the legislature, but on court cases and the implications of concluding otherwise. In the court's opinion, he wrote "The risk *reasonably to be perceived* defines the duty to be obeyed, and risk imports relation; it is risk to another or to others *within the range of apprehension.* [emphasis added]"[1] In reaching this conclusion, Justice Cardozo reasoned:

> Here . . . there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, *so far as appearances could warn him* [emphasis added].[2]

[‡]The four elements of negligence are: duty, breach of duty, proximate causation, and harm. One may think of these four elements as the wheels on a car. Unless each of the wheels is present, the car cannot successfully move forward.

Justice Cardozo decided that for a duty to arise the harm must be foreseeable, "[T]he orbit of the danger as disclosed to the eye of reasonable vigilance [is] the orbit of the duty."[3] "A different conclusion," he reasoned, "will involve us in a maze of contradictions."[4] According to the Cardozo view, no duty of care will arise if an individual's harm is not foreseeable. In the absence of foreseeability, a claim in negligence will fail. Because there was no way the employees helping the passenger onto the train could have foreseen Mrs. Palsgraf's injury, her claim against the Railroad should fail.

Justice Cardozo's colleague on the Court, Justice Andrews, wrote a strongly worded dissent to the *Palsgraf* decision. What is interesting is that Justice Andrews based his dissent primarily on policy grounds, not on laws enacted by the legislature. In his dissent, Justice Andrews rejected the idea that duty should be predicated on whether the plaintiff's injury was foreseeable. According to Justice Andrews, *any* individual who is injured should be able to succeed in a negligence claim, not just those whose injuries could be foreseen:

> In an empty world negligence would not exist. It does involve a relationship between man and his fellows, but not merely a relationship between man and those whom he might *reasonably expect* his act would injure; rather, a relationship between him and those whom he *does in fact* injure. If his act has a tendency to harm some one, it harms him a mile away as surely as it does those on the scene.
>
> The proposition is this: Everyone owes *to the world at large* the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm *might reasonably be expected* to result, but he also who is *in fact* injured, even if he be outside what would generally be thought the danger zone.
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> We build a dam, but are negligent as to its foundations. Breaking, it injures property downstream. We are not liable if all this happened because of some reason other than the insecure foundation. But, when injuries do result from our unlawful act, we are liable for the consequences. *It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable* [emphases added].[5]

Justice Andrews believed that a duty should extend to anyone who is injured by a negligent act, regardless of whether the injury was foreseeable. On Justice Andrew's view, one owes a duty "to the world at large." As he saw it, Justice Cardozo's requirement of limiting the duty to injuries that are foreseeable missed an important point: If a negligent act causes harm, the individual responsible for that act should be responsible for compensating a person injured as a result. Foreseeability is nothing other than an artificial limitation on responsibility for negligent behavior. According to Justice Andrews, Mrs. Palsgraf should prevail—the Railroad employees had committed a negligent act and she had suffered harm as a consequence. It was simply irrelevant that the employees could not have foreseen Mrs. Palsgraf's injury.

While Justice Cardozo's position carried the day—he was able to convince a majority of the judges on the Court that his view was correct—what is striking is that the debate over foreseeability had virtually nothing to do with laws that a legislature had written. Justices Cardozo and Andrews were debating which of their views made most sense for the law of negligence, a debate that heavily in-

volves questions of public policy. The debate asks not so much what the law says but what direction the law ought to follow. In this sense, their debate sounds very much like what occurs in a legislature: arguments for moving the law in one direction or another are heard, a vote is taken, and those in the majority win. The majority on New York's highest court in 1928 favored limiting one's duty to individuals whose harm is reasonably foreseeable; outside this zone of danger, no duty arises. Hence, no negligence accrues.

The *Palsgraf* case has had a major influence on the law of negligence, specifically in terms of how far one's duty of care extends. Its effects have been far-reaching in mental health law, as the heart of the California Supreme Court's *Tarasoff* decision makes clear:

> [O]nce a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect *the foreseeable victim* of that danger [emphasis added].[6]

As important as the doctrine of foreseeability has been to the law of negligence, equally important is the manner in which the court reached its conclusion in *Palsgraf*. The court looked to what earlier courts had done and then examined the merits of limiting or broadening the duty of care. Central to this analysis were policy considerations—the reasons that spoke in favor of deciding one way or another.

Courts have engaged in similar exercises when deciding whether health care providers owe a duty of care to non-patient family members accused of abuse following the apparent recovery of childhood memories. Two questions arise as courts address these cases: first, what reasons are relevant to the question of extending a duty to non-patient family members; and second, once these reasons are identified, how should a court balance these reasons against one another?

A Question of Duty: Identifying and Weighing Relevant Reasons

Malpractice is a specific form of negligence. Because malpractice is a type of negligence, all of the essential elements of a claim in negligence must be present for a claim in malpractice to succeed. Because duty is one of these four elements, it must be shown that the defendant owed the plaintiff a duty of care. Yet, only in the rarest circumstances have courts ruled that a health care provider owes a duty of care to an individual who is not a patient, a so-called "third party."[§]

In deciding whether to create third-

[§]In certain recovered memory cases, plaintiffs have argued that they were, in fact, a patient, and so not a third party. These claims often arise because the therapist arranged a "confrontation," in which the patient confronts the third-party family member with the allegations of abuse in the presence of the therapist. Such a meeting or meetings, plaintiffs have argued, creates a treater-patient relationship with the (former) third party and so provides the basis for a straightforward malpractice action. In their opinions, courts have generally taken care to separate out claims based on negligence that harmed a third party from claims based on treater-patient negligence. As an example, in *Doe v. McKay*, 700 N.E.2d 1018 (Ill. 1998), the Illinois Supreme Court made clear that its opinion would address the negligence claim only insofar as third-party negligence was concerned; a separate legal action, explained the court, would deal with the claim of negligence insofar as the plaintiff (the father in the *Doe* case) was arguing that a treater-patient relationship existed between him and the therapist based on a confrontation that had taken place.

party liability in recovered memory cases, courts have reasoned that they must look to certain factors that speak for or against creating a duty of care in general. Courts have identified the following factors as relevant to their analyses:

