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INTRODUCTION

Sex between psychotherapists and patients is deemed unethical by major mental health organizations, is unanimously considered to constitute malpractice, and in some jurisdictions constitutes a criminal offense.[1] Professional organizations and commentators have begun to recognize that sexual contact between other professionals—physicians, lawyers, and clergy—and their patients or clients is unprofessional, at a minimum.[2] Despite proscriptions against such relationships, sexual misconduct by professionals continues. One collection of self-reporting surveys recounts that from 2 to 14% of male therapists and 0.3 to 3% of female therapists reported engaging in some form of sexual contact with at least one patient.[3]

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[1] *See generally* Linda M. Jorgenson et al., *The Furor over Psychotherapist-Patient Sexual Contact: New Solutions to an Old Problem*, 32 WM. & MARY L. REV. 645 (1991).

[2] *See, e.g.*, AMA Council on Ethical & Judicial Affairs, *Sexual Misconduct in the Practice of Medicine*, 266 JAMA 2741 (1991) (sexual contact between physician and patient is unethical); *see also* Linda M. Jorgenson & Pamela K. Sutherland, *Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact*, 45 ARK. L. REV. 459 (1992).

[3] GARY R. SCHOENER ET AL., PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS: INTERVENTION & PREVENTION 39 (1989); *see also* Kenneth Pope, *Therapist-Patient Sexual Involvement: A Review of the Literature*, 10 CLINICAL PSYCHOL.

The primary legal remedy plaintiffs pursue is a civil lawsuit alleging negligence based on professional malpractice.[4] A majority of malpractice actions against therapists are based on allegations of negligent mishandling of the psychological phenomena known as transference.[5] One court, noting the dangers of such relationships, emphasized that:

> A sexual relationship between therapist and patient cannot be viewed separately from the therapeutic relationship that has developed between them. The transference phenomenon makes it impossible that the patient will have the same emotional response to sexual contact with the therapist that he or she could have to sexual contact with other persons.[6]

While mishandling of transference often results in sexual contact between the therapist and patient, malpractice can

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REV. 477 (1990).

[4] *See, e.g.*, Weaver v. Union Carbide Corp., 378 S.E.2d 105, 106-07 (W. Va. 1989) ("[S]exual intimacy with a patient . . . is a form of malpractice permitting recovery of damages for emotional distress and other harm resulting from the malpractice. The basis of the malpractice is the trust relationship that arises from such counseling services, which are designed to improve the mental and emotional well-being of the patient." (footnote omitted)); ROBERT SIMON, CLINICAL PSYCHIATRY & THE LAW 22-23, 414-19 (2d ed. 1992). *See generally* RESTATEMENT (SECOND) OF TORTS § 299A (1956). The therapist's liability to her patient may extend even after therapy has ended. For a discussion of post-termination liability, see generally Paul Appelbaum & Linda Jorgenson, *Psychotherapist-Patient Sexual Contact After Termination of Treatment: An Analysis & A Proposal*, 148 AM. J. PSYCHIATRY 1466 (1991).

[5] *See, e.g.*, Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986); Zipkin v. Freeman, 436 S.W.2d 753 (Mo. 1968) (en banc). Transference has been described as "the term used by psychiatrists and psychologists to denote a patient's emotional reaction to a therapist and is 'generally applied to the projection of feelings, thoughts and wishes onto the analyst, who has come to represent some person from the patient's past.'" *Simmons*, 805 F.2d at 1364 (citation omitted). Positive transference may be experienced by the patient in the form of feelings of erotic attraction toward the therapist. *See generally* SIGMUND FREUD, *Further Recommendations in the Technique of Psycho-Analysis: Observations on Transference-Love*, in 2 COLLECTED PAPERS 377 (Joan S. Riviere trans., 1959).

Transference is not limited to psychotherapeutic relationships but may arise in any professional relationship in which there is a degree of trust, confidence or good faith placed in the person in the position of relative authority. For example, the relationship that may develop in a law office between a male associate and an older partner can be similar to that between a son and a father. Other examples of professional relationships in which the trusting party may experience transference toward the fiduciary include patient or student relationships with physicians, chiropractors and teachers. *See generally* MICHAEL PECK, THE MEANING OF PSYCHOANALYSIS 93-94 (1950); ANDREW WATSON, PSYCHIATRY FOR LAWYERS 2-8 (1978).

[6] L.L. v. Medical Protective Co., 362 N.W.2d 174, 178 (Wis. Ct. App. 1984).

occur due to the therapist's mishandling of the transference alone. In an early psychotherapist malpractice case, *Zipkin v. Freeman*, the court stated:

> Once Dr. Freeman started to mishandle the transference phenomenon, . . . it was inevitable that trouble was ahead. It is pretty clear from the medical evidence that the damage would have been done to Mrs. Zipkin even if the trips outside the state were carefully chaperoned, the swimming done with suits on, and if there had been ballroom dancing instead of sexual relations.[7]

Another court stated, "[w]e see no reason for distinguishing between this type of malpractice [the mishandling of transference] and others, such as improper administration of a drug or a defective operation. In each situation, the essence of the claim is the doctor's departure from proper standards of medical practice."[8]

Most lawsuits brought by patients and clients against professionals focus on the liability of the professional individual. Many professionals—particularly lawyers and physicians—are employed by or otherwise affiliated with other professionals. This Article examines the tort doctrines that render employers liable for the misconduct of their employees. It focuses on two different legal approaches to liability: vicarious and direct. Under the theory of vicarious liability—known in the context of employer-employee relationships as the respondeat superior doctrine[9]—an employer can be vicariously liable to a third party for the wrongful acts of its employee or agent without the injured party proving fault on the part of the employer. Under certain exceptions to the respondeat superior doctrine—such as the common-carrier exception—vicarious liability may be imputed to the employer regardless of whether the employee acted within the course of his or her employment. In contrast, direct liability involves the employer's own negligence in hiring, retaining and supervising employees. Direct liability also may result from the employer's failure to uphold its duties toward its clients and others.

The application of employer liability tort doctrines varies

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[7] 436 S.W.2d at 761.

[8] Cotton v. Kambly, 300 N.W.2d 627, 628-29 (Mich. Ct. App. 1980).

[9] Respondeat superior means "let the master answer." BLACK'S LAW DICTIONARY 1311 (6th ed. 1990).

widely among jurisdictions.[10] A court's decision may turn upon subtle variations in the interpretation of issues such as whether the employee was acting within the scope of his or her employment or with an intent to benefit the employer. Thus, on a similar set of facts, an employer may be found liable in one jurisdiction and not liable in another.

Liability also may be imposed when the employer-employee relationship has a less traditional configuration such as in supervisory or consultant relationships.[11] Additionally, the variety of modern medical care delivery systems provides ample ground for the imposition of liability on several agency-related theories, including vicarious liability for the wrongful acts of staff physicians associated with Health Maintenance Organizations ("HMOs"),[12] apparent agency between an HMO and its staff members,[13] and institutional corporate negligence.[14]

Even if a plaintiff establishes vicarious liability, certain

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[10] There are no commonly accepted texts or guidelines focused on employer responsibility or risk management in connection with sexual misconduct. Schoener and others have published a series of checklists of administrative safeguards, which, although helpful in risk management, generally are not accepted enough to constitute a standard of care. *See* SCHOENER ET AL., *supra* note 3, at 455-58. Schoener also reviewed other sources of advice and standards on employer and supervisor liability and risk management. *See* Gary R. Schoener, *Employer/Supervisor Liability and Risk Management: An Administrator's View, in* BREACH OF TRUST: SEXUAL EXPLOITATION BY HEALTH CARE PROFESSIONALS AND CLERGY 300, 312 (John C. Gonsiorek ed., 1995). The Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") has constructed peer review and credentialing standards for hospitals. The theories of liability and agency relationships used in the hospital context, which are based on the JCAHO standards, have been extended to mental health and drug abuse residential programs and health maintenance organizations ("HMOs"). Katherine Benesch & Michael D. Roth, *Peer Review and Credentialing—Recent Liability Developments, in* LIABILITY ISSUES FOR HEALTH CARE PROVIDERS IN A CHANGING ENVIRONMENT A-151 to A-152 (ABA Section of Tort & Insurance Practice and the Division for Prof. Educ. eds., 1994). Other health care providers standards, however, are not as widely favored. HMOs, for example, choose to seek review and accreditation by the JCAHO. *Id.* at A-149.

Churches and religious institutions have no single, broadly accepted standard for handling sexual misconduct cases beyond their own internal rules and canons. Reverend Marie Fortune provides some standards for handling cases once they are discovered, but no clear models exist regarding methods of handling such cases. *See generally* MARIE FORTUNE, IS NOTHING SACRED? (1992).

[11] *See infra* text accompanying notes 247-56.

[12] Sloan v. Metro Health Council, 516 N.E.2d 1104, 1108 (Ind. Ct. App. 1987).

[13] Boyd v. Albert Einstein Med. Ctr., 547 A.2d 1229, 1234-35 (Pa. Super. Ct. 1988).

[14] Harrell v. Total Health Care, Inc., 781 S.W.2d 58 (Mo. 1989) (en banc).

types of employers may be immune to such suits. For example, governmental employers, such as veterans hospitals or medical facilities located on military bases, may avoid or limit liability under the doctrine of governmental immunity. Federal and state tort claims acts along with recent case law, however, have restricted the protection of governmental tort immunity.[15] In addition, private non-profit hospitals also may benefit from limited liability through charitable immunity statutes. While some states provide total immunity to most non-profits,[16] the trend at the state level is toward replacing charitable immunity statutes with liability caps.[17] The degree to which charitable immunity still applies, therefore, varies from jurisdiction to jurisdiction with recovery amounts dependent upon the statutory limits of the particular jurisdiction.[18] Some states also impose notice requirements[19] or abbreviated statutes of limitation periods in actions against public hospitals.[20]

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[15] See, e.g., Federal Torts Claims Act, 28 U.S.C. §§ 1346(b), 2671-2178, 2680 (1988 & Supp. IV 1992), which waives sovereign immunity and allows the United States to be sued for money damages arising from personal injury caused by

> the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. § 2672.

[16] *See, e.g.*, N.J. STAT. ANN. § 2A:53A-7 (West 1994) (disallowing recovery in negligence by "beneficiaries" of the works of non-profit charitable organizations). *But see* N.J. STAT. ANN. § 2A:53A-8 (allowing recovery up to $250,000 for hospitals only).

[17] *See, e.g.*, VA. CODE ANN. § 8.01-38 (Michie 1994) (limiting liability of charitable hospitals "for negligence or other tort" to $1 million).

[18] Massachusetts, for example, abolished the charitable immunity doctrine but capped liability at $20,000 for "tort[s] committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation." MASS. GEN. L. ANN. ch. 231, § 85K (West 1987). The cap does not apply to primarily commercial activity carried on by charitable institutions. *Id.* The cap has come under attack as failing to provide sufficient compensation to render the statute financially meaningful to plaintiffs. *See* English v. New England Med. Ctr., 541 N.E.2d 329, 333 (Mass. 1989), *cert. denied*, 493 U.S. 1056 (1990). Massachusetts courts, however, have ruled that adjustments to the cap are a matter for legislative determination. *See id.* The Massachusetts liability cap has been held applicable to recoveries for intentionally tortious conduct as well as negligent torts. *See* St. Clair v. Trustees of Boston Univ., 521 N.E.2d 1044 (Mass. App. Ct. 1988).

In New Jersey, charitable organizations are completely immune from liability for negligent torts. N.J. REV. STAT. ANN. § 2A:53A-7 (providing that "beneficiaries" of the works of charitable organizations may not recover in negligence).

[19] *See, e.g.*, MASS. GEN. L. ch. 258 (providing a six-month notice requirement).

[20] In Texas, for example, a plaintiff has only six months in which to file a

Plaintiffs' attorneys therefore must familiarize themselves with local statutes and liability caps to insure maximum recovery for their clients.

