Recovered Memory Cases

Over the years, there have been numerous court cases focusing on a patient’s “recovered memory,” typically involving allegations of past sexual abuse. Advocates of recovered memory theory often believe that confronting an alleged abuser will aid the patient’s healing process. Frequently this confrontation takes the form of a lawsuit brought by the victim against the alleged abuser. In turn, the alleged abuser, a third party, non-patient will often bring a lawsuit against the psychiatrist. This article evaluates the liability issues related to recovered memory claims brought by a third party, non-patient, discusses emerging law that may expand a physicians’ liability to third party, non-patients, and provides risk management strategies on how to prevent such claims.

When a patient recovers a memory of abuse that occurred many years ago, the alleged abuser, a third party non-patient may then sue the treating psychiatrist claiming harm from the psychiatrist’s negligent actions in creating, nurturing, and/or publicizing these false memories. These lawsuits ask the court to establish liability by creating a duty owed by the provider to this third party. In the past, courts have been hesitant to create such a duty, but they have not been unanimous when deciding these issues. The decisions in these cases often depend on the particular state and court where the case is tried.

Traditionally in medical malpractice cases, courts have restricted the duty owed to third party non-patients by physicians to those situations involving circumstances where the physicians were aware of a foreseeable injury to an identifiable third party. For example, although not involving a case involving recovered memory, the California Supreme Court in one of the seminal cases involving mental health, Tarasoff v. Regents of the University of California, found that a mental health professional may be held liable for failure to warn a third party non-patient of an imminent danger posed by a patient. Keep in mind though, that in Tarasoff, unlike in a recovered memory case, there was no malpractice claim concerning the treatment itself that implicated the therapist’s professional judgment. Rather, the claim was that the therapist had a duty to warn the potential victim. Nonetheless, the court found a duty owed by the therapist to a third party non-patient.

Establishing Liability

By way of review, negligence is typically the chief liability theory asserted against psychiatrists in medical malpractice cases, including recovered memory cases. To prevail in a negligence claim, the plaintiff must prove the following elements: 1) the psychiatrist owed a duty to the plaintiff; 2) something that the psychiatrist did or did not do breached that duty; 3) the breach resulted in an injury to the plaintiff; and 4) as a result of that breach, the plaintiff suffered damage.
In terms of determining liability, recovered memory cases may be problematic because the alleged abuse often happened a long time ago. Thus, the patient’s “memory” is often the only available evidence supporting the claim of abuse. Although the statute of limitations may have expired, many states permit these cases to proceed under their state’s “delayed discovery” laws, which effectively extend the statute of limitations in cases involving the sexual abuse of minors.6

The existence of a physician-patient relationship creates the duty owed by the psychiatrist to the plaintiff. If that relationship is established, and the psychiatrist breaches that duty by not adhering to the requisite standard of care, and a breach results in damages, the psychiatrist may be liable for malpractice.7 Thus, in recovered memory cases while there is a duty owed to the psychiatrist’s patient, there may not necessarily be a duty owed to the alleged abuser who is a third party non-patient.

**Expanded Liability?**

Several courts over the years have expanded liability to third party non-patients in “recovered memory” cases. Specifically, the expanded liability occurred in cases where the alleged abusers filed suit against the alleged victims’ mental health professionals for negligence in treating the patient with techniques that caused or allowed the patient to recover a false memory of abuse. The *Ramona* case was the first case where a third-party non-patient successfully prevailed in a case against the therapists involved in the patient’s treatment.8 Subsequently, a number of other lawsuits were filed by third party non-patients against patients’ therapists.9

Some of the legal theories asserted by the plaintiffs in these types of cases included: negligence, intentional infliction of emotional distress, failure to obtain informed consent, breach of contract and defamation. Additionally, some courts have also expanded liability by determining that the alleged abuser is a “quasi-patient” to whom the physician owed a duty of reasonable care to be protected from false allegations of abuse. According to these courts, holding psychiatrists liable to “quasi-patients” can provide such protection. As an example, quasi-patient liability may arise in situations where a clinician holds sessions with the patient’s family members present or includes them in the treatment in some manner.10

**Minimizing Liability**

There are several risk mitigation strategies that a psychiatrist can use in order to minimize the risk of being named in a false memory claim. First, document clearly who the patient is. As indicated earlier, there may be an argument made that another family member was a “quasi-patient.” It is important that a review of the medical record clearly illustrates who your patient was. This is particularly important in situations in which you talk to or meet with other family members as well as your patient.

Second, if the patient recovers a “new” memory, thoroughly document how the memory was recovered. In a number of recovered memory cases, the plaintiff claimed that the psychiatrist “implanted” the false memories. Thus, when relevant, document that the patient recovered the memory without any prompting or suggestion from the psychiatrist. To the degree possible, documentation should be memorialized in a factual manner, that such memories were not “implanted,” or even suggested by the psychiatrist.
This documentation is crucial because often these lawsuits are filed years after a session with the patient. As such, there may be a long time before the physician testifies, either in a deposition or in court, and it can be difficult for the physician to provide specific testimony as to what was discussed with the patient. It is not unusual for there to be a difference between what the patient and what the physician recalls being discussed. A well-documented medical record will tell the story of the patient care provided and is vital to the defense of a claim.

Furthermore, the integrity of the patient and the physician is a critical element of a court’s decision. Juries may reach a verdict in malpractice trials more often based upon who is more “believable”, the patient or the physician, rather than based upon any medical, psychiatric, or legal issues. Again, without a thoroughly documented medical record, the physician is at a disadvantage in building a defense. For example, the medical record may contain phrases such as “discussed family issues.” The psychiatrist, when asked years later may not remember the “family issues” that were discussed. The patient, on the other hand, may testify that he has an excellent memory of what was said during a session. Finally, psychiatrists should remember their obligation to practice within their area of competency and according to their profession’s ethical principles. The bottom line is, in cases of recovered memory, the more specific, objective documentation, the better.

### Conclusion

Treating patients with recovered memories of abuse can be challenging. Since some states are now allowing for such lawsuits, in order to minimize risk, psychiatrists should take extra caution in such cases, such as by: utilizing sound documentation principles; practicing within their area of competency; and observing their profession’s ethical principles.

### Risk Management Tips

- Complete initial assessments of all patients.
- Practice within your particular areas of expertise and competency.
- Assist patients in coming to their own conclusions regarding the accuracy of their memories, particularly when there is no corroborating evidence available to confirm/refute reports of newly recovered memories.
- Refrain from making public statements regarding the accuracy of uncorroborated memory reports.
- Do not arrange for the victim and abuser to meet in your presence.
- Clearly document, using specific, objective language and direct patient quotes.
Recovered Memory Cases (continued)

9 Other courts now recognizing this expanded cause of action include, On the other hand, Arizona, New Jersey, Pennsylvania, Oklahoma, Illinois, Maine, Connecticut, and Texas have rejected such causes of action. (Behnke, S.)