- Is the harm to the plaintiff by the defendant's conduct foreseeable?
- How likely is it that the defendant's conduct would actually injure the plaintiff?
- How close is the connection between the defendant's conduct and the plaintiff's injury?
- How severe is the harm at issue?
- Is the defendant's conduct morally blameworthy?
- How likely is it that imposing a duty on the defendant will prevent future, similar harms?
- How much of a burden would it be for the defendant to prevent such harms?
- What will be the cost to the defendant of insuring against this sort of harm?
- How will imposing or not imposing a duty to prevent such harms affect the community?
- Who does society believe ought to bear the burden of preventing the harm?[7]

Notice three things about this list. First, while foreseeability is often cited as the most important factor in determining whether a plaintiff owes a duty of care, it is not the *only* factor. While courts will virtually always ask whether a particular harm was foreseeable, the answer to the foreseeability question does not provide a definitive answer about whether a duty of care exists. Put another way, the foreseeability question is part, but not the entirety, of the equation. Second, the factors speak to public policy considerations. In addressing the question of duty, courts often act like mini-legislatures, insofar as they weigh and balance the pros and cons of holding that one individual owes a particular duty of care to another. Case decisions therefore often read like a policy-maker's analysis of what effects imposing or not imposing a duty will have on the actors involved and on society as a whole. Third, the final decision asks a straightforward question: do the benefits of creating a duty outweigh the costs? Case decisions should be read by keeping in mind that the court's analysis is in the service of answering this ultimate question.

Cases

A number of state courts have addressed the issue of third-party liability to family members in cases involving recovered memories of sexual abuse. This section reviews four such cases in depth—*Doe v. McKay*,[8] *Flanders v. Cooper*,[9] *Trear v. Sills*,[10] and *Hungerford v. Jones*,[11]—and briefly mentions other cases that have addressed third-party liability in similar contexts. In *Doe*, *Flanders*, and *Trear*, the Supreme Courts of Illinois and Maine and a California court of appeal held that no such duty existed; in *Hungerford*, the Supreme Court of New Hampshire concluded that such a duty did exist in limited, highly specific situations. *Doe*, *Flanders*, *Trear*, and *Hungerford* have been chosen to dis-

cuss because in writing these opinions the courts were quite explicit about what factors they saw as relevant to third-party liability and about how they balanced those factors against one another in creating, or not creating, a duty of care.

In *Doe v. McKay,* the Supreme Court of Illinois faced the question of whether Bobbie McKay, a licensed clinical psychologist, owed a duty to the father of a patient who, during the course of a therapy, had "supposedly discovered repressed memories of sexual abuse allegedly committed by [her father]."[12] The father adamantly denied ever having sexually abused his daughter and claimed that the psychologist had a separate duty *to him* to treat his daughter with reasonable care.[‖] Dr. McKay's negligence, he argued before the Court, was found in her views regarding repression and the recovery of repressed memory, which were "not supported by scientific evidence and [were] not generally accepted by the psychological community"[13] and by the manner in which Dr. McKay relied upon those views in conducting her treatment. The harm, he claimed, was found in the loss of his daughter's society and companionship. The Supreme Court of Illinois rejected Doe's claim by ruling that Dr. McKay did not owe him a duty of care. The Court put forth seven reasons explaining why it would be ill-advised to conclude that a therapist owed a duty to a third-party family member.

The Court began its analysis by reasoning that "Approval of the plaintiff's [Doe's] cause of action . . . would mean that therapists generally, as well as other types of counselors, could be subject to suit by any nonpatient third party who is adversely affected by personal decisions perceived to be made by a patient in response to counseling."[14] Three reasons against creating a duty to a third party are embedded in this sentence. First, the Court is concerned with the possibility of "floodgates," that is, with the possibility of creating endless opportunities for people to bring lawsuits. Put another way, should the Court conclude that one third party (nonpatient) can successfully sue a therapist, *any* third party who does not like what is happening in some individual's treatment could bring a lawsuit and prevail in a legal proceeding. This result is undesirable because courts generally do not like to make rulings that threaten a large increase in litigation. Call this the "floodgate of litigation" argument.[¶]

Second, the Court is sensitive to how enlarging the scope of duty will affect the practice of psychotherapy. The Court states that "permitting the plaintiff's action here would considerably enlarge therapists' potential liability to persons affected by the decisions made by pa-

[‖]Note the difference between this claim and a claim based upon *Tarasoff.* In *Tarasoff,* the duty that flows to a third party is the duty to protect, and it arises by virtue of something that has occurred in the course of the therapy that indicates the possibility of danger. Here, the claim is different: the duty owed to a family member is the same duty owed to the patient—to treat the patient with reasonable care.

[¶]The dissent in *Doe v. McKay* took great exception to this argument, "A cardinal principle of our common law system is that a holding can have no broader application than the facts of the case that gave rise to it" (at 1027). The dissent argued that the holding would be limited to "licensed clinical psychologists" who injure a "family member" by virtue of "a failed course of treatment" (at 1027). Thus, according to the dissent, the claim that a floodgate of litigation would ensue was specious.

tients in response to psychological counseling."[15] Creating a duty of care to third parties, reasons the Court, will significantly enhance the number of people who could bring a successful legal action against a therapist. Such an increase would, in turn, have a detrimental effect on the ability of an individual to practice as a therapist. Call this the "burden on the profession" argument.

Third, the Court raises the issue of a patient's autonomy. The Court reasons that decisions a patient makes in response to a therapy are "personal decisions"—that is, they belong to the patient. As a consequence, a therapist is not properly held responsible for the consequences of those decisions. As a complement to this argument, the court points out that should the patient be displeased with a therapy, she has a remedy: she herself can bring an action in malpractice against the therapist.

> [W]e note that a tort remedy is available to a patient who believes that he or she has been the victim of professional malpractice. Although the plaintiff's [Doe's] daughter is not a party to the present action, she may, if she chooses, bring her own suit for malpractice.[16]

Whether the patient will continue to participate in the therapy, will deem the therapy negligent and so bring a legal action against the therapist, or will make public allegations of abuse following the recovery of certain memories are matters that fall within the *patient's* realm of autonomy and decisions for which the *patient* is properly held responsible. Holding the therapist responsible for these decisions does not show sufficient respect for the patient's ability and right to make such choices. Call this the "patient's autonomy/responsibility" argument.