I. EMPLOYERS' VICARIOUS LIABILITY

Under the doctrine of respondeat superior, an employer is liable for an employee's wrongful or negligent act committed within the scope of employment.[21] Courts initially determine whether an employer-employee relationship exists.[22] If so, they next inquire into whether the employee acted within the scope of his or her employment. The standard analysis used to determine an employee's scope of employment is set forth in section 228 of the *Restatement of Agency*.[23] Some jurisdictions, rejecting the harsh results of the *Restatement* test, have held employers liable for their employees' torts through alternate theories such as job-created authority or enterprise liability.[24]

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claim, and recovery is limited to the amount of funds remaining in the fund overseen by the Board of Regents. TEX. CIV. PRAC. & REM. CODE ANN. § 101.101 (West 1994).

[21] W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 465 (5th ed. 1984).

> [Scope of employment] refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.
>
> As in the case of the existence of the relation itself, many factors enter into the question: the time, place and purpose of the act, and its similarity to what is authorized; whether it is one commonly done by such servants; the extent of departure from normal methods; the previous relation between the parties; whether the master had reason to expect that such an act would be done; and many other considerations. . . . [I]n general, a servant's conduct is within the scope of his employment if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master.

Id. at 502 (footnotes omitted).

[22] *See, e.g.*, Ross v. Texas One Partnership, 796 S.W.2d 206, 211 (Tex. Ct. App. 1990) (finding that security company was an independent contractor precluded apartment owner from respondeat superior liability); *see also infra* notes 25-30 and accompanying text.

[23] See *infra* notes 31-33 and accompanying text for a basic explanation of the *Restatement* test, and notes 33-64 and accompanying text for its application.

[24] See *infra* notes 65-102 and accompanying text for a discussion of these theories and their application.

A. *Respondeat Superior*

1. Determination of Employee Status

When determining whether a person is an employee, courts often look to the employer's degree of control over the worker.[25] A key factor is which party controls the "methods and means by which the work is to be done."[26] Other factors courts consider include the type of occupation involved; the skill required to perform the occupation; whether the employer withheld taxes from the employee's pay; whether the employee was on the payroll; whether the employee received any benefits through the employer; and the general nature of the relationship between the putative employee and the employer.[27]

Employers arguing against liability sometimes claim that the person committing the misconduct is not an employee but an independent contractor. Generally, unlike an employee, an independent contractor determines whether and how to perform a particular duty.[28] Radiologists, anesthesiologists and emergency room physicians frequently practice as independent

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[25] *See* Lazo v. Mak's Trading Co., 199 A.D.2d 165, 166, 605 N.Y.S.2d 272, 273-74 (1st Dep't 1993) (holding that as a matter of law, itinerant workers hired to unload rice for the defendant were not employees because defendant controlled neither method nor means by which work was done), *aff'd*, 84 N.Y.2d 896, 644 N.E.2d 1350, 620 N.Y.S.2d 794 (1994).

[26] *Id.* at 166, 605 N.Y.S.2d at 273-74; *see also In re* Morton, 284 N.Y. 167, 172, 30 N.E.2d 369, 371 (1940) (stating that "[t]he distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used." (citations omitted)).

[27] *Lazo*, 199 A.D.2d at 166-67, 605 N.Y.S.2d at 273 (nothing in type of work, skill involved, payment, or general nature of relationship pointed to control); *see also* Arthur v. St. Peters Hosp., 405 A.2d 443, 444-45 (N.J. Super. Ct. Law Div. 1979) (discussing various factors that go into "degree of control" determination); *In re Morton*, 284 N.Y. at 173, 30 N.E.2d at 371.

[28] *Lazo*, 199 A.D.2d at 166, 605 N.Y.S.2d at 274; *see also Arthur*, 405 A.2d at 445 (holding that employer of independent contractor may nevertheless be liable if contractor acted with apparent authority); Corleto v. Shore Memorial Hosp., 350 A.2d 534, 537 (N.J. Super. Ct. Law Div. 1975) (stating that proof an "employee" was an independent contractor is good defense to vicarious liability but holding that liability may attach directly for placing an incompetent contractor in a position to do harm).

contractors for hospitals.[29] Independent Practice Model HMOs, which contract with professionals to provide services to subscribers, typically rely on the independent contractor defense.[30]

Assuming the plaintiff establishes that the defendant is an employee, the plaintiff then must prove that the defendant acted within the scope of employment. The second part of the respondeat superior inquiry determines whether and how a plaintiff may meet this requirement.

2. Scope of Employment: The *Restatement* Test

What constitutes the scope of an employee's employment remains in contention. The definition varies on a state-by-state, and even a case-by-case, basis.[31] Courts often apply some version of the test set forth in section 228 of the *Restatement (Second) of Agency* to determine whether an act falls within an employee's scope of employment.[32] The *Restatement*

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[29] Martell v. St. Charles Hosp., 137 Misc. 2d 980, 991, 523 N.Y.S.2d 342, 351 (Sup. Ct. Suffolk County 1987) ("[I]t is not at all uncommon . . . to have emergency rooms operated by independent contractors.").

[30] For a more thorough discussion of HMO liability, see *infra* text accompanying notes 279-306.

[31] Prosser notes:

> This highly indefinite [language] which sometimes is varied with "in the course of employment," is so devoid of meaning in itself that its very vagueness has been of value in permitting a desirable degree of flexibility in decisions. It is obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not. It refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.

KEETON, *supra* note 21, § 70 at 460-61 (4th ed. 1971).

[32] The *Restatement* defines the test as follows:

> 1. Conduct of a servant is within the scope of employment if, but only if:
>
> a. it is of the kind he is employed to perform;
>
> b. it occurs substantially within the authorized time and space limits;
>
> c. it is actuated, at least in part, by a purpose to serve the master; and
>
> d. if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

test requires the imposition of liability when the conduct is of the kind the employee was hired to perform, is motivated by a purpose to serve the employer, and occurs within the work time and space limits (usually during work hours and on the premises).[33] Various courts construe this test differently or modify it by applying a number of approaches to determine whether an act falls within the scope of employment.

Some courts have interpreted the first element of the *Restatement* test—that the employee's conduct be "of the kind he

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2. Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

The *Restatement* test is essentially a formulation of public policy concerns that may appeal to a court's sense of equity when determining whether an employer is responsible under a given set of facts. It often has been construed differently by different courts, and, in the area of sexual torts there is no consistency based on any easily articulated principle. *See, e.g.*, Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986) (applying Washington State law and emphasizing the requirement of benefit to the master); Marston v. Minneapolis Clinic of Psychiatry & Neurology, 329 N.W.2d 306 (Minn. 1983) (the court, skirting negligence and intent, found motivation to serve irrelevant); Cosgrove v. Lawrence, 520 A.2d 844, 847-49 (N.J. Super. Ct. Law Div. 1986) (focusing on both the purpose of the action and whether it was "substantially within authorized time and space limits"), *aff'd*, 522 A.2d 483 (N.J. Super. Ct. App. Div. 1987).

States have adopted different variations of the *Restatement* test. For example, Alabama has a variation on the "scope of employment" test known as the "line and scope" of employment test.

> The test is the service in which the employee is engaged. The rule is whether certain conduct of an employee is within the line and scope of his employment. . . .
>
> The conduct of the employee . . . must not be impelled by motives that are wholly personal, or to gratify his own feelings or resentment, but should be in promotion of his employment.

Solmica of the Gulf Coast, Inc. v. Braggs, 232 So. 2d 638, 642-43 (Ala. 1970) (citations and emphasis omitted); *see also* Doe v. Swift, 570 So. 2d 1209, 1211 (Ala. 1990). One court simply found that a psychiatrist's sexual relationship with his patient was "not within the scope of his employment" without conducting any further inquiry. Sharples v. State, 793 P.2d 175, 177 (Haw. 1990) (citing *Cosgrove*, 520 A.2d at 844, without elaboration).

[33] The *Restatement (Second) of Agency* section 228 requires that the offending conduct occur "substantially within authorized time and space limits." The New Jersey court in *Cosgrove* found that sexual contact between a therapist and patient, which occurred outside the therapist's office, was not within authorized time and space limits. 520 A.2d at 846-47. On a similar set of facts, the court in *Simmons* found that as the therapist's negligent abuse of the transference phenomenon occurred in his office during scheduled therapy sessions, time and space limitations were satisfied. 805 F.2d at 1370. *See infra* notes 42-45 and accompanying text.

is employed to perform"—to deny employer liability for a therapist's sexual misconduct. Such reasoning formed the basis of a New Jersey court's denial of respondeat superior liability in *Cosgrove v. Lawrence*.[34] The appellate court held that as a matter of law the sexual relations between a social worker therapist and his patient were not the kind of conduct the therapist had been employed to perform.[35] The court considered that sexual relations between social workers and their clients violated the Code of Ethics of the National Association of Social Workers. Additionally, the defendant himself testified that "sexual relations with his client constituted improper conduct on his part, were 'never meant to be a part of therapy,' could not be justified as part of therapy, and were not used 'as a treatment technique in any way.'"[36] For these reasons, the doctrine of respondeat superior did not apply and the therapist's employers were found immune from vicarious liability.[37]

The third element of the *Restatement* test—that the conduct be motivated to serve the employer—is often contested in therapist sexual misconduct cases. Many courts view a health care provider's sexual contact with a patient as solely for the employee's gratification and therefore absolutely unrelated to the employment. For example, in *Andrews v. United States*,[38] a physician's assistant engaged in a sexual relationship with a patient after assuring her of the therapeutic value of sexual

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[34] 522 A.2d at 484-85.

[35] *Id.* at 484.

[36] *Id.*

[37] *Id.* This reasoning was followed in Birkner v. Salt Lake County, 771 P.2d 1053, 1057 (Utah 1989) ("Although [the therapist's] misconduct took place during, or in connection with, therapy sessions, it was not the general kind of activity a therapist is hired to perform."). In Destefano v. Grabrian, 763 P.2d 275, 287 (Colo. 1988) (en banc), the Colorado Supreme Court rejected respondeat superior liability for a priest/therapist's sexual relationship with his parishioner. The court applied the Colorado "scope of employment" test, which provides that "[a]n employee is acting within the scope of his employment if he is engaged in work which has been assigned to him by his employer or he is doing what is necessarily incidental to the work which has been assigned to him or which is customary within the business in which the employee is engaged." *Id.* (citation omitted). The court held, "A priest's violation of his vow of celibacy is contrary to the instructions and doctrines of the Catholic church. When a priest has sexual intercourse with a parishioner it is not a part of the priest's duties nor customary within the business of the church." *Id.*

[38] 732 F.2d 366, 370 (4th Cir. 1984) (applying South Carolina law).

intimacy during the patient's first psychological counseling session.[39] The court found that such conduct clearly furthered the employee's self interest and as such did not constitute a bona fide part of the therapy the therapist had been hired to provide.[40] Therefore, the court held that the employer was not vicariously liable for the therapist's acts.[41] The court found, however, that the employer could be found liable under a theory of negligent supervision for the supervising therapist's failure while acting within the scope of his employment to properly supervise the abusing therapist.[42]

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[39] *Id.* at 368.

[40] *Id.* at 370 ("Nothing in the record suggests that [the therapist] considered his sexual adventures to be a bona fide part of the therapy he was employed to provide. On the contrary, the government took the position at trial that [the therapist] never had sexual relations with [the patient].").

