A Duty to the Parents of an Allegedly Abused Child? *Althaus v. Cohen*

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In the summer of 2000, the Pennsylvania Supreme Court decided in favor of Pittsburgh psychiatrist Judith Cohen, who had appealed an aspect of a medical malpractice verdict.[1] At issue was whether she had a duty to protect the parents of her patient, Nicole Althaus, from the horrific consequences of the teenager's assertions of their abuse. This was not a case of the parents and child alleging that the therapist implanted false memories of abuse, thus distinguishing it from *Ramona v. Ramona*[2]; nor was it a straightforward case of whether a doctor had a duty to foreseeable third parties in which the patient was either mentally ill and dangerous[3] or infected with a contagious disease,[4] situations faced in earlier Pennsylvania decisions. Instead, *Althaus* looks at a permutation of third-party tort principles: when the psychiatrist becomes aware that the patient's allegations are either incompetent or fabricated, does she then have an affirmative duty to protect the parents from prosecution and other consequences?

Case Summary

Nicole, a 15-year-old female from Pittsburgh, began to experience coping problems when both her mother and paternal grandmother developed cancer. A schoolteacher referred her to a support group. Her mother recovered, whereas her grandmother succumbed to the disease. Nicole disclosed to the group's social worker that her father had touched her inappropriately, recalling his being in bed with her. By law (23 Pa. Crim. Stat. § 6311), the social worker reported the situation to Children and Youth Services (CYS). The usual cascade of events ensued—CYS removed the child from the home, the district attorney was notified, and the child was examined by a physician and by a psychologist for evidence of abuse—all before Dr. Cohen had met Nicole. Although there was no physical evidence corroborating Nicole's story, her credibility with the psychologist was enough to carry forward the presumption of abuse. In this context, Nicole was sent to Dr. Cohen for psychiatric treatment of parental sexual abuse.

Dr. Cohen treated Nicole for over a year, apparently accepting that the authorities had investigated the case satisfactorily; that is, her task was to alleviate the child's suffering. During this time, two scenarios unfolded in parallel, Dr. Cohen being in a unique position to see both. First, Nicole's allegations extended to her mother and others, her stories became fantastic (ritual torture, multiple pregnancies, and murder of the resulting offspring), and Dr. Cohen's attempts at confrontation appeared to intensify the complaints. Second, both of Nicole's parents were arrested and criminal hearings were held, which Dr. Cohen attended passively. Meanwhile, Dr. Cohen and others perceived that Nicole's outlandish accusations had lost credibility, prompting a competency hearing. Dr. Cohen testified that the patient could not distinguish fact from fantasy, and the district attorney dropped the criminal charges against the parents. The court ordered new treatment aimed at family reunification, during which Nicole recanted her allegations. The Althauses sued Dr. Cohen for medical malpractice on behalf of themselves and Nicole, asserting that the doctor had misdiagnosed the child and exacerbated her condition. Further, they contended that Dr. Cohen's negligence *directly* harmed them as *foreseeable* victims. They won on both counts in 1996, receiving an aggregate award of 271,000 dollars. Dr. Cohen appealed the verdict for

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the parents and lost in 1998,[5] thus, giving rise to her Supreme Court appeal.

The Supreme Court of Pennsylvania heard arguments in March 1999, taking a year and a half to issue a divided opinion. Dr. Cohen was aided by *amicus* Pennsylvania Psychiatric Society (PPS).[6] The brief attacks the superior court's dividing the therapist's loyalty, a theme familiar to forensic psychiatrists[7]: "It threatens to transform the psychiatrist into the patient's adversary, requiring the psychiatrist to vouch for or to undermine the patient's veracity and to do so in the forensic rather than therapeutic setting."[7] Pennsylvania's high court majority agreed that such a burden would destroy the doctor-patient relationship, reversing, in part, the earlier appeal decision.

Duty to Protect Third Parties in Abuse Cases: When Is It Triggered?

Psychiatric patients can pose a threat to persons outside the therapeutic relationship in a variety of circumstances, most notably when they are psychotic. Clinical and forensic psychiatrists and other mental health professionals have lived with the specter of liability from the actions of dangerous patients for 25 years. The legal decisions, including *Tarasoff*[8] and its many progeny, are now part of all clinicians' consciousness. The parameters of these cases include whether or not the potential victim is known, how long the clinician remains liable, the extent that confidentiality is breached, and how reasonable care is achieved.

Many states have adopted statutory standards for fulfilling the duty to shield third parties from patients' actions. Yet, there seems to be no end to the variations and permutations of how and when clinicians must act. A key example is the duty that may arise to third parties whom the therapist involves in the care of an identified patient.[9] The family may become the "client." The confluence of this concept and evolving interest in recovered memories of abuse has given rise to potential liability for therapists. In this permutation, the parents claim that the therapist *caused* the child to have false memories of abuse and join with the child in suing the therapist. Thus, in *Ramona*,[2,9] the patient and her parents were considered clients of the therapist, triggering a duty to all parties. Indeed, the Ramonas were awarded a substantial sum, but only after the family had been torn asunder. *Ramona* was a departure from mainstream tort law, in that there was neither a physical injury to the third parties nor the presence of a communicable disease.[9] Here, the duty to the parents arose as they became part of the therapy process; not the case in *Althaus*.