The Court next states that creating a duty to a third party would "place therapists in a difficult position, requiring them to answer to competing demands and to divide their loyalty between sharply different interests."[17] Ethical codes make clear that the client's welfare is a mental health professional's primary concern. The American Psychological Association's "Ethical Principles of Psychologists and Code of Conduct,"[18] for example, states that the Code's primary goal is with "the welfare and protection of the individuals and groups with whom psychologists work." Ethical Standard 1.17 states that a psychologist should avoid entering into a relationship when it appears likely "that such a relationship reasonably might impair the psychologist's objectivity or otherwise interfere with the psychologist's effectively performing his or her functions as a psychologist."[18] The Court points out that a duty to third parties would create within the very fabric of the therapist-patient relationship an incentive for the therapist to be diverted from the patient's best therapeutic interest. Call this the "divided loyalty" argument.

Following closely from the divided loyalty argument, the Court points out that the specter of third-party liability will affect the nature and quality of the treatment offered:

> Concern about how a course of treatment might affect third parties could easily influence the way in which therapists treat their patients. Under a rule imposing a duty of care to third parties, therapists would feel compelled to con-

> sider the possible effects of treatment choices on third parties and would have an incentive to compromise their treatment because of the threatened liability. This would be fundamentally inconsistent with the therapist's obligation to the patient.[19]
>
> Hoping to avoid liability to third parties . . . a therapist might instead find it necessary to deviate from the treatment the therapist would normally provide, to the patient's ultimate detriment.[20]

Therapists, according to the court, mindful that they could be sued by third parties who dislike what patients are discovering, might deviate from their usual therapy so as not to reveal truths that could result in a lawsuit. Call this the "compromised treatment" argument.#

The Court next moved to the complicated area of confidentiality and testimonial privilege. The Court underscored the importance of confidentiality to the therapist-patient relationship. In making this point, the Court pointed out that the law makes few exceptions to confidentiality. One exception is that a therapist may disclose otherwise confidential material when a patient brings a malpractice action against the therapist. This exception makes sense, because it is through her records that a therapist will be able to defend herself by arguing that the treatment met the standard of care. The Court makes clear, however, that no such exception exists when a *third party* sues a therapist for malpractice:

> [R]ecognition of the plaintiff's action could also be inconsistent with the duty of confidentiality that every therapist owes to his or her patients. The defendants point out that the therapist cannot properly defend the present action without revealing confidences revealed to her by Jane Doe.[21]

Third-party lawsuits leaves therapists in a particularly vulnerable position because the material they most need to defend themselves—material that speaks to the content of the therapy—is available *only* if the patient agrees to waive privilege. Put another way, if the patient refuses to waive privilege the therapist is deprived of her best defense.** Call this the "vulnerable therapist" argument.

Following upon the vulnerable therapist argument, the Court pointed out that the problem of confidentiality places the *patient* in an untenable position as well. Should the patient insist that confidentiality be maintained, the therapist is effectively deprived of her best defense against the third party's suit; should the patient wish to assist the therapist in defending herself, doing so comes at the price of exposing intimate details of her therapy. The patient thus has a painful choice, either to:

> . . .waive the privilege and permit the therapist to defend the action, while suffering the public disclosure of communications originally intended to remain private, or assert the privilege and maintain the confidentiality of the therapy, but at the price of denying the therapist, presumably a valued friend, the use of potentially helpful evidence.[22]

#The compromised treatment argument has two versions. One says that this *specific* treatment will be compromised because a recovered memory has raised the specter of third-party liability, while the other says that treatment *in general* will be compromised because all therapists, aware of third-party liability, will be hesitant to explore certain material. Even though the court does not make this distinction, both versions of the argument seem relevant to how therapies will be affected by the prospect of third-party liability.

**It is of note that Jane Doe had declined to waive her privilege, thus preventing McKay from disclosing confidential material.

Call this the "patient's double-bind" argument.

These seven arguments provided the basis for the Court's ruling that Dr. McKay did not owe a duty of care to John Doe, her patient's father. Note that the Court did not address the question of whether the harm was foreseeable, undoubtedly because it saw other compelling reasons not to impose a duty. That is to say, the argument that the harm to John Doe was foreseeable—an argument in favor of third-party liability—seemed to the Court overwhelmed by arguments in favor of not imposing liability.[††] John Doe had presented the Court no compelling reason that the benefits of imposing third-party liability outweighed the costs.

In *Flanders v. Cooper*,[23] Thomas Flanders brought a negligence suit against Peter Cooper, a licensed physical therapist. Flanders' lawsuit was based on his claim that Cooper had negligently treated Flanders' daughter by inducing in her false memories of sexual abuse. Flanders' daughter had seen Cooper for a problem with temporomandibular joint syndrome. Cooper's work with her had culminated in allegations that she had been sexually abused by her father, and an estrangement in the father-daughter relationship had resulted.

The Supreme Court of Maine found several of the arguments relied upon by the Illinois Supreme Court in *Doe* compelling. As examples, the Maine Supreme Court was sensitive to the divided loyalty argument:

> [T]he duty that Flanders advocates is a duty of medical treatment that goes to the core of the relationship between a patient and a health care professional. A health care professional who suspected that a patient had been the victim of sexual abuse and who wanted to explore that possibility in treatment would have to consider the potential exposure to legal action by a third party who committed the abuse.[24]

The Maine Supreme Court was also persuaded by the compromised treatment argument, "Our recognition of the duty Flanders advocates might restrict the treatment choices of health care professionals, and hence it would intrude directly on the professional-patient relationship."[25] Both the Illinois and Maine Supreme Courts showed a notable sensitivity to the close connection of divided loyalties, consequent intrusions into the therapist-patient relationship, and the detrimental effects upon treatment that would likely follow from creating a duty of care to third-party family members.