[41] *Id.*; *see also* Doe v. Swift, 570 So. 2d 1209, 1213 (Ala. 1990) (sexual assault by psychologist during first therapy session with in-patient plaintiff not within line and scope of psychologist's employment and therefore his employer was not liable; one therapy appointment not enough time for "transference" to develop); Sharples v. State, 793 P.2d 175, 177 (Haw. 1990); P.S. v. Psychiatric Coverage, Ltd., 887 S.W.2d 622, 625 (Mo. Ct. App. 1994) (sexual encounters between therapist and patient in office, therapist's car and therapist's apartment "resulted from purely private and personal desires" and therefore not within therapist's scope of employment); Cosgrove v. Lawrence, 520 A.2d 844, 848 (N.J. Super. Ct. Law Div. 1986) (holding that the defendant "had betrayed his trust as a therapist and that his conduct was too little actuated by a purpose to serve his employer"), *aff'd*, 522 A.2d 483 (N.J. Super. Ct. App. Div. 1987); Bunce v. Parkside Lodge, 596 N.E.2d 1106, 1109 (Ohio Ct. App. 1991) (stating that sexual contact occurring in a counseling program is completely unrelated to the business of the employer); Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989).

> [T]he admitted purpose of [the therapist] was not to further the employer's interest, but only a personal interest, and his conduct was strictly prohibited both by the employer's work rules and the rules governing his professional conduct. . . . [W]e hold that . . . the sexual contacts were not within the scope of [the therapist's] employment.

Id. at 1058.

The court's decision in *Psychiatric Coverage* appears to contradict the decision in Zipkin v. Freeman, 436 S.W.2d 753 (Mo. 1968) (en banc), where the same court found that a therapist's sexual misconduct constituted negligence and thus could fall under the language defining professional services in a liability insurance policy. The *Zipkin* court examined a psychiatrist's mishandling of the transference phenomenon and held that the clause in the professional insurance policy addressing "professional services rendered or which should have been rendered" covered such a claim. *Id.* at 761. The *Psychiatric Coverage* court noted, however, that *Zipkin* limited its holding to whether the claim was within the coverage of the insurance policy.

[42] See *infra* text accompanying notes 187-97 for a discussion of negligent supervision.

Some courts, however, have interpreted the *Restatement* test to hold employers liable for sexual misconduct. For example, the Ninth Circuit in *Simmons v. United States*,[43] applied the *Restatement* test to hold a social worker's employer liable for the employee's sexual misconduct. The court found that the social worker's sexual contact with his patient was motivated in part by an intent to serve the employer and, therefore, fell within the scope of the worker's employment. The court reasoned that because the sexual contact occurred "in conjunction with legitimate counseling activities," the counselor had acted within the scope of his employment.[44]

The *Simmons* court devoted substantial discussion to the dynamics of the transference process. The court defined transference as a patient's projection of feelings, thoughts and wishes onto the therapist as a representative of a significant person from the patient's past.[45] Relying on a line of cases that found abuse of the transference phenomenon inseparable from the treatment itself, the *Simmons* court concluded that the abuse of transference arose out of the ongoing therapy relationship. The behavior thus fell within the scope of employment, warranting the imposition of vicarious liability.[46]

Similarly, in *Doe v. Samaritan Counseling Center*,[47] the plaintiff sought damages from the counseling center for injuries resulting from a sexual relationship with a counselor. The center argued that the counselor's sexual relationship with the plaintiff was motivated by his own self interest and, therefore, it was not liable for the employee's actions.[48] The court, rejecting this argument, reasoned that:

> [W]here tortious conduct arises out of and is reasonably incidental to

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[43] 805 F.2d 1363 (9th Cir. 1986) (applying Washington State law).

[44] *Id.* at 1369.

[45] *Id.* at 1364.

[46] *Id.* at 1369-70; *see also* St. Paul Fire & Marine Ins. Co. v. Love, 459 N.W.2d 698, 702 (Minn. 1990) (finding therapist's sexual contact with patient was professional malpractice because "the transference phenomenon pervades the therapeutic alliance [and] sexual conduct arising from the phenomenon may be viewed as the consequence of a failure to provide proper treatment of the transference"); *Zipkin*, 436 S.W.2d at 763 (discussing mishandling of transference phenomenon as constituting "professional services rendered" and therefore within coverage of insurance policy).

[47] 791 P.2d 344 (Alaska 1990).

[48] *Id.* at 346.

> the employee's legitimate work activities, the "motivation to serve" test will have been satisfied. Given the transference phenomenon that is alleged to have occurred in this case, we hold that it could reasonably be concluded that the resulting sexual conduct was "incidental" to the therapy.[49]

The *Samaritan Counseling Center* court required the misconduct to occur within authorized time and space limits, but did not strictly confine those limits to specific session times or to the center premises.[50] Specifically, the court held that sexual intercourse, occurring one month after termination of counseling, could reasonably be found to fall within such prescribed limits.[51]

At least one jurisdiction has modified the *Restatement* test significantly by expressly abandoning the motivation to serve the employer test.[52] In eschewing this test, the court, in *Marston v. Minneapolis*, reasoned that judicial attempts to determine when an employee ceases to act in furtherance of the employer's business and becomes motivated by personal benefit are unrealistic and arbitrary.[53]

The court instead focused on the basis of the therapist's

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[49] *Id.* at 348. The court went on to state that

> an employee is rarely authorized to commit a tort. We therefore construe [the] provision [that an employee's act may not be "different in kind from that authorized"] to mean only that the act which leads to the tortious behavior cannot be different in kind from acts the employee is authorized to perform in furtherance of the employer's enterprise.

Id. at n.7.

[50] *Id.* at 349.

[51] *Id.*

[52] Minnesota explicitly abandoned the test in a case involving a cookie salesman who physically assaulted a grocery store owner over shelf space for his products. Lange v. National Biscuit Co., 211 N.W.2d 783, 786 (Minn. 1973). In finding Nabisco liable for the actions of the representative, the court stated that "the focus should be on the basis of the assault rather than the motivation of the employee." *Id.* at 785. The court viewed the entire episode as one indistinguishable event based on the employee's performance of his duties. In so doing, the court declined to undertake the difficult task of drawing a line between actions motivated by an intent to serve and actions motivated by the representative's own concerns. *Id.* The court then adopted the rule that "an employer is liable for an assault by his employee when the *source* of the attack is related to the duties of the employee" and the assault occurs within work-related time and space limits. *Id.* at 786 (emphasis added).

[53] 329 N.W.2d 306, 308 (Minn. 1983). *But see* Bunce v. Parkside Lodge, 596 N.E.2d 1106, 1109 (Ohio Ct. App. 1991) (finding that such a point could be determined).

sexual relations with his patient during therapy sessions.[54] It did not consider the employee's motivation for the actual assault a factor for the imposition of vicarious liability.[55] Rather, the court concluded that an employee's act falls within the scope of employment when the act is foreseeable and bears a relation to acts otherwise within the scope of employment.[56] The court concluded that the sexual contact between the psychologist and his client related to the employee's duties.[57]

Another variation of the motivation-to-serve test was articulated in *Stropes v. Heritage House Children's Center*.[58] In *Stropes*, an attendant at a home for disabled children sexually assaulted a patient.[59] The court declined as a matter of law to categorize sexual assaults as outside the scope of employment even though such acts clearly were not sanctioned by the employer.[60] Instead, it focused on whether the employee had committed the sexual acts in the employment context.[61] Thus,

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[54] 329 N.W.2d at 310-11.

[55] *Id.* at 311 (stating that "[o]ne basic rationale underlying *Lange* is that it would be a rare situation where a wrongful act would actually further an employer's business").

[56] *Id.* The court noted that in the case of an intentional wrong the jury instruction might read:

> An agent is acting within the scope of his employment when he is performing services for which he has been employed or while he is doing anything which is reasonably incidental to his employment. The conduct must occur within work-related limits of time and place. The test is not necessarily whether the specific conduct was expressly authorized or forbidden by the principal but rather whether such conduct should fairly have been foreseen from the nature of the employment and the duties relating to it.

Id. at 311 n.3. *But see* Doe v. Swift, 570 So. 2d 1209 (Ala. 1990) (stating that a state psychologist's sexual contact with a patient was not undertaken to benefit his employer and was not committed while in performance of his official duties or within the scope of his employment); Cosgrove v. Lawrence, 520 A.2d 844, 847 (N.J. Super. Ct. Law Div. 1986) (refusing to follow *Marston* and stating that motivation to serve is relevant and foreseeability is not significant in determining whether an employee's act is within the scope of employment), *aff'd*, 522 A.2d 483 (N.J. Super. Ct. App. Div. 1987).

[57] *Marston*, 329 N.W.2d at 311.

[58] 547 N.E.2d 244 (Ind. 1989).

[59] *Id.* at 245.

[60] *Id.* at 249.

[61] *Id.* at 250; *see also* Rodebush v. Oklahoma Nursing Homes, Ltd., 867 P.2d 1241 (Okla. 1993). In *Rodebush*, a nursing assistant slapped a patient while bathing him. The court noted that an employee's act is within the scope of employment if it is "incident to some service being performed for the employer or arises out of an emotional response to actions being taken for the employer." *Id.* at 1245.

the court considered those legitimate job duties relative to the patient,[62] and concluded that a jury could find that the attendant's actions were, "at least for a time, authorized by his employer, related to the service for which he was employed, and motivated to an extent by [his employer's] interests."[63]

In therapist-patient cases, the abuse of the transference phenomena is often the element of the relationship that brings the sexual misconduct within the employment context. The trend is toward holding employers liable for acts that were reasonably incidental to the employee's legitimate work activities. According to the *Simmons* court, for example, sexual contact could reasonably be found incidental to therapy because the sexual relationship resulted from the misuse of the transference phenomenon.[64] Similarly, the *Marston* court determined that because of the transference phenomenon, dual relationships between doctors and patients are well-recognized risks in the therapy professions. The court reasoned that when a risk is so well recognized, it is appropriate to hold an employer liable for the resulting harm.[65]

3. Scope of Employment: Job-Created Authority

Another theory used to hold employers vicariously liable for employees' wrongful actions is that the tort constituted an abuse by the employee of his or her job-created authority. Under this theory, employers may be found civilly liable for employees' intentional torts and crimes. Employer liability based on job-created authority is found most commonly in cases involving police officers as their occupation has special

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Because bathing of patients was a duty assigned to the nursing assistant, it met these criteria. *Id.* at 1246.

[62] These duties included changing patients' clothing and bedding, and bathing the patient. *Stropes*, 547 N.E.2d at 245.

[63] *Id.* at 250.

[64] Simmons v. United States, 805 F.2d 1363, 1365-66 (9th Cir. 1986).

[65] *Marston*, 329 N.W.2d 306, 309 (Minn. 1983). Other cases have made a distinction between doctor-patient sexual contact and therapist-patient sexual contact relative to scope of employment determinations. *See, e.g.*, Odegard v. Finne, 500 N.W.2d 140 (Minn. Ct. App. 1993) (physician treating patient for physical conditions cannot be held liable under Minnesota statute for sexual relationship with that patient where physician did not perform psychotherapy on patient—the critical distinction being that transference is not a recognized component in the medical treatment of physical conditions).

duties and powers associated with it such as the authority to detain and arrest, and the considerable trust afforded by society to law enforcement personnel.[66] In *Applewhite v. City of Baton Rouge*,[67] for example, the city was held liable when a police officer, city employees and a state official stopped the plaintiff, threatened her with arrest for vagrancy, ordered her into the police car, and then raped her.[68] The court reasoned that the city should be liable for its employees' actions because police officers, as public officials, are vested with considerable public trust and authority.[69]

Attempts to analogize the theory of job-created authority to other occupations where authority and trust are essential elements of job performance have not met with much success. The California Supreme Court rejected the application of the theory to a case in which a teacher had sexually assaulted a ninth-grade student. In *John R. v. Oakland Unified School District*,[70] the court ruled that the school district could not be held vicariously liable for a teacher's sexual assault of a student even when the student was under that teacher's exclusive supervision.[71] The court distinguished the actual authority

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[66] *See, e.g.*, Turner v. State, 494 So. 2d 1292, 1296 (La. Ct. App. 1986) (holding state liable for the actions of national guard recruiting officer who conducted physical "examinations" of female recruits and noting that "the sergeant's actions were so closely connected to his employment duties that the risk of harm faced by the young women was fairly attributable to his employer, who had placed the sergeant in a position of trust and authority in contacting young persons for recruitment into the guard").