Pennsylvania, now a *Tarasoff* state, had considered clinicians' duties to third parties before *Althaus*. In *DiMarco v. Lynch Homes*,[4] a physician misinformed a patient about the risk of hepatitis (saying it was 6 weeks instead of 6 months), causing her to engage in sexual relations prematurely, infecting her partner, who sued. The doctor was found negligent and liable for damages in regard to the nonpatient. In *Emerich v. Philadelphia Center for Human Development*,[3] Pennsylvania defined its stance on the question of a psychiatrist's duty to warn third parties of potential harm from patients. The patient had made repeated and explicit threats toward his girlfriend. His therapist warned her to stay away from the apartment, but she disregarded the advice and was killed. Relying heavily on *Tarasoff* and citing *DiMarco*, Pennsylvania's high court saw little difference between a virus-borne and a psychosis-borne vector of harm:

> Having found that a physician owes a duty to a non-patient third party, at least in the context of a contagious disease, we believe that there is no reason why an analogous duty to warn should not be recognized when the disease of the patient is a mental illness that may pose a potentially greater and more immediate risk of severe harm or death to others.[3]

The therapist in *Emerich* did discharge his duty to warn the victim. The *Althaus* court was nevertheless poised to impose liability on Dr. Cohen where her patient was not dangerous in a sense previously construed.

Althaus: How Far Did It Fall from the *Tarasoff* Family Tree?

This is neither a typical negligence case nor the typical duty-to-warn circumstances envisioned by Pennsylvania's *Tarasoff* clone. The PPS *amicus* brief argued on behalf of Dr. Cohen, distinguishing the analyses in *DiMarco* and *Emerich* from the factual scenario in *Althaus*. The victims in the earlier cases were clearly in the causal nexus defined by the clinicians' duty. An important difference in *Althaus* is that had Dr. Cohen decided to step out of her role as therapist and come to the aid of the alleged perpetrators, she would have breached her fundamental duty to Nicole. Thus, unlike the duty and limited breach of confidentiality expected in *Emerich*, no such duty was triggered here, because there was no

imminent threat that the patient's illness would cause harm, Dr. Cohen argued.

The 1998 superior court decision against Dr. Cohen portrayed her both as negligently diagnosing Nicole as abused (taking her word at face value and not doing an independent evaluation) and idly standing by while her patient, whom she knew to be incompetent, savaged her parents. As PPS brief points out, Dr. Cohen undertook treatment of Nicole with the understanding that all threshold tests for abuse had been satisfied. Indeed, the actions of CYS and the district attorney had occurred *before* Dr. Cohen met Nicole. Nevertheless, the trial court found Dr. Cohen negligent in her treatment of the child, which was not appealed. This aspect of the verdict raises other issues not covered in the subsequent decisions; for example, what responsibility does the treating clinician have to reinvestigate the factual allegations of abuse? Does the fact that "authorities" prejudged the authenticity of the claim immunize the therapist? The PPS brief notes that Nicole's increasingly "outlandish" claims could have been reconsidered by CYS and prosecutors. This simpler solution would have preserved the integrity of the psychiatrist-patient relationship. As it was, the Althauses and two courts faulted the doctor for her inaction in the face of the parents' being harmed (the superior court appeal decision was especially critical of Dr. Cohen, saying she "actively participated" in the criminal proceedings by "remain[ing] passive" while Nicole gave unreliable testimony[5]).

As it turns out, Dr. Cohen chose a different battleground for appeal, namely, the third-party duty. Here, the question arises: Does the duty of the therapist to the parents change at the moment she believes the child's allegations to be false or unreliable due to mental illness? If so, the therapist risks violating the trust of the patient. However, what about the parents, the "victims" of the child's fantasies? According to the Pennsylvania Supreme Court's pithy dissent by two justices, public policy should have prevailed: "[T]he therapist attended preliminary hearings with knowledge that allegations are untrue, indeed physically impossible, and sat idly by, public policy is not well served by a judicially created insulation from liability."[1] It is fundamental that the therapeutic relationship remain free of contamination from external events (unless a special duty is triggered, *à la Tarasoff*,[8] etc.). Otherwise, the therapy would fall victim to an absurd domino effect: therapists would have to judge their patients' veracity; an advocacy or adversarial role may be adopted in the forensic arena; the therapist would need to warn the patient of the potential consequences of disclosure, thus inhibiting openness; and there would be an unnecessary breach of confidentiality.[6] The Pennsylvania Supreme Court majority agreed.

The *Althaus* majority also addressed the broader issue of the rights of individuals versus social policy. Acknowledging that children need statutory protection from abuse, the Court also saw the need for a "firewall" to safeguard the therapeutic process. Thus, the imposition of third-party liability on therapists weighs against effective treatment for victims of abuse. The fact that Nicole was not an authentic victim here does not alter the analysis.

In summary, *Althaus* shows that there is no duty to protect the parents of an alleged victim of abuse under these circumstances. Because Dr. Cohen had no role in the investigation or prosecution of the parents and never undertook to incorporate them into Nicole's therapy, she owed them no professional obligation. Her apparent passivity during the criminal proceedings should be construed only as providing general support for her patient, not as an arm of the prosecution. Indeed, it was Dr. Cohen's testimony at Nicole's competency hearing that halted the criminal proceedings. The issues raised in *Althaus* also amplify the message in the article by Strasburger and colleagues[7] that clinicians must avoid wearing both therapist and expert witness hats. Although Dr. Cohen did so here, it took substantial time, effort, and stress to sort the issues. Psychiatrists can take but small comfort in this decision, which repels an attempt—presumably not the last—to violate that psychiatrist-patient relationship.

References

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