The Maine Supreme Court made additional arguments in *Flanders*. The Court noted its concern "that recognition of the duty urged by Flanders would undermine laws enacted by the Legislature to enhance efforts to uncover and to investigate possible instances of child abuse."[26] The Court explained:

> [T]here is an inescapable link between the duty to a third party urged by Flanders and the willingness of a health care professional to pursue a course of treatment that would cause a child to recognize that sexual abuse has occurred. . . . That report of sexual abuse could expose the health care professional to retaliatory lawsuits by the alleged abuser if we held that the health care professional owed a duty of care to that party. Such exposure to a negligence action would be a powerful disincentive to the detection and treatment of sexual abuse.[27]

[††]Thus, foreseeability is taken to be a necessary, but not sufficient, factor in determining whether a duty exists.

The Court concluded that "The recognition of the duty urged by Flanders would be contrary to the legislative concern for the detection and reporting of sexual abuse reflected in Maine's mandated reporter statute."[28] Call this the "protection of children" argument.

The Maine Supreme Court saw a final reason not to create a duty of care to third parties. According to the Court, certain statutes in Maine showed that the state's legislature had "demonstrated a concern for the effect of malpractice liability on health care professionals and ha[d] acted to limit that liability."[29] In light of the legislature's explicit policy of limiting the liability of health care professionals, the Court reasoned that the legislative rather than judicial branch of government was the more appropriate forum to decide these questions:

> In our [the Maine Supreme Court's] view, the Legislature is the more appropriate forum for gathering and considering the factual material needed to fashion a policy that might balance the needs of victims of sexual abuse and the needs of those individuals who claim they were wrongly accused of sexual abuse because of the negligence of a health care professional.[30]

Call this the "legislative prerogative" argument.

The Supreme Court of Maine ruled in *Flanders* that a health care provider did not owe a duty to third parties. Like the Supreme Court of Illinois in *Doe,* the Maine Supreme Court saw the arguments against creating a duty more compelling than arguments favoring a duty and made its conclusions accordingly. The Court did briefly address the question of foreseeability, only to say that foreseeability alone did not "provide a basis for imposing a duty."[31]

The California court of appeals took up the issue of third-party liability following recovered memories of sexual abuse in *Trear v. Sills.*[32] *Trear* involved a father who sued his daughter's psychotherapist, Judith Sills, on the grounds that Sills had implanted in his daughter's mind the idea that he had raped and sexually abused her when she was a child. James Trear's daughter, Kathleen Searles, claimed to have no memory of these events until she entered therapy with Sills, who diagnosed Searles with "body and cell memories" of sexual abuse beginning at age six months, perpetrated by her father. Sills encouraged Kathleen Searles to file a lawsuit and take other action against him. Trear claimed that the harm he suffered was foreseeable and would have been avoided had Sills exercised reasonable care in treating his daughter.

The California court of appeals began its opinion by noting that the question of foreseeability is one, and only one, factor to consider in determining whether a duty of care exists. The court reasoned that whether harm is foreseeable is relevant, but not dispositive, on the issue of third-party liability to therapists. While the court relied upon arguments against third-party liability found in *Doe* and *Flanders,* the court put forth a novel argument. The court pointed out that creating a duty to a third party places the therapist in an impossible position because of the *inherent unverifiability* about the truth of the memories:

> The issue presented by a claim of a duty to the potential "third party" abuser is to what degree

> therapists necessarily become insurers of the truth of any diagnosis of childhood sexual abuse by a parent. We say "insurers" because a moment's reflection will demonstrate the perilous position in which any such duty would put the therapist. The therapist risks utter professional failure in his or her duty to the patient if possible childhood sexual abuse is ignored. On the other hand, if the heinous crime of (recently discovered) childhood sexual abuse really is the cause of the patient's disorders, then it is virtually inevitable that the alleged abuser will suffer "harm."[33]

Because it is impossible to verify whether the abuse actually took place—"Unless there is photographic evidence or contemporaneous medical evidence of events which may have happened decades before, the matter is likely to turn on the vicissitudes of human memory"[34]—creating a duty to third parties places the therapist in an inescapable Catch-22. Failure to explore the possibility of sexual abuse risks failing to provide what is perhaps the most appropriate and helpful treatment. Exploring the possibility of sexual abuse risks harm to the potentially accused. *Either way harm is foreseeable. Either way the therapist is exposed to liability.* Call this the "therapist's double-bind of unverifiability" argument.‡‡

Table 1 contains arguments found against imposing third party liability in cases involving recovered memories of sexual abuse.

Table 1
Arguments Against Third-Party Liability

1. Floodgate of litigation
2. Burden on the profession
3. Patient autonomy/responsibility
4. Divided loyalty
5. Compromised treatment (two versions)
6. Vulnerable therapist
7. Patient's double-bind
8. Protection of children
9. Legislative prerogative
10. Therapist's double-bind of unverifiability
11. Revictimization (see "Commentary")
12. Alternative remedies (see "Commentary")
13. Educate the police/prosecutor (see "Commentary")
14. Danger of particular cases (see "Commentary")
15. Professional identity and purpose (see "Commentary")

In *Hungerford v. Jones,*[35] the Supreme Court of New Hampshire took up the question of third-party liability when Joel Hungerford brought a malpractice action against Susan Jones, a social worker. Hungerford's daughter, Laura, had gone into treatment with Jones. As the therapy progressed, Jones conveyed to Laura that Laura's nightmares and anxiety attacks were flashbacks and recovered memories of sexual assault and abuse by her father. Jones also convinced Laura that she was experiencing "body memories" of her father's sexual abuse, which allegedly occurred from the time Laura was five years old until two nights before her wedding. Jones attributed Laura's psychological

‡‡The court noted with more than a hint of irony that: "[T]he law would hardly impose upon a lawyer the duty to refrain from negligently doing harm to his or her client's adversary [citation omitted]. An attorney is not even required to believe that his or her client would prevail in a court of law in order to avoid liability for malicious prosecution—a sin rather more grievous than mere negligence. If an attorney who cannot know the absolute truth of a client's position has no duty in negligence toward the client's adversary, how much less of a reason is there to impose a duty on a therapist, who must, by necessity, choose between possible harm to a patient if a recovered memory story is not believed and harm to a possible abuser if the patient's recovered memory story is believed." *Trear v. Sills,* 82 Cal. Rptr. 2d 281, 289 (Cal. Ct. App.) (1999).

difficulties, including her problems with intimacy, to that same cause. Jones persuaded Laura to cease all contact with her father and several months later urged Laura to file criminal charges against him. Jones supported the accusations against Joel Hungerford in concrete ways, including contacting the police to encourage his prosecution and meeting with the county attorney to assist in the prosecution. The criminal case against Hungerford ended when a court ruled that Laura's memories of the sexual assault, recovered during her therapy, were not reliable. Joel Hungerford then filed a lawsuit against Susan Jones. Hungerford claimed that Jones had been negligent in treating Laura and that he had suffered harm as a result. Before the suit could succeed, however, it would need to be determined whether Jones owed Hungerford, who was not her patient and so a third party, a duty of care.