[67] 380 So. 2d 119 (La. Ct. App. 1979).

[68] *Id.* at 121-22.

[69] *Id.*; *see also* White v. County of Orange, 212 Cal. Rptr. 493, 496 (Ct. App. 1985) The *White* court imposed liability on the county when a sheriff threatened to rape and murder a motorist he had stopped. The court noted that a police officer is entrusted with great authority and supplied with a police car, badge and gun, which enable him to ensure prompt compliance with his directions. The *White* court further stated,

> The officer's method of dealing with this authority is certainly incidental to his duties; indeed, it is an integral part of them. . . . [T]he wrongful acts flowed from the very exercise of this authority. . . . It follows that the employer/government must be responsible for acts done during the exercise of this authority.

Id.

[70] 769 P.2d 948 (Cal. 1989).

[71] The school's instructional work-experience program allowed students to receive credit and monetary compensation for their work. *Id.* at 956. The students could perform the required work at the teacher's home. The school did not require

police officers have over citizens from the mere apparent authority teachers have over students.[72] While acknowledging that important policy considerations might favor vicarious liability,[73] in this instance the court found that these considerations were outweighed by the risk that liability would limit educational goals by artificially formalizing student-teacher interactions.[74]

In contrast, a recent Louisiana decision, *Samuels v. Southern Baptist Hospital*,[75] did apply the theory of job-created authority to impose vicarious liability on the employer of a nursing assistant who had raped a patient in the psychiatric unit. The court stated that "[e]mployers are answerable for the damage caused by their employees in the exercise of the functions for which they are employed."[76] In reaching this conclusion, the court reasoned that "[t]he scope of risks attributable to an employer increases with the amount of authority and freedom of action granted to the servant in performing his assigned tasks."[77] Although the assistant had no actual authority to engage in sexual acts with patients, his job duties necessarily put him in a position of trust and physical contact with the patients. Because the assistant had abused these job-created duties, the court imposed vicarious liability on the hospital.[78]

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written parental permission before a child participated in the program. *Id.*

[72] *Id.* at 954-55.

[73] The court found that the following policy reasons supported a finding of liability under theories of respondeat superior: prevention of the acts; greater assurance of compensation for victims; and equitable distribution of costs among parties. *Id.* at 955-56. The court concluded that while holding a city liable for acts of the police officers furthers these policy reasons, holding a school district responsible for the same acts by a teacher does not. *Id.*

[74] *Id.* at 956-57.

[75] 594 So. 2d 571 (La. Ct. App.), *cert. denied*, 599 So. 2d 316 (La. 1992).

[76] *Id.* at 573.

[77] *Id.*

[78] *Id.* at 574; *see also* Miller v. Stouffer, 11 Cal. Rptr. 2d 454, 458 (Ct. App. 1992) (stating that the factors to consider in determining the scope of employment include the amount of freedom allowed the employee in performing the task).

The court in Lindheimer v. St. Paul Fire & Marine Ins. Co., 643 So. 2d 636 (Fla. Dist. Ct. App. 1993), *reviewed denied*, No. 92-2254, 1995 Fla. LEXIS 112 (Fla. Jan. 18, 1995), while not specifically addressing job-created authority, found that a dentist's sexual assault of a patient constituted an abuse of his position as a dentist. Thus, the court held that the dentist's liability insurance covered his actions because he committed the sexual misconduct in the course of rendering professional services. The court reasoned:

It is the patient's submission to treatment at the hands of the physician

Other courts have used similar reasoning to hold employers liable when an employee abuses his or her authority. For example, *Erickson v. Christenson*[79] involved a pastor who had sexually abused one of his female parishioners in the course of a counseling relationship. The court found that the harm to the parishioner had resulted from the abuse of a confidential relationship unique to the counseling setting.[80] The improper performance of his pastoral counseling duties warranted the imposition of liability on his employer.[81]

Similarly, in *College Hospital v. Superior Court*,[82] the hospital was held liable when its director of cardiopulmonary services engaged in sexual relations with a psychiatric patient. The court found that the employee had acted within the scope of his employment stating that "a jury could find that [the employee's] managerial position and his concomitant access to information about [the patient's] condition and treatment techniques put him in a unique position of influence over her, thus justifying the imposition of liability on the hospital."[83] Such reasoning provides one more example of the trend toward expanding the definition of job-created authority to include non-state sanctioned professions.

These cases, along with the cases involving the police, illustrate the circumstances under which courts will hold employers liable for their employees' abuse of job-created authority and power. Generally, courts assume that employers should be responsible for people in whom they vest power and authority, especially when those people come in contact with third parties.[84] From a plaintiff's perspective, the trend in recent

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> which provides the opportunity for the misconduct that occurred, and in the present case the administration of anesthesia . . . [—]a professional service—immobilized the patient so that the doctor was able to take advantage of her.

Id. at *7. Therefore, the patient's claim resulted from the rendition of professional services that the malpractice policy covered. *Id.*

[79] 781 P.2d 383 (Or. Ct. App. 1989).

[80] *Id.* at 385.

[81] *Id.*

[82] 16 Cal. Rptr. 2d 833 (Ct. App. 1993).

[83] *Id.* at 836.

[84] *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958) ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . the servant . . . was aided in accomplishing the tort by the existence of the agency relationship.").

cases is encouraging: courts no longer exclusively focus on the abuse of transference or analyze each separate act of the professional to separate job-related from personal acts.[85] Plaintiffs should urge courts to examine the entire episode of misconduct to determine whether the professional abused the power, authority or trust vested in him or her.

Courts generally have been reluctant to extend the theory of vicarious liability based on an employee's abuse of job-created authority too far beyond the realm of police officers or others with official power. This general reluctance, however, appears to be changing. The controversial nature of this theory suggests that it may become a viable argument in unofficial job-created authority cases. In the context of a therapist-patient relationship, courts tend to rely on the abuse of transference as a basis for liability instead of relying on theories of abuse of a job-created authority. The therapist-patient relationship, however, may create apparent authority that affords a therapist the opportunity to engage in acts in which he or she could not otherwise engage.

4. Scope of Employment: Enterprise Liability

Enterprise liability theory offers yet another way to hold the employer liable for an employee's tortious actions. This theory seeks to balance the cost of reimbursing persons injured by the acts of employees with the benefits derived by an employer from doing business. Thus, damages are viewed as part of the employer's cost of doing business and as such are reflected in the price of the product or service. The loss-spreading function of vicarious liability rests on the idea that business expenses resulting from foreseeable acts or those relating to the nature of the business should be borne by the business enterprise and not by the injured party.[86]

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[85] *See generally* Linda Jorgenson et al., *Therapist-Patient Sexual Exploitation and Insurance Liability*, 27 TORT & INS. L.J. 595 (1992).

[86] The basis of respondeat superior has been stated as

> the desire to include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefitted by the enterprise . . . . Employees' acts sufficiently connected with the enterprise are in effect considered as deeds of the enterprise itself. Where through negligence such acts cause

Enterprise liability theory focuses on whether an employee's action is foreseeable given the nature of his or her employment.[87] The employer must be responsible for those actions which, in the course of business, cause injury to third persons. An unforeseeable risk, however, does not allow an employer to weigh the costs of a business against its benefits to determine whether it is worth pursuing. The outcome of enterprise liability cases primarily depends on factual determinations as to whether an act is so related to the employment as to be a foreseeable risk of the enterprise.[88] For example, it is foreseeable that a delivery person might assault a customer or that a salesperson could cause an automobile accident.[89] The foreseeability of such risks and their close connection to the nature of the business justifies requiring the employer to compensate the victim for the costs of the employee's wrongful conduct. Under this theory the employee does not have to be motivated by an intent to serve the employer while performing the act.

The D.C. Circuit used enterprise liability theory while finding employer liability in *Lyon v. Carey*.[90] In this case, a

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injury to others it is appropriate that the enterprise bear the loss incurred.

Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 349 (Alaska 1990) (quoting Fruit v. Schreiner, 502 P.2d 133, 140-41 (Alaska 1972)).

The American Law Institute conducted a study on enterprise liability and devised a proposal that would create true "organizational liability" for a hospital. The proposal suggested that doctors should not obtain personal malpractice liability insurance but that the hospitals should assume the liability and the duty to provide insurance. This would be more cost-effective and would allow patients to sue hospitals instead of the individual doctor. AMERICAN LAW INST., 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 113-15 (1991).

[87] *See Samaritan Counseling Ctr.*, 791 P.2d at 348 (abuse of transference was foreseeable from the nature of the professional relationship).

[88] *See, e.g.*, Doe v. Swift, 570 So. 2d 1209 (Ala. 1990) (insufficient time for transference to develop, therefore psychiatrist's actions not within the scope of his employment); DeStefano v. Grabrian, 763 P.2d 275 (Colo. 1988) (holding that sexual conduct by a priest engaged in marriage counseling did not necessitate imposition of vicarious liability on the archdiocese); Sharples v. State, 793 P.2d 175 (Haw. 1990) (psychiatrist's sexual relationship was, as a matter of law, not within the scope of his employment); Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989) (licensed social worker's sexual misconduct did not warrant imposition of vicarious liability on the county).

[89] *See* Lyon v. Carey, 533 F.2d 649 (D.C. Cir. 1976); Fruit v. Schreiner, 502 P.2d 133 (Alaska 1972).

[90] 533 F.2d 649 (D.C. Cir. 1976).

delivery man assaulted and raped a customer while at her apartment to deliver a mattress. The court held the delivery company liable for the assault and stated:

> It is within the enterprise liability of vendors like furniture stores and those who deliver for them that deliverymen, endeavoring to serve their masters, are likely to be in situations of friction with customers, and . . . these foreseeable altercations may precipitate violence for which recovery may be had, even though the particular type of violence was not in itself anticipated or foreseeable.[91]

Pivotal to the court's decision was its finding that the assault arose out of a dispute over employment-related matters and not out of "propinquity and lust."[92]

The Alaska Supreme Court in *Fruit v. Schreiner*[93] combined the enterprise liability theory with a motivation-to-serve analysis. In *Fruit*, a salesman attending a job-related convention injured a third party in a car accident. The accident occurred on the salesman's ride back to his hotel after an evening of socializing with other salesmen. The court rejected the defendant's theory that the employer was liable only for acts that it expressly had authorized or ratified. The court noted that "'[s]cope of employment' as a test for application of respondeat superior would be insufficient if it failed to encompass the duty of every enterprise to the social community which gives it life and contributes to its prosperity."[94] Using

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[91] *Id.* at 651.

[92] *Id.* at 655. The court stated:

> If . . . the assault was not motivated or triggered off by anything in the employment activity but was the result of only propinquity and lust, there should be no liability. However, if the assault, sexual or otherwise, was triggered off or motivated or occasioned by a dispute over the conduct—then and there—of the employer's business, then the employer should be liable.

Id.

[93] 502 P.2d 133 (Alaska 1972).

[94] *Id.* at 140-41. In support of its reasoning, the court stated:

> There was a time when the artisans, shopkeepers and master craftsmen could directly oversee the activities of their apprentices and journeymen. Small, isolated communities or feudal estates evinced a provincial sense of social interaction which ensured that many enterprises would conduct their businesses with a careful concern for the community of its patrons. But in the present day when hundreds of persons divide labors under the same corporate roof and produce a single product for market to an unidentified consumer, the communal spirit and shared commitment of enterprises from another age is sacrificed to other efficiencies. At the

this reasoning, the court found that the salesman's socializing with out-of-town salesmen benefitted his employer and held the employer vicariously liable for the salesman's negligence.