The Supreme Court of New Hampshire began its analysis by emphasizing the importance of foreseeability to a determination of whether a therapist's duty extends to third parties. The Court then acknowledged "the social utility in detecting and eradicating sexual abuse"[36] and the importance of "protecting children from such abuse and promoting healing for abuse survivors."[37] The Court cautioned, however, that these societal interests must be balanced "against the need to protect parents, families, and society from false accusations of sexual abuse. Though not a simple task, such a delicate balance must be achieved in light of the potentially devastating consequences stemming from a misdiagnosis."[38] The Court emphasized the "grave physical, emotional, professional, and personal ramifications"[39] that follow upon a false accusation of sexual abuse. The *Hungerford* Court's description of this harm is unchallenged by courts and commentators alike, who have been extremely sensitive to the harm suffered by an individual who is falsely accused of having sexually abused a child. The term "child molester" has been called "one of the most loathsome labels in society."[40] Call this the "grievous nature of the harm" argument.

The New Hampshire Supreme Court then reasoned that the "[t]he severity and likelihood of harm is compelling and clearly foreseeable when false accusations of sexual abuse arise from misdiagnosis."[41] The Court points out that certain publications of confidential material, made according to mandatory reporting statutes, are privileged and so will not expose the therapist to liability if made in good faith. When a therapist steps outside of privileged communications, however, and makes the accusations public, it is virtually inevitable that the accused will suffer significant harm. Call this the "foreseeability of harm" argument.

The Court next concluded that the risk of harm is even greater when four conditions are met:

1. the individual accused of sexual abuse is the patient's parent ("family members are more likely victims of false accusations than nonfamily members"[42]);
2. the therapist lacks the professional skills and experience ("the likelihood of harm is considerable where an unqualified therapist *e.g.*, one lack-

ing in appropriate training or experience, attempts a diagnosis"[43]);

3. the therapist relies on techniques not generally accepted among mental health professionals ("The concept of repressed memories of sexual abuse is extremely controversial"[44]); and, *most important from the court's point of view,*
4. the accusations of abuse are made public with the encouragement of or by the therapist ("the likelihood of harm to an accused parent is exponentially compounded when treating therapists take public action based on false accusations of sexual abuse or encourage their patients to do so"[45]).

The second and third of these conditions speak to the reliability of a finding that sexual abuse occurred. The Court reasons that when the therapist is unqualified to conduct a particular kind of therapy or relies on techniques not generally accepted among mental health professionals, the memories are less likely to be reliable and the family member is more likely to suffer harm as a result. Call this the "unqualified therapist/not generally accepted technique" argument.

The fourth criterion speaks to the harm that results when a finding of dubious reliability is promulgated through "public action," which the court defined as "any effort to make the allegations common knowledge in the community."[46] The Court concludes that when public action is taken on allegations of questionable reliability "the foreseeability of harm is so great that public policy weighs in favor of imposing on the therapist a duty of care to the accused parent throughout the therapeutic process."[47] In the *Hungerford* case, public action on the part of the therapist involved contacting the police to support the allegations of abuse and meeting with the county attorney to encourage the prosecution of the patient's father. Call this the "public action" argument.

The New Hampshire Supreme Court made three other arguments in favor of imposing a duty on third parties. First, the Court addressed the fear that imposing a liability would discourage therapists from conducting sexual abuse evaluations. The Court reasoned that this fear was unfounded, insofar as creating a duty to third parties would not require a therapist to meet a higher standard of care. Rather, the therapist would be held to the very same standard as always: reasonable care. If the therapist provided care that was reasonable, no liability would accrue, even were memories of sexual abuse to emerge during the course of the therapy. Call this the "unchanged standard of care" argument.[§§]

Second, the therapist will be conducting the evaluation which, if it results in a finding of sexual abuse, "inherently consists of a conclusive determination concerning the suspected abuser[‖‖] as well as

[§§]See also *Althaus v. Cohen*, 710 A.2d 1147 (Pa. Super. Ct. 1998), where the court, ruling that a therapist did owe a duty of care to the parents of a child who had allegedly been abused, reasoned, "we find that imposing such a duty on therapists requires no more than what a therapist is already bound to provide—a competent and carefully considered professional judgment," at 1157.

[‖‖]It is unclear why the Court says that the determination is "conclusive" concerning the identity of the suspected abuser. While a therapist could determine, for example, that a patient had been sexually abused, determining that a particular individual is the abuser is quite another matter. [Footnote not in original text.]

the patient, regardless of the accused's involvement in the therapy process."[48] Great harm will result from a mistake. Because the therapist is responsible for the treatment procedure, the therapist is in the best position to avoid harm to the parent in cases in which the diagnosis of sexual abuse is made public. The ability of the therapist to avoid the harm speaks in favor of imposing a duty to the accused family member, a duty to conduct the evaluation and treatment according to appropriate professional standards. Call this the "therapist as best person to avoid harm" argument.[¶¶]

Third, the Court reasoned that recognizing a duty to third parties "should result in greater protection for parents and families from unqualified or unaccepted therapeutic diagnoses."[49] The Court thus underscores another harm that is foreseeable from therapy that falls below the standard of care—incorrect allegations of sexual abuse can rend a family apart, causing substantial harm to the individual members and the family unit as a whole. Imposing third-party liability would serve to deter this kind of harm. Call this the "protection of family integrity" argument.[##]

The New Hampshire Supreme Court ruled that therapists do owe a duty of care to third parties.*** The court's conclusions, however, were highly specific. The duty is owed *to a parent* of an *adult* patient "where the therapist or the patient, acting on the encouragement, recommendation, or instruction of the therapist, takes *public action* concerning the accusation."[50] [emphases added] The Court ruled that "In such instances, the social utility of detecting and punishing sexual abusers and maintaining the breadth of treatment choices for patients is outweighed by the substantial risk of severe harm to falsely accused parents, the family unit, and society."[51]

A number of other cases, while not involving recovered memories, have examined the question of third-party liability when allegations of sexual abuse are at issue. These cases can help shed light on the arguments over whether a therapist owes a duty to third-party individuals accused of sexual abuse following the recovery of a memory.[†††] *Althaus v. Cohen*[52] contains a detailed analysis of the issues involved in determining whether the therapist owes a duty of care to a parent against whom allegations of sexual abuse have been made.[‡‡‡] The *Althaus*

[¶¶]Here is a close parallel to *Tarasoff* cases. Questions of who owes a duty in a negligence case frequently involve a court's asking who is in the best position to avoid the harm. The *Tarasoff* court identified a therapist apprised of a patient's threat as being in the best position to avoid harm of injury to a third party. The *Hungerford* court identifies the therapist as being in the best position to avoid the harm of false public accusations of sexual abuse against a third party.

[##]A challenge to this argument is that it so clearly cuts both ways: true allegations of sexual abuse can rend a family apart as well.

***In making this ruling, the Court made two comments about Susan Jones' treatment of Laura. The Court pointed out, first, that Jones had never obtained Laura's informed consent to this sort of therapy, and second, that Jones had never received any consultation as the therapy progressed.

[†††]The three cases discussed here all involve children. Courts might be more likely to find third-party liability when the patient is a child, for a variety of reasons; as examples, the third-party parent is the child's legal guardian, and it is usually the parent who will pay for the therapist's services. Nevertheless, certain arguments found in these cases are relevant to recovered memory cases and so are included in this analysis.

[‡‡‡]The court reasoned: A court must consider the great social benefit of uncovering sexual abuse and, at the same time, recognize that determinations of sexual

court added two arguments in favor of third-party liability. First, the court looked to the degree of the therapist's involvement in the legal proceedings that accompanied the allegations of sexual abuse. According to the court, the treating therapist's involvement in the legal case extended beyond her professional role:

> [W]e cannot conclude that [the psychiatrist's] actions were solely part of her therapeutic treatment of [the child]; rather, [the psychiatrist] became deeply enmeshed in legal proceedings against the [parents] and, in doing so, placed herself in a role that extended well-beyond the therapeutic treatment context. It is clear that [the psychiatrist] was not adequately prepared for such a role . . . However, because she chose to take on this active role, the [parents], as alleged child abusers, had a reasonable expectation that [the psychiatrist's] diagnosis . . . affecting them as it did, would be carefully made and would not be reached in a negligent manner. Further, [the psychiatrist's] negligent treatment of [the child] combined with her subsequent course of action against [the parents] resulted in foreseeable harm . . . [53]

Call this the "over-involved therapist" argument.[§§§]

Second, the *Althaus* court noted that the harm of mistaken allegation extended not only to the falsely accused, but to the child as well. The court named "the detrimental effect of a misdiagnosis on the child" as one of the factors to be balanced in determining whether a therapist owes a duty to a third party. Call this the "harm to the child" argument.[‖‖‖]

Other child cases have also ruled that a therapist owes a duty to a third-party family member. Often these cases contain little analysis; their focus tends to be on the foreseeability of harm from a mistaken allegation of sexual abuse and on the nature of the harm that the accused will experience. In *Caryl S. v. Child & Adolescent Treatment,*[54] for example, the Court stated that "it requires little imagination to see the harm that might result from a negligently and erroneously formed conclusion that sexual abuse had occurred, with subsequent treatment based on that 'misdiagnosis,'"[55] while in *Montoya v. Bebensee,*[56] a Colorado appellate court reasoned:

> We conclude that [the defendant] owed a duty of care to the father in this case. We reach this conclusion after considering both the great social utility of having therapists make reports of suspected child abuse and the significant risk of substantial injury that may occur to one who is falsely accused of being a child abuser. Certainly, the harm that may result from negligent accusations is readily foreseeable . . . [57]

Both *Caryl S.* and *Montoya* involved allegations of sexual abuse that had arisen following a divorce or separation. In neither case were recovered memories of sexual abuse an issue. Their reasoning is instructive, nonetheless, because it shows how courts that have ruled in favor of third-party liability have emphasized the

abuse necessarily affect both the victim and the alleged abuser, and that such a determination should be carefully made and should not be reached in a negligent manner. Specifically, the courts in these cases have examined: the injury that may occur as a result of being labeled a child abuser; the concern that many therapists become too involved in legal proceedings against the alleged abuser; the devastating effects a misdiagnosis can have on the family relationships; and the detrimental effect of a misdiagnosis on the child. *Althaus v. Cohen,* 710 A.2d 1147, 1155 (Pa. Super. Ct. 1998).

[§§§]The *Althaus* case is currently on appeal. One of the issues for appeal is that the lower court misconstrued the nature of the psychiatrist's involvement in the legal proceedings.

[‖‖‖]Again, this argument cuts both ways. The child will also be harmed, perhaps far more grievously, if abuse occurs and goes undetected.

nature and the foreseeability of the harm over other factors.

Table 2 contains arguments in favor of imposing third-part liability in cases that involve recovered memories of sexual abuse.

Table 2
Arguments in Favor of Third-Party Liability[a]

1. Grievous nature of the harm (to the accused)
2. Foreseeability of harm
3. Unqualified therapist/not generally accepted technique
4. Public action
5. Unchanged standard of care
6. Therapist as best person to avoid harm
7. Protection of family integrity
8. Over-involved therapist
9. Harm to the child

[a]It might be said that these 9 arguments really collapse into six, for three reasons. First, the theory behind the foreseeability argument is that the actor who can foresee a harm is in the best position to avoid that harm. Thus, arguments 2 and 6 might be seen as the same argument. Second, arguments 4 and 8 might collapse into one argument, insofar as the nature of the over-involvement, as identified by the *Althaus* court, consisted in taking the kind of actions defined as "public actions" by the *Hungerford* court. Finally, argument 5 might be seen as not really an argument for imposing third-party liability as much as it is an argument that counters arguments on the other side—namely, the argument that imposing third-party liability will require a therapist to meet a heightened standard of care. Argument five says, "No, imposing third party liability will not have this detrimental effect." So the effect of argument 5 is more to knock down an opposing argument than to support the imposition of third-party liability. Nonetheless, because the courts have put forth the arguments in this manner, they are presented separately in this article.