Adhering to a similar rationale and quoting *Fruit*, the Alaska Supreme Court again focused on the cost-spreading and foreseeability aspects of enterprise liability in *Doe v. Samaritan Counseling Center*.[95] With respect to the motivation-to-serve requirement, the court found that, "where tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities, the 'motivation to serve' test will have been satisfied."[96] It reasoned that a narrower reading of the motivation-to-serve test would "too significantly undercut the enterprise liability basis of the respondeat superior doctrine" which it had articulated previously in *Fruit*.[97] Although the court found that the employee's actions somehow must be related or incidental to the employment, enterprise theory of liability was the driving force behind imposition of vicarious liability against the employer.[98]

The theory of enterprise liability is not without its critics. Some dispute the application of enterprise liability theory to non-commercial enterprises such as public hospitals. Those commentators argue that such liability could jeopardize these organization's very existence.[99] Furthermore, some fear that

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same time, the impersonal nature of such complex enterprises and their mechanization make third parties considerably more vulnerable to injury incidentally arising from the pursuit of the business. Business corporations are granted a personal identification in legal fiction to limit liability of the investors, but not to insulate the corporate entity itself from liability for the unfortunate consequences of its enterprise.

Id. at 140.

[95] 791 P.2d 344 (Alaska 1990).

[96] *Id.* at 348.

[97] *Id.* at 349.

[98] *Id.* at 349 (stating that "[e]mployees' acts sufficiently connected with the enterprise are in effect considered as deeds of the enterprise itself" such that "it is appropriate that the enterprise bear the loss incurred").

[99] *See* Cliona M. Robb, *Bad Samaritans Make Dangerous Precedent: The Perils of Holding an Employer Liable for an Employee's Sexual Misconduct*, 8 ALASKA L. REV. 181 (1991); *see also* William F. Baxter, *Enterprise Liability, Public and Private*, 42 LAW & CONTEMP. PROBS. 45, 51 (1978) (stressing dichotomy between commercial and non-commercial applications of enterprise liability theory and stating that the deterrence rationale for enterprise liability, which assumes that businesses are better able than victims to reduce harms associated with the enterprise and to bear costs associated with those harms, does not apply to public and non-profit

the definition of foreseeable acts will be expanded to include acts that are merely conceivable and further contend that there is no guarantee that costs will be distributed appropriately rather than simply passed along to innocent consumers.[100]

Yet enterprise liability is appropriate at least in situations of sexual misconduct by therapists. Just as altercations between deliverypersons and customers are foreseeable risks of the delivery business, sexual contact is a foreseeable risk of therapeutic relationships.[101] The American Psychiatric Association expressly warns practitioners that "the necessary intensity of the therapeutic relationship may tend to activate sexual and other needs and fantasies on the part of both patient and therapist, while weakening the objectivity necessary for control."[102] This warning, far from a casual statement, attests to the serious risk of sexual contact in the therapeutic relationship.[103]

B. *Apparent Agency and Agency by Estoppel*

Agency by estoppel provides another theory by which employers may be held liable for sexual misconduct by therapists. Theories of apparent or ostensible agency and agency by estoppel impose liability on an employer for the negligent acts of someone who is not technically an employee. Thus, liability does not result from an actual employment arrangement, but from a misleading act or omission by the employer, whether intentional or not, that causes a third party to believe that such a relationship exists.

The doctrines of apparent or ostensible agency and agency

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entities who cannot pass along costs to clients).

[100] Robb, *supra* note 99, at 192; *see also* Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 352 (Alaska 1990) (dissenting opinion).

[101] *See generally* SCHOENER ET AL., *supra* note 3 (stating that sexual contact is a recognized risk in the therapeutic relationship).

[102] AMERICAN PSYCHIATRIC ASS'N, THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY § 2.1 (1985).

[103] METRO ACTION COMM. ON PUBLIC VIOLENCE AGAINST WOMEN AND CHILDREN ("METRAC"), BREACH OF TRUST IN SEXUAL ASSAULT: STATE OF THE PROBLEM PART II 7 (1992). Studies reveal that as many as 12% of therapists self-report that they have had sexual contact with one or more of their patients during the therapeutic relationship or within a short time of its termination.

by estoppel derive primarily from two *Restatement* provisions. Section 429 of the *Restatement (Second) of Torts* states:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.[104]

Section 267 of the *Restatement (Second) of Agency* states:

> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.[105]

The elements of apparent or ostensible agency include a reasonable belief in the agent's authority, generated by some act or omission of the principal sought to be held liable, and a lack of negligence on the part of the person relying on the agent's apparent authority.[106]

In the context of hospitals and other health care institutions' liability for physicians' misconduct, courts consider two factors: a holding out by the institution that the physician is an employee, and a reasonable belief on the part of the patient that the physician is an employee. As a threshold matter courts often inquire into whether the patient looked to the institution for care rather than to the individual physician.[107] Many patients rely on the reputation of a hospital or a health care institution when choosing treatment locations. Such reliance often provides a ground for imposing liability on the health care provider for the independent physician's acts.[108]

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[104] RESTATEMENT (SECOND) OF TORTS § 429 (1965).

[105] RESTATEMENT (SECOND) OF AGENCY § 267 (1958).

[106] Hill v. Citizens Nat'l Trust & Sav. Bank, 69 P.2d 853, 855 (Cal. 1937); *see also* Grewe v. Mt. Clemens Gen'l Hosp., 273 N.W.2d 429, 434 (Mich. 1978).

[107] *See* Paintsville Hosp. v. Rose, 683 S.W.2d 255 (Ky. 1985); McClellan v. HMO, 604 A.2d 1053, 1057 (Pa. Super. Ct. 1992); Boyd v. Albert Einstein Med. Ctr., 547 A.2d 1229, 1234 (Pa. Super. Ct. 1988).

[108] *See, e.g.*, Uhr v. Lutheran Gen'l Hosp., 589 N.E.2d 723, 733 (Ill. App. Ct. 1992) (stating that "unless there is some reason for a patient to believe that the treating physician in a hospital is an independent contractor, it is natural for the patient to assume reliance on the reputation of the hospital as opposed to any specific doctor"); *Grewe*, 273 N.W.2d at 433 (stating that the critical question is

The existence of an independent patient-physician relationship does not bar finding ostensible agency on the part of the treating hospital. This was demonstrated in *Thompson v. Nason Hospital*,[109] where the patient's private physician had admitted the plaintiff to the hospital through its emergency room. The court held that an independent physician-patient relationship did not, as a matter of law, preclude a reasonable belief on the part of the patient that the physician had rendered care as an agent of the hospital.[110] Even a disclaimer by the hospital may not shield it from liability.

For instance, *Beeck v. Tucson General Hospital*,[111] involved a patient who had signed a treatment authorization form upon admission which stated that the x-ray department physicians were independent contractors unaffiliated with the hospital.[112] The court found that the signed disclaimer did not preclude a finding of ostensible agency. The court held the hospital liable for the patient's severe injuries, suffered when a screen from the x-ray machine struck a needle inserted in her back by the radiologist. Unless the hospital could prove that the radiologist had acted as an independent contractor, the clause did not bar the plaintiff's recovery from the hospital.[113]

"whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment . . . or merely viewed the hospital as the situs where his physician would treat him"); White v. Methodist Hosp., 844 S.W.2d 642 (Tenn. Ct. App. 1992).

[109] 535 A.2d 1177 (Pa. Super. Ct. 1988), *aff'd*, 591 A.2d 703 (Pa. 1991).

[110] The court noted that the hospital "held out" the doctor as their agent through the privileges they gave him and by the manner in which he worked at the hospital. The doctor held staff privileges with the hospital, he treated the plaintiff in the emergency room and arranged for her admission to the intensive care unit and he arranged for diagnostic tests and consultations with at least three different doctors. *Id.* at 1179-80; *see also* Strach v. St. John Hosp. Corp., 408 N.W.2d 441, 446 (Mich. Ct. App. 1987) (expressing "disapproval of the often-suggested proposition that an independent relationship between the patient and his treating physician requires a finding of no agency relationship as a matter of law").

[111] 500 P.2d 1153 (Ariz. Ct. App. 1972).

[112] *See* Quintal v. Laurel Grove Hosp., 397 P.2d 161 (Cal. 1964) (hospital liable for actions of group of anesthesiologists under independent contractor agreement); White v. Methodist Hosp., 844 S.W.2d 642 (Tenn. Ct. App. 1992) (where anesthesiologist is independent contractor of hospital and patient is precluded from choosing own anesthesiologist, hospital is liable for acts of independent contractor).

[113] *Beeck*, 500 P.2d at 1159; *see also* Mduba v. Benedictine Hosp., 52 A.D.2d 450, 452, 384 N.Y.S.2d 527, 529 (3d Dep't 1976) (holding that provisions in contracts were "not determinative of the relation in the event that the actualities

Referrals by staff physicians to non-staff physicians also may establish an agency relationship. In *Howard v. Park*,[114] the owner of a medical clinic faced liability for the negligence of a physician working as an independent contractor at the clinic. After examining the patient, the clinic owner referred her to the independent contractor. Because the treatment took place entirely in the clinic, and the clinic billed the patient, the referral established sufficient reason for the patient to assume that the independent contractor worked for the clinic.[115]

Defendant hospitals often argue that it is the patient's responsibility to determine whether a doctor is an employee of the hospital before accepting treatment. Yet courts have held that patients have no duty to inquire about the employment status of an individual physician, especially when the hospital either furnishes the caregiver or refers the patient to the caregiver. In *Capan v. Divine Providence Hospital*,[116] for example, the treatment in question occurred in the hospital's emergency room. The court stated that "[i]t would be absurd to require such a patient to be familiar with the law of respondeat superior and so to inquire of each person who treated him whether he is an employee of the hospital or an independent contractor."[117] Similarly, the court in *Quintal v. Laurel Grove Hospital*[118] held that the patient need not inquire as to the employment status of the anesthesiologists aiding his surgeon.[119]

Most courts make a finding of ostensible agency based on

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indicate otherwise").

[114] 195 N.W.2d 39 (Mich. Ct. App. 1972).

[115] *Id.* at 41-42.

[116] 430 A.2d 647 (Pa. Super. Ct. 1980).

[117] *Id.* at 649; *see also* Adamski v. Tacoma Gen'l Hosp., 579 P.2d 970 (Wash. Ct. App. 1978) (material issue of fact existed as to whether emergency-room physician who treated the patient was hospital's agent); Seneris v. Haas, 291 P.2d 915, 927 (Cal. 1955) ("There is nothing in the record to show that plaintiffs should have been on notice that defendant . . . was not an employee of defendant hospital and it cannot be 'seriously contended' that she was obliged to inquire whether each person who attended her in said hospital was an employee or an independent contractor."); Stanhope v. Los Angeles College of Chiropractic, 128 P.2d 705, 708 (Cal. Ct. App. 1942) (stating that it cannot be "seriously contended" that the plaintiff should have inquired as to the employment status of the x-ray technician when he was being carried from room to room in excruciating pain).

[118] 397 P.2d 161 (Cal. 1964).

[119] *Id.* at 169.

more than one act or omission by a hospital.[120] Additional circumstances that, in combination, may support such a finding include whether the treatment took place entirely on the hospital's premises;[121] the hospital billed the patient for the independent physician's services;[122] and the physician maintained an office or held a title at the hospital.[123]

The agency by estoppel theory allows a patient who can prove a detrimental reliance on the hospital's representation that an independent physician is its employee to estop the hospital from raising lack of agency as a defense to vicarious liability for the physician's conduct.[124] Although difficult to establish, the burden of detrimental reliance is not impossible to meet. Courts have examined the reasonable beliefs and expectations of the public to determine whether the plaintiff detrimentally relied on hospital representations or omis-

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[120] *See, e.g.*, Brown v. Moore, 247 F.2d 711 (3d Cir. 1957) (it is for the jury to decide whether the parties who owned a sanitarium were liable for the malpractice of the director), *cert. denied*, 344 U.S. 882 (1957); Whitaker v. Zirkle, 374 S.E.2d 106 (Ga. Ct. App. 1988) (although the doctor was an independent contractor, general issues of material fact as to the doctor's apparent authority for hospital precluded summary judgment); Howard v. Park, 195 N.W.2d 39 (Mich. Ct. App. 1972); Mduba v. Benedictine Hosp., 52 A.D.2d 450, 384 N.Y.S.2d 527 (3d Dep't 1976) (holding hospital liable for emergency-room physician's negligence, whether or not he was an independent contractor).

[121] *See Howard*, 195 N.W.2d at 40.

[122] It is a reasonable assumption that the caregiver is an employee of the hospital when the bill for the services comes from the hospital and is printed on their letterhead. *See, e.g.*, *Howard*, 195 N.W.2d at 41 (bill was sent on clinic's letterhead and had the doctor's name on it); *see also* Kober v. Stewart, 417 P.2d 476 (Mont. 1966) (hospital furnished space and employees for the x-ray department and charged for its services).

[123] *See, e.g.*, Street v. Washington Hosp. Ctr., 558 A.2d 690, 692 (D.C. 1989) (stating that it is logical assumption that a doctor is an employee of the hospital when the hospital furnishes him with an office); *Whitaker*, 374 S.E.2d at 109 (fact that doctor's written report was issued on hospital stationery showing the doctor to be the director of the hospital's department of pathology held controlling factor in creating jury question whether doctor was agent of hospital).

[124] *See* Capan v. Divine Providence Hosp., 430 A.2d 647, 650 (Pa. Sup. Ct. 1980) (detrimental reliance was established where patient allows doctor to treat her based on patient's knowledge of hospital's reputation and assumption that doctor works for the hospital).

sions.[125] The court in *Jackson v. Power*,[126] for example, found that direct testimony is not needed to show that the patient detrimentally relied on the representations of the hospital unless the plaintiff knew or should have known the true nature of the employment relationship.[127] The patient therefore needs to show only that no prior relationship existed between the treating physician and the plaintiff, and that the patient possessed no knowledge of the employment status of the doctor. While detrimental reliance is clearly a stricter test than mere reasonable belief, it is not an impossible test to pass.

C. *Common Carrier Liability*

The theory of common carrier liability, which emerged from railroads passengers cases, provides another means of establishing employer liability for sexual misconduct. The railroad passenger cases based liability on the exclusive control the defendant had over the plaintiff.[128] Once inside the railroad car the passenger surrenders the right to control his or her environment and is unable to change variables such as the

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[125] *See, e.g.*, Mduba v. Benedictine Hosp., 52 A.D.2d 450, 453, 384 N.Y.S.2d 527, 529 (3d Dep't 1976) ("Patients entering the hospital through the Emergency Room, could properly assume that the treating doctors and staff of the hospital were acting on behalf of the hospital. [They] are not bound by secret limitations as are contained in a private contract between the hospital and the doctor.").

[126] 743 P.2d 1376 (Alaska 1987).

[127] *Id.* at 1382 n.10 ("[The] application of apparent authority in the hospital/emergency room physician situation does not require . . . direct testimony as to reliance . . . absent evidence that the patient knew or should have known that the treating physician was not a hospital employee when the treatment was rendered.").

[128] The common carrier theory of liability and the non-delegable duty theory often overlap. *See infra* notes 152-57, 205-30 and accompanying text. Common-carrier liability imposes a very high duty of care on the employer. This duty is owed directly to the passenger, and is not delegable. Therefore, while the employer may employ others to carry out the duty (for example, security personnel), the employer never relinquishes responsibility for the failure to properly carry out that duty. Common carrier liability theory is characterized as an exception to the respondeat superior doctrine because it imposes liability on the employer for any action that breaches the duty owed by the employer to the passengers taken by its employees, whether in the scope of their employment or not, or even by non-employees. *See, e.g.*, Morton v. Carnival Cruise Lines, 984 F.2d 289, 292 (9th Cir. 1993) (stating that relationship between cruise line and passenger was such that it imposed a duty of protection on the master that it could not delegate), *cert. denied*, 114 S. Ct. 289 (1993).

route travelled or the safety of the train. The party who controls the environment and profits from such control must bear the risk of loss from any harm that results from the passenger's choice to travel on that train.[129] The common carrier theory's application has evolved to include inns and hotels.[130] Common carrier theory thus calls for an extraordinary, non-delegable duty of care that imposes liability on the employer for any harm befalling the plaintiff. The plaintiff is not obligated to prove that the employee was acting under the scope of his or her employment or even that the actor was the defendant's employee.[131]

An employer has a duty to protect a client and cannot delegate liability for a breach of that duty to anyone else.[132] Courts sometimes couch the common carrier theory of liability in the language of implied contract. This rationale creates an obligation based upon the parties' intent or understanding of the circumstances or the relationship rather than upon an express oral or written agreement. For example, *Vannah v. Hart Private Hospital*,[133] involved a hospital's liability for a nurse's theft of a valuable ring from a sedated patient in the operating room. The court mentioned that the common carrier liability stems from the implied contract between the carrier and the passenger and by analogy held the hospital account-

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[129] Stropes *ex rel.* Taylor v. Heritage House Children's Ctr., 547 N.E.2d 244 (Ind. 1989).

> [C]ommon carriers, inn-keepers, merchants, managers of theaters, and others, who invite the public to become their patrons and guests, and thus submit personal safety and comfort to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation and particularly that they shall not suffer wrong from the agents and servants of those who have invited them.

Id. at 252 (quoting Dickson v. Waldron, 34 N.E. 506, 510 (Ind. 1893)).

[130] *See, e.g.*, Dye v. Schwegmann Bros. Giant Supermarkets, Inc., 627 So. 2d 688 (La. Ct. App. 1993) (discussing application of common carrier theory of liability to other entities, including hotel's liability to its guests), *writ denied*, 634 S.2d 401 (La. 1994).

[131] Both the respondeat superior and common carrier theories base liability on the concept of control. In respondeat superior, the focus is on the employer's authority to control its employee's activities. The common carrier theory shifts the focus to the plaintiff's surrender of the ability to control her environment to the employer. *See Stropes*, 547 N.E.2d at 252-53.

[132] The non-delegable duty is discussed further at *infra* notes 205-30 and accompanying text.

[133] 117 N.E. 328 (Mass. 1917).

able in contract for the loss because "an act of the defendant's servants which while not in the course of the servants' employment is none the less a violation of the duty owed by the defendant under the defendant's contract with the plaintiff."[134] The court reasoned that the hospital absolutely guaranteed protection to the patient at a time when she was unable to protect herself.[135]

Courts have moved away from finding an implied contract to ensure the safety of clients and patients. In *G.L. v. Kaiser Foundation Hospital*,[136] a patient was drugged and sexually assaulted by a respiratory therapist employed by the hospital. In the absence of negligence on the part of the hospital or an express contract for the safekeeping of patients, the court did not find the hospital liable.[137] While the court recognized that hospitals take on a special responsibility by admitting patients and providing care, it reasoned that such acts do not make hospitals absolutely responsible for patients' safety.[138]

In recent cases, the existence of a special relationship warranting a higher duty of care, rather than an implied contractual relationship, has been more effective in convincing courts to impose liability on employers. For example, in *Eversole v. Wasson*,[139] a teacher assaulted a student on school grounds who the teacher believed had smashed a Halloween pumpkin at the teacher's home. The court held that while an intentional tort committed outside the scope of employment ordinarily would not implicate the employer,[140] under the particular circumstances the school district could be held lia-

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[134] *Id.* at 330. The court did not specify whether this contract was express or implied.

[135] The *Vannah* court noted that the legal aspects of the case were governed by the decision in Bryant v. Rich, 106 Mass. 180 (1870), where a passenger on a steamer and a steamer employee got into a fight. That court held that, as a matter of contract, the passenger had the right to receive proper treatment from the defendant and its servants. *Vannah*, 117 N.E. at 330. The *Vannah* court stated that the implied contract doctrine does not depend on a passenger-carrier relationship, but applies "whenever there is a contract between the plaintiff and defendant by force of which the defendant is to furnish for the plaintiff's comfort the service of its, the defendant's, employees." *Id.*

[136] 757 P.2d 1347 (Or. 1988).

[137] *Id.*

[138] *Id.* at 1354.

[139] 398 N.E.2d 1246 (Ill. Ct. App. 1980).

[140] *Id.* at 1247-48.

ble.[141] The court reasoned that a special relationship existed between the student and the school district requiring the district to protect the student.[142] This relationship was created by the statutory requirement that the student attend school.[143]

In other cases that address special relationships requiring a higher duty of care, courts have noted that such relationships exist between hospitals and patients, thus invoking the common carrier standard of care.[144] In the context of health care provider sexual misconduct, the court in *Stropes v. Heritage House Children's Center* relied on the common carrier theory of liability.[145] In *Stropes*, a caregiver at a residential facility sexually assaulted a patient. The court predicated lia-

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[141] *Id.* at 1248.

[142] *Id.*

[143] *Id.*

[144] *See, e.g.*, Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970).

> Other relationships in which [duties to protect] have been imposed include . . . school district-pupil, *hospital-patient* and carrier-passenger. In all, the theory of liability is essentially the same: that since the ability of one of the parties to provide for his own protection has been limited in some way by his submission to the control of the other, a duty should be imposed upon the one possessing control (and thus the power to act) to take reasonable precautions to protect the other one from assaults by third parties which, at least, could reasonably have been anticipated. However, there is no liability normally imposed upon the one having the power to act if the violence is sudden and unexpected provided that the source of the violence is not an employee of the one in control.

Id. at 482-83 (emphasis added); *see also* Sebastian v. District of Columbia, 636 A.2d 958 (D.C. 1994) (broadened liability based on special relationships has usually been limited to common carriers, innkeepers and *hospitals*); Nazareth v. Herndon Ambulance Serv., 467 So. 2d 1076, 1079 (Fla. 1985) (stating that the basis for tort liability and a special duty to protect has been applied in situations involving *hospitals*). As the court in Dye v. Schwegmann Bros. Giant Supermarkets, Inc., 627 So. 2d 688 (La. Ct. App. 1993) noted, courts have recognized a duty to protect, even from unnamed and unknowable third persons, by

> those businesses which have a unique relationship to customers—hotels to their guests, *hospitals* to their patients, common carriers to their customers. In these situations the guests, patients, and customers have placed their safety in the hands of hotels, *hospitals*, and common carriers who in turn have assumed the responsibility for their welfare.

Id. at 692 (emphases added); *see also* Doe v. Linder Constr. Co., 845 S.W.2d 173, 191 (Tenn. 1992) (stating that the duty to protect arises from special relationships, including those that exist between a *hospital and patient*); KEETON, *supra* note 21, § 70, at 465 (discussing the broader liability imposed on common carriers, innkeepers and *hospitals*).

[145] 547 N.E.2d 244 (Ind. 1989).

bility on "the passenger's surrender and the carrier's assumption of the responsibility for the passenger's safety, the ability to control his environment, and his personal autonomy in terms of protecting himself from harm."[146] It considered the carrier a bailor or an insurer and analogized the passengers to goods bailed or insured.[147] Thus, the employer was responsible for an employee's act that had breached the carrier's nondelegable duty to protect the passenger, regardless of whether the act was within the scope of the employment.[148] The *Stropes* court focused on the relationship between the patient and the caregiver and the degree of control and autonomy surrendered by the patient due to that relationship. The court noted that common carrier liability is premised on the surrender of the passenger's safety and protection to the enterprise, and observed that the exception had been applied to enterprises other than common carriers.[149] In finding the facility liable, the court noted that the employee's scope of employment is not the relevant determinant.