Commentary

Cases that involve third-party liability following a recovered memory of sexual abuse are a challenge to the law. They are a challenge because they ask the law to create a duty where normally no duty exists; they ask the law to hold a health care professional responsible to one individual for having provided negligent treatment to someone *else.* Courts have not been unanimous in their thinking about this issue, although the thrust of the legal analysis in each case has been to explore the policy implications of deciding one way or the other. Several comments can be made about how the courts have approached this task.

First, the more compelling arguments are, at present, on the side of not imposing a duty of care.[¶¶¶] Cases that have not imposed a duty are thick with analysis; cases that have imposed a duty generally contain little in the form of analytic reasoning about this issue.[###] That said, how

[¶¶¶]For law review articles arguing opposite sides of this issue, see Cynthia Grant Bowman and Elizabeth Mertz, A dangerous direction: legal intervention in sexual abuse survivor therapy, 109 Harv. L. Rev. 549 (1996); and Joel Jay Finer, Therapist's liability to the falsely accused for inducing illusory memories of childhood sexual abuse—current remedies and a proposed statute," 11 J. Law & Health 45 (1997). Bowman and Mertz examine the interests of all the parties involved—the falsely accused, the abuse survivor, the therapist, and the larger community—and, balancing these interests against one another, conclude that the harms of imposing third party liability outweigh the benefits. Finer focuses on the extreme and outrageous conduct of certain therapists who conduct recovered memory therapy, the severe and foreseeable harm that results from these therapies, and the lack of any currently adequate and appropriate check on such harm. Finer proposes a new, statutorily created tort to hold therapists responsible in certain instances of highly suggestive techniques that encourage patients to believe they have been sexually abused. Underneath these two articles lies a deep difference in thinking about the reliability of memories recovered during a therapy. Bowman and Mertz argue that "some people, when confronted with painful or traumatic situations, either simply forget or actually block the feelings and/or memories associated with those situations from their conscious minds" (at 599); Finer is profoundly skeptical of the veracity of memories that arise solely during the course of a recovered memory therapy.

[###]*Hungerford v. Jones*, 722 A.2d 478 (N.H. 1998), and *Althaus v. Cohen*, 710 A.2d 1147 (Pa. Super. Ct. 1998), are notable exceptions.

a court comes down on the question of third-party liability may indicate something that the court has found particularly troubling. In *Hungerford v. Jones,* for example, the New Hampshire Supreme Court was obviously disturbed by the quality of the treatment the therapist had provided. The Court's distress was undoubtedly exacerbated by the therapist's failure to obtain informed consent for the kind of therapy she offered or to receive any consultation as the treatment progressed. Given the totality of the circumstances, the Court's concern appeared to lie with the high likelihood of the memories being inaccurate and with the harm that foreseeably resulted when actions against the plaintiff were taken based on those memories. Likewise in *Althaus, Caryl S.,* and *Montoya,* cases that involved sexual abuse evaluations and young children, the courts seemed quite sensitive to the harm that would result to the accused, the child, and the family as a whole from a false allegation of sexual abuse. Courts that focus on the likelihood that memories recovered during a therapy are false are more likely to find that therapists owe a duty of care to third parties.

The arguments against this way of thinking, however, are powerful. Imposing third-party liability may not be the only way to reduce harms that result from a false allegation of sexual abuse and doing so may entail toxic side effects. For example, third-party liability may serve as a weapon against an ethical and highly competent therapist doing her client a service by exploring the possibility of childhood sexual abuse. A lawsuit may intimidate the therapist and thus revictimize the client:**** The perpetrator returns, only to deprive the client of the treatment she needs to alleviate the very suffering he caused her to begin with. Call this the "revictimization" argument.

A second argument speaks against the focus on the likelihood that the recovered memories at issue are false. A court will generally conclude that memories are false, or at least unreliable, by closely examining the facts of a particular case. Whether a duty to third parties exists, however, is a question of *law*; that is, is a question about what the law should be, to be decided on arguments that are assessed and balanced by judges or legislatures. When a court focuses on *particular* memories deriving from a *particular* therapy, it risks turning what should be a question of *law* into a question of *fact.* This result is undesirable, because the question of third-party liability may then devolve into a case-by-case analysis. Case-by-case analyses are undesirable, because they defeat an important purpose of the law: to make the law's precepts known so that individuals can conform their actions to the requirements of the law. Call this the "danger of particular cases" argument.

The *foreseeability* of harm has been given as a reason to impose a third-party duty of care on therapists. The argument is that because the harm of a false allegation is foreseeable, the therapist, who is in charge of the treatment or evaluation, is in the best position to avoid the harm and

****See Cynthia Grant Bowman and Elizabeth Mertz, A dangerous direction: legal intervention in sexual abuse survivor therapy, 109 Harv. L. Rev. 549, at 590 (1996). This argument holds, of course, only if the allegations are true.

so should be held responsible if someone is injured. The challenge to this argument—at least when the client is an adult or older adolescent, as in *Doe, Flanders, Trear,* and *Hungerford*—is that placing the burden of avoiding harm on a third party unduly treads upon the patient's autonomy. Whether to proceed in a therapy, whether to make allegations public, whether to assist in a prosecution, are all decisions that belong to a competent adult. Creating a duty to third parties, insofar as it interferes with the therapy, may interfere with a competent patient's right to make those decisions.[††††] Looked at from another perspective, the argument in favor of autonomy says that the *patient,* and not a third party, is in the best position to decide whether a treatment is negligent, and it is the patient who should bear the responsibility of decisions made according to that judgment.