The court in *Nazareth v. Herndon Ambulance Service* held likewise.[150] In *Nazareth*, an ambulance company employee had sexually assaulted a woman whom he was transporting to a hospital. The court found that an implied contract for safe passage existed between the ambulance company and the passenger, and that the ambulance functioned as a common carrier for liability purposes.[151] "Once the undertaking to transport a passenger has begun, this extraordinary duty [of

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[146] *Id.* at 253.

[147] *Id.*

[148] *Id.*; *cf.* G.L. v. Kaiser Foundation Hosp., 757 P.2d 1347, 1351 (1988) (stating courts that have found an analogy between bailees and innkeepers "deal with the care of bailed personal property, not persons, who, unlike property, are not 'bailed' "); *see also* Lyons v. Kamhoot, 575 P.2d 1389 (Or. 1978) (hotel guest/owner of electric organ had no right to its possession on the day of alleged conversion of organ where hotel improperly asserted an innkeeper's lien); Real Good Food Store v. First Nat'l Bank, 557 P.2d 654 (Or. 1976) (once bank admitted receipt of funds in the depository, it was not permitted to invoke exculpatory clause in a contract to relieve itself of liability for the negligence of its employees).

[149] 547 N.E.2d at 252. The court noted that in Dickson v. Waldron, 34 N.E. 506 (Ind. 1893), the common-carrier theory had been applied to a theater, analogizing the theater's responsibility toward the patron to that of a common carrier toward its passenger and holding that the treatment due was similar in kind. *Id.*

[150] 467 So. 2d 1076 (Fla. App. Dist. Ct. 1985).

[151] *Id.* at 1081.

common carrier] to the passenger [to protect from attack from carrier's employees] arises, and does not terminate until the journey is complete."[152] Because the court had determined that the ambulance was a common carrier, it did not reach the question of whether the duty would be the same for a non-common carrier.[153] The court did add, however, that "the technical classification appears to us less significant than the nature and scope of [the enterprise's] undertaking on behalf of its users."[154]

Court decisions regarding the parameters of common carrier liability are not uniform. In *Sebastian v. District of Columbia*,[155] for example, under nearly the same facts as *Nazareth*, the court did not hold an ambulance company strictly liable for its employee's intentional tort. The court rejected the common-carrier theory and refused to impose a non-delegable duty of care on the ambulance company. Instead the court referred this issue to the state legislature.[156] Similarly, in *Worcester Insurance Co. v. Fells Acres Day School, Inc.*,[157] the Supreme Judicial Court of Massachusetts declined to hold a daycare center to the high standard of care imposed upon common carriers. Though the state had adopted and applied common carrier liability in other contexts, it was unwilling to include daycare centers, reasoning that it would overextend existing state law.[158]

Other courts have mentioned the duty owed by hospitals in dicta. Such courts have expressed their belief that hospitals have a non-delegable duty to protect patients from acts of third parties simply because the hospital has accepted them as patients and is in the best position to protect them.[159] The court in *Samuels v. Southern Baptist Hospital*,[160] noted that

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[152] *Id.* at 1079.

[153] *Id.* at 1081.

[154] *Id.*

[155] 636 A.2d 958 (D.C. 1994).

[156] *Id.* at 962.

[157] 558 N.E.2d 958 (Mass. 1990).

[158] *Id.* at 968.

[159] *See, e.g.*, Insinga v. LaBella, 543 So. 2d 209, 214 (Fla. 1989) (stating that as a matter of public policy, hospitals are in a superior position to supervise and monitor a doctor's performance and are "the only entity that can realistically provide quality control").

[160] 594 So. 2d 571 (La. Ct. App.).

"[e]nsuring a patient's well-being from others, including staff . . . is part of the hospital's normal business."[161] Similarly, in *Dye v. Schwegmann Brothers Giant Supermarkets*,[162] the court described that a duty to protect clients from unarticulated criminal conduct by unnamed and unknowable third persons might arise in certain circumstances in

> those businesses which have a unique relationship to customers—hotels to their guests, hospitals to their patients, common carriers to their customers . . . guests, patients, and customers have placed their safety in the hands of hotels, hospitals, and common carriers who in turn have assumed the responsibility for their welfare.[163]

Although these statements are dicta, they should not be disregarded.[164] These theories ultimately may become a significant part of the law imposing vicarious liability on patients.

Employer liability in therapist-patient sexual abuse cases often stems from the imposition of vicarious liability for the acts of their employees.[165] The respondeat superior doctrine holds employers vicariously liable for acts their employees perform within the scope of employment or that are motivated by an intention to serve the employer. The competing and often contradictory analyses of the respondeat superior doctrine with its modifications and exceptions demonstrate the unsettled nature of this doctrine. Plaintiffs seeking to impose vicarious liability on an employer for the sexual misconduct of

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[161] *Id.* at 574.

[162] 627 So. 2d 688 (La. Ct. App. 1993).

[163] *Id.* at 692 (imposing a strict non-delegable duty of care on hospitals, akin to that of a common carrier).

[164] Such remarks have the potential for persuasive effect because they represent opinions of courts that may well constitute a correct principle of law, but which were simply unnecessary or incidental to the resolution of the matters pending. *See* Bell v. Sharp Cabrillo Hosp., 260 Cal. Rptr. 886, 893 n.13 (Ct. App. 1989) (hospital's breach of its duty to exercise reasonable care in selecting its employees).

[165] The teacher-student relationship is similar to that between a therapist and patient. Both teachers and therapists may exercise their authority over vulnerable people in their care to manipulate and control them. The very nature of their profession requires therapists to probe into and learn the intimate details of patients' lives. Patients submit to therapists' questions and conduct because they believe that therapists are authorized to act in such a manner and do so because it is in the patient's best interest. Students often respond in a similar manner to their teachers and as such both therapists and teachers occupy positions of power and authority that are easily abused.

an employee may find that they can exercise a degree of creativity often precluded in other, more rigid areas of the law.

An employer may also be found liable even where the employee's act was not within the scope of employment and was not meant to further the employer's interests. The common carrier exception to the respondeat superior doctrine holds an employer strictly liable for the acts of an employee that breach the employer's non-delegable duty to the patient. While the common carrier theory of liability arose out of the railroad context, courts have occasionally extended it to other entities, such as ambulances, that bear similar features to those of common carriers and innkeepers. While common carrier is a potential theory of recovery, plaintiffs should argue it in conjunction with other, time-tested theories and should consider theories of direct liability as well.

II. EMPLOYERS' DIRECT LIABILITY

An employer is found to be directly liable to third parties injured by the actions of its employees if a plaintiff proves that there is a direct link between the negligence by the employer and the injury. Links are found when an employer is negligent in such areas as the hiring, supervision or retention of employees.[166] To prevail, plaintiffs must show that the employer owed them a duty, that the employer breached that duty, and that this breach was the proximate cause of the plaintiff's injury.[167]

A. *Institutional Negligence*

Courts may impose a duty on an institution to act in a non-negligent manner toward its clients.[168] This duty was

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[166] Negligent hiring, supervising, and retention are separate causes of action and do not involve vicarious liability. The principles involved in negligent hiring, supervising, and retention are based on the law of torts, not the rule of agency, and are therefore distinguishable from the agency doctrine of vicarious liability. These negligence theories do not involve the scope of employment limitation. *See* Tenantry v. Diocese of Colorado, 863 P.2d 310, 324 n.16 (Colo. 1993).

[167] *See, e.g.*, Pedroza v. Bryant, 677 P.2d 166, 168 (Wash. 1984) (action against hospital for alleged negligence toward decedent).

[168] Buckley v. Lovallo, 481 A.2d 1286 (Conn. App. Ct. 1984) (malpractice action against physician and hospital).

first applied to hospitals in 1965, in *Darling v. Charleston Community Memorial Hospital.*[169] The court imposed a duty of care on the hospital and established its overall obligation to supervise the quality of patient care services. In that case, a physician at the hospital had set the plaintiff's broken leg improperly eventually requiring its amputation. The court found that the hospital owed a duty of care to the plaintiff that included monitoring the work of its physicians.[170]

Public policy considerations also support the imposition of liability on hospitals and health care institutions. A hospital is clearly in a better position than a patient to perform such tasks as supervising staff, enforcing regulations and rectifying unsafe or unhealthy conditions. In addition, the potential for liability creates a financial incentive for hospitals to implement policies to ensure the safety of its patients and the competence of the house staff and other employees.[171]

Negligent hiring is one way in which institutional employers, including hospitals, are liable for the acts of their employees. Liability is imposed if the employer knew, had reason to believe, or failed to use reasonable care to discover that the employee was unfit prior to hiring the employee.[172] This re-

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[169] 211 N.E.2d 253 (Ill. 1965), *cert. denied*, 383 U.S. 946 (1966).

[170] *See id.* at 257.

> The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.

Id.

[171] *See, e.g.*, Bell v. Sharp Cabrillo Hosp., 260 Cal. Rptr. 886, 897 (Ct. App. 1989) (discussing the effect of pecuniary damages and economic pressures of the market which will cause hospitals to ensure safety to remain competitive); Pedroza v. Bryant, 677 P.2d 166, 170 (Wash. 1984) (stating that a financial incentive exists because "[t]he most effective way to cut liability insurance costs is to avoid corporate negligence").

[172] It also is important to note that some courts have held employers to the same standard of care for the work performed by volunteers. In Doe v. Boys Clubs, 868 S.W.2d 942 (Tex. Ct. App. 1994), the court held that a volunteer could

quirement constitutes an independent duty imposed on the institution to select competent staff[173] and independent contractors.[174]

Because the duty is to select competent employees, employers may be liable if they are negligent in properly screening potential employees.[175] For example, in *Evan F. v. Hughson United Methodist Church*,[176] the court held that a church could be found liable for hiring a pastor who had been discharged from a previous position for sexual misconduct involving a minor parishioner where the pastor sexually abused parishioners in his new position. The court found that a diligent inquiry would have uncovered information alerting the church to the pastor's prior sexual misconduct. Because it did not perform such an inquiry before retaining the pastor, the church faced liability for negligent hiring.[177]

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be considered an employee for purposes of determining the liability of the club. The court noted that the criteria used to determine whether a volunteer would be so considered are "whether the employer: 1. Has a right to direct the duties of the volunteer; 2. Has an interest in the work to be accomplished; 3. Accepts direct or incidental benefit derived from the volunteer's work; and 4. Has a right to fire or replace the volunteer." *Id.* at 950 (citation omitted); *but see* Harris County v. Dillard, 883 S.W.2d 166 (Tex. 1994) (holding that a volunteer reserve deputy sheriff whom the county appoints to carry out law enforcement duties, who carries all the devices and emblems of a law enforcement officer, and who answers calls in the same manner as any police officer is not an "employee" for purposes of the Texas Tort Claims Act).

[173] *See Bell*, 260 Cal. Rptr. at 896 (stating that "the competent selection and review of medical staff is precisely the type of professional service a hospital is licensed and expected to provide").

[174] *See* Bost v. Riley, 262 S.E.2d 391, 396 (N.C. Ct. App. 1980) (stating that hospital could be found negligent "for its failure to adequately investigate the credentials of a physician selected to practice at the facility).

[175] *See* Joiner v. Mitchell County Hosp. Auth., 186 S.E.2d 307, 308 (Ga. Ct. App. 1971) (failure of hospital to screen employee credentials constituted an act of negligence on hospital's part distinct from physician's negligence), *aff'd*, 189 S.E.2d 412 (Ga. 1972); Welsh Mfg. v. Pinkerton's Inc., 474 A.2d 436, 441 (R.I. 1984) (holding that "[w]hen an employee is being hired for a sensitive occupation, mere lack of negative evidence may not be sufficient to discharge the obligation of reasonable care" but affirmative statements and background checks may be required); Johnson v. Misericordia Community Hosp., 294 N.W.2d 501, 506 (Wis. Ct. App. 1980) (failure to check credentials upon application for admission to staff can lead to hospital's liability), *aff'd*, 301 N.W.2d 156 (Wis. 1983).

[176] 10 Cal. Rptr. 2d 748, 758 (Ct. App. 1992).

[177] *Id.*; *see also* Erickson v. Christenson, 781 P.2d 383, 384 (Or. Ct. App. 1989) (holding that if church knew or should have known that pastor was not adequately trained as a counselor and had misused his position in the past to take advantage of parishioners, it was reasonable for a trier of fact to infer that hiring the

The Colorado Supreme Court, in *Moses v. Diocese of Colorado*,[178] expanded the employer's responsibility for pre-employment investigation to include more than just prior misconduct. In *Moses*, a parishioner sued the diocese and a bishop for negligent hiring and retention of a priest who had engaged in a sexual relationship with a parishioner he had counselled. The priest's personnel file with the diocese included psychological reports noting his problems with depression, low self-esteem, and a "sexual identification ambiguity."[179] Although the bishop and the diocese were aware of these reports, they were withheld from the parish hiring body.[180] In finding that the diocese and bishop owed a duty to the parishioner, the court stated that liability for negligent hiring is not based on past conduct alone but includes an examination by the employer of character attributes that may create an undue risk of harm to others who come into contact with the employee.[181] The court expanded the duty to investigate on the basis of the priest's position of trust and reliance as a counselor and the nature of his contact with the public.[182]

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pastor created the risk of harm to plaintiff and that this risk of harm was reasonably foreseeable to the church).

[178] 863 P.2d 310 (Colo. 1993), *cert. denied*, 114 S. Ct. 2153 (1994).

[179] *Id.* at 315.

[180] *Id.*

[181] *Id.* at 327 n.21; *see also* Biel v. Alcott, 876 P.2d 60 (Colo. Ct. App. 1993) (noting the *Restatement (Second) of Agency* states: "Liability results . . . not because of the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist"). *But see* Schieffer v. Catholic Archdiocese, 508 N.W.2d 907 (Neb. 1993). In *Schieffer*, the plaintiff was a parishioner who saw defendant Lange for counseling. Lange engaged in sexual conduct with her. *Id.* at 910. The court denied a claim for negligence stating that the court would not entertain a claim for clergy malpractice. It would necessitate that the court set standards for the church in violation of the Constitution. *Id.* at 912. The court then stated that the plaintiff had no cause of action against the Archdiocese for negligent hiring, retention or supervision because the priest had not been found liable of anything. *Id.* at 913.

[182] *Moses*, 863 P.2d at 328. This duty is the same as that owed from hospitals to patients. The hospital owes a duty to investigate potential employees or staff. Under the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11135 (1988), hospitals must check The National Practitioner Databank before making a staff appointment. The records in this databank contain information on physicians who have been disciplined or reprimanded, have had malpractice claims brought against them, or have had privileges revoked or limited. A hospital is held to have constructive knowledge of any information appearing in this databank whether or not it actually checks the information. Health care groups also are required to report such information to their local boards who in turn report to the

Liability may also fall on the employer who retains an employee after becoming aware that the employee poses a risk of harm to third parties. Hospitals, for example, may be liable for failing to revoke the staff privileges of a physician when hospital administrators become aware, or should become aware, that the physician sexually abused patients.[183] In *Copithorne v. Framingham Union Hospital*,[184] the plaintiff, an employee of the hospital, was raped by a visiting physician staff member. After filing her complaint, the plaintiff became aware that three similar complaints previously had been filed against the same physician. One of the complaints had culminated in a criminal trial in which the physician was found not guilty. Because the hospital received actual notice of the prior assaults, the court held that it was foreseeable that the doctor would continue to abuse patients and employees.[185] Thus, a jury could find that the risk of injury to the plaintiff due to the doctor's continued employment was "within the [hospital's] range of foreseeable consequences."[186] The court concluded that the hospital could be liable for failing to take appropriate remedial measures given its knowledge of the doctor's propensities.[187]

Negligent supervision of employees is another theory under which an employer may be held liable.[188] For example, in

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national board.

[183] This may include a duty to have proper chains of command for reporting negligent or dangerous treatment by staff members. *See* Campbell v. Pitt County Memorial Hosp., 352 S.E.2d 902, 908-09 (N.C. Ct. App.), *aff'd*, 362 N.E.2d 273 (N.C. 1987).

By remaining silent once a report has been made, employers also may find themselves criminally liable through aiding and abetting by silence. *See* Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting by Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 34 (1993) (noting that analogies to securities regulations have been made to find other types of non-disclosures equivalent to aiding and abetting through silence).

[184] 520 N.E.2d 139 (Mass. 1988).

[185] *Id.* at 140-42. After receiving the initial complaints, the hospital instructed the doctor to have a chaperon present when visiting female patients and instructed the nurses on the floor to keep an eye on the doctor.

[186] *Id.* at 142.

[187] *Id.* at 143. One member of the court expressed concern that the decision was too far-reaching in establishing the hospital's duty "to protect its patients from the criminal acts of independent physicians occurring off the premises and arising from a private and independent doctor-patient relationship." *Id.* (dissenting opinion).

[188] The *Restatement (Second) of Agency* § 213 (1959), provides: "A person con-

Andrews v. United States,[189] the court found the therapist's employer liable for negligent supervision where the plaintiff's therapist engaged in sexual contact with her under the guise of therapy.[190] Similarly, in *Simmons v. United States*,[191] a social worker's supervisor knew that the counselor had engaged in sexual relations with his client, yet took no action.[192] The court found that proper supervision of the social worker would have prevented a significant portion of the plaintiff's emotional damages.[193]

While a court may find that an employer was negligent in hiring, supervising, or retaining an employee, courts are still bound by the rules of general negligence theory.[194] These rules dictate that the employer's negligence be the proximate cause of the plaintiff's injury.[195] If the employer negligently hires an employee, but that employment is not the cause of the plaintiff's injuries, courts will not find the employer liable. For example, in *Carter v. Skokie Valley Detective Agency, Ltd.*,[196] the plaintiff alleged that the defendant corporation was negligent in hiring a security guard without performing a background check on him. The defendant's employee worked nights at a gas station where the plaintiff's daughter worked as a cashier. On a night when the security guard was off duty he came to the gas station still dressed in his uniform. He told the cashier that he was scheduled to work somewhere else that night and asked her to give him a ride. After leaving together in her car he kidnapped, raped and murdered her.[197]

On appeal, Skokie Valley did not dispute its negligence in hiring the guard. Instead, the defendant successfully argued

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ducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the supervision of the activity."

[189] 732 F.2d 366 (4th Cir. 1984).

[190] *Id.* at 370.

[191] 805 F.2d 1363 (9th Cir. 1986).

[192] *Id.* at 1364.

[193] *Id.* at 1371.

[194] For a discussion on the elements of the negligence cause of action, see generally Jorgenson et al., *supra* note 1, at 695-96.

[195] *See* Purcell v. Zimbelman, 500 P.2d 335 (Ariz. Ct. App. 1972). Proximate cause requires, at a minimum, a showing of "some reasonable connection" between the act or omission of the entity and the plaintiff's injury. *Id.* at 342.

[196] 628 N.E.2d 602 (Ill. Ct. App. 1993).

[197] *Id.* at 603-04.

there was no liability because hiring the guard had not been the proximate cause of the victim's death. The court held that the guard's employment "merely furnished a condition which made the rape and murder possible, but [that] it was not the result of 'a natural and continuous sequence of events' set in motion by Skokie Valley's negligence and 'unbroken by any effective intervening cause.'"[198]

B. *Institutional Breach of Fiduciary Duty*

One of the most important components of the professional-patient relationship is the degree of trust the patient places in the professional. Because therapists, physicians, clergy and other professionals occupy positions of respect and trust, they owe a fiduciary duty to patients and clients to act in the patient's or client's best interest.[199] Sexual contact between a therapist and patient breaches the trust relationship and violates the therapist's duty of care.[200]

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[198] *Id.* at 605 (quoting Escobar v. Madsen Constr. Co., 589 N.E.2d 638, 639 (Ill. App. Ct. 1992)). The court explained its reasoning by stating that:

> It was not the fact Harris was a security guard that got him into Emma's car and proximately caused her injuries and death; it was the fact that she trusted him because she knew him from work where he happened to be employed as a security guard. In order to find liability in this case, we would have to reason that if Skokie Valley had not negligently hired Harris he would not have met Emma and she would not have trusted him enough to let him into her car. If we followed such reasoning then we would have had to find Skokie Valley liable if, after leaving the Amoco station alone, she had seen him on the street out of uniform and offered him a ride or if they ran into each other on a weekend at the supermarket. We do not believe that the concept of proximate cause should be extended this far.

Id. at 605-06.

[199] The Metro Action Committee on Public Violence Against Women and Children ("METRAC") states that the most salient factors involved in a trust relationship are age, authority, reliance or dependence, and emotional dependence. METRAC, BREACH OF TRUST IN SEXUAL ASSAULT: STATEMENT OF THE PROBLEM, PART ONE 7-9 (1992); *see also* Erickson v. Christensen, 781 P.2d 383 (Or. 1989) (stating that if clergypersons misuse their position as clergy and counselor, then plaintiff's injuries stem from the misuse of a position of trust). In Destefano v. Gabrian, 763 P.2d 275, 284 (Colo. 1988), the court held that when a therapist undertakes to counsel another, a fiduciary duty is created. *See also* Rogers v. United States, 397 F.2d 12, 14 (4th Cir. 1968) ("When an agency of the United States voluntarily undertakes a task, it can be held to have accepted the duty of performing that task with due care.").

[200] *See Cosgrove*, 520 A.2d 844, 848 (N.J. Super. Ct. Law Div. 1986) (stating

When a therapist is employed by a professional institution, the breach of the trust relationship may encompass not only the therapist's initial breach, but also the failure of the employer to deal appropriately with that breach.[201] The Metro Action Committee on Public Violence Against Women and Children defines this institutional breach of trust as:

> When an individual who enjoys special status and bears special responsibility derived from a position within [a professional, governing or religious] institution takes advantage of that position to commit sexual abuse, the breach of trust aggravates the wrong. When the institution does not respond in ways that recognize the abuse and its impact, respect the rights of both victims and offenders, protect and support the victim, and prevent further abuse by the same or other offenders, the original breach of trust is compounded. If it fails to care for the victim and serve her/his interests, or if it shields the offender and itself, the institution is in breach of its societal trust.[202]

Individual employers and organizations owe a fiduciary duty to clients or patients if they stand in a fiduciary relationship to them.[203] This duty extends to a range of institutions. For instance, in *Vallinoto v. DiSandro*,[204] the defendant law firm was found to stand in a position of trust with respect to a

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that the therapist who engaged in sexual contact with his patient betrayed his trust as a therapist); *see also* Bunce v. Parkside Lodge, 596 N.E.2d 1106, 1111-12 (Ohio Ct. App. 1991).

[201] METRAC, *supra* note 103, at 1; *see also* Rowe v. Bennett, 514 A.2d 802 (Me. 1986) (stating that the social worker who undertook psychotherapeutic treatment and her employer and supervisor were under duty to provide proper care).

[202] METRAC, *supra* note 103, at 3.

[203] *Restatement (Second) of Torts* § 874 cmt. a (1979), states that a fiduciary relationship exists when one person is "under a duty to act or give advice for the benefit of another upon matters within the scope of the relation."

Some courts have noted this institutional fiduciary duty without using the terminology. In Richard H. v. Larry D., 243 Cal. Rptr. 807 (Ct. App. 1988), for example, the court held that a clinic was liable for a therapist's sexual assault of a patient. The court characterized the malpractice action against the therapist as one for the breach of his "professional and fiduciary responsibilities." *Id.* at 810. The court went on to state that because of the agency relationship between the therapist and the hospital, "this cause of action is also good against the hospital," implying, but not holding, that the hospital owed