Courts which have imposed a duty of care to third parties have approached the harm issue from yet another angle: therapists who report allegations of sexual abuse in accordance with mandatory reporting laws are immunized from liability. It is only when therapists step *outside* of their legally mandated duties—by assisting the prosecution in making its case, for example, or by publicizing the allegations more generally—that they subject themselves to the possibility of liability toward the accused.[‡‡‡‡] Commentators have pointed out that remedies against this sort of harm exist and are available to injured third parties—defamation and intentional infliction of emotional distress are legal actions that can be brought against unscrupulous or incompetent therapists who have made accusations of sexual abuse public, that is, who step outside the bounds of mandatory reporting statutes. Call this the "alternative remedy" argument.[§§§§]

[††††]See Cynthia Grant Bowman and Elizabeth Mertz, A dangerous direction: legal intervention in sexual abuse survivor therapy, 109 Harv. L. Rev. 549, at 590 and 633–7 (1996). A challenge to Finer is that his view (favoring the creation of a new tort to hold therapists responsible for certain particularly suggestive techniques) has profound, yet insufficiently justified, implications for the way we think about a patient's autonomy in the context of these cases. Consider the language Finer uses to describe a patient who makes an allegation following what he defines as an unreliably recovered memory (these quotations come in the context of Finer exploring analogies between the cases under discussion and other cases in which a health care provider may owe a duty to a third party, such as when a patient threatens harm or carries a communicable disease): "The duty to the falsely accused plaintiff [in Finer's proposed statute] is to avoid grossly irresponsible behaviors that would turn a patient into a powerful psychic weapon—destroying reputation and family, and imposing emotional anguish. . . ."; "A therapist who culpably implants false memories of CSA renders his or her patient harmful. The patient is carrying a harmful (social) virus; contact with (accusations toward) highly vulnerable people (the patient's family) operates to spread and implant the toxin, indeed to spread it in ways harmful far beyond the harm to the patient. . . ."; "Where the therapist effectively induces a false memory of CSA that the patient had not previously remembered at all, *it is similar to intoxicating or inflaming the patient to act in a manner dangerous and injurious to a confluence of interests of great socially and legally protected value.* Like alcohol, some of the methods of extreme suggestiveness, severely distort mental processes of the patient, and untenably render the patient a danger to the innocent accused person and 'safety' of the family . . ."; and "Because of the physician's culpability, the patient is rendered foreseeably dangerous." (Joel Jay Finer, Therapist's liability to the falsely accused for inducing illusory memories of childhood sexual abuse—current remedies and a proposed statute, 11 J. Law & Health, 45, at 104–8 (1997). Parentheses and emphases in original.) These descriptions of the patient as virtually devoid of personal autonomy—even granted that they are for the purpose of drawing analogies—need more justification that Finer supplies in his article.

[‡‡‡‡]Tom Gutheil (personal communication) has pointed out that the strength of this argument lies in its clinical validity; good clinical care entails staying within the frame of the therapy.

[§§§§]See Cynthia Grant Bowman and Elizabeth Mertz, A dangerous direction: legal intervention in sexual abuse

It is also worth noting that however far a therapist strays from the professional role, it is the *police* and *prosecutor* who decide whether a criminal case should move forward. Rather than imposing third-party liability on the therapist, the more appropriate safeguard against inappropriate prosecutions would be to educate police and prosecutors about the standard of care in therapies that are directed toward recovering memories of past traumatic events. Police and prosecutors would then be in a better position to evaluate critically the basis on which an accusation has been made and to determine whether such an accusation would stand up to legal scrutiny. Call this the "educate the police/prosecutor" argument.‖‖‖‖‖ Given these alternative remedies and the possible side effects of imposing third-party liability, the more judicious path, the counter-argument goes, is not to impose a duty on third parties.

Still other arguments against imposing third-party liability emerge from arguments presented by the courts. In *Trear,* the court emphasized how the inherent unverifiability of recovered memories placed therapists in a double-bind. The double-bind is that a therapist could either: investigate the possibility of abuse and risk raising false allegations against the abuser; or ignore the possibility of abuse and risk failing in the responsibility to provide good treatment. Behind this double-bind lies a deeper problem that concerns the therapist's professional identity and purpose. It may be the role of an expert witness, an investigator from the department of social or youth services, a police officer, or a prosecutor to determine whether a criminal act occurred. The role of a therapist is simply different. The role of a therapist involves attempting to understand as much as possible about how a patient's mind works, how a patient relates to other people, how a patient goes about getting along in her life, how a patient deals with problems that present themselves. Confusing the role of a therapist and the role of an investigator will undermine the good work that a therapist can do in her role *as a therapist.* Call this the "professional identity and purpose" argument.[58]

At present, the better arguments lie on the side of not imposing third-party liability in cases of recovered memories when the legal action is based in negligence. The case against third-party liability is strengthened by the general presumption against holding a health care provider responsible for harms suffered by a third party. This presumption seems to require a reason to deviate from the law's normal way of doing business that has yet to be provided.

A number of state Supreme Courts have addressed the issue of third-party

survivor therapy 109 Harv. L. Rev. 549, at 585–6 (1996). See also Joel Jay Finer, Therapist's liability to the falsely accused for inducing illusory memories of childhood sexual abuse—current remedies and a proposed statute, 11 J. Law & Health 45, at 108–15 (1997). Finer himself proposes a new, statutory remedy (at 125–31), designed to address certain problems with imposing third-party liability discussed by Bowman and Gertz. A fruitful area for further analysis and normative discussion will be how well these alternative remedies actually work.

‖‖‖‖‖The same argument could be applied to departments of social or youth services, insofar as workers could be trained to focus on and scrutinize the basis for an accusation or allegation rather than on the therapist's degree of conviction.

liability in cases that involve recovered memories of sexual abuse. That number will grow in the near future. The outcome of these cases appears to depend in large part on where a court chooses to focus its analysis. An emphasis on foreseeability of harm or on the harms suffered suggests a propensity to impose third-party liability. An emphasis on the provider-patient relationship, the patient's autonomy, the quality of treatment, the prevention and detection of child abuse, the effect on confidentiality, the availability of other remedies to address the harm—or some combination of these—signals a propensity not to impose third-party liability. This article has attempted to crystallize and clarify the arguments found on both sides of these difficult and challenging cases.

Acknowledgments

The author thanks Thomas Gutheil, James T. Hilliard, Elyn Saks, Walter Sinnott-Armstrong, and Larry Strasburger for comments and suggestions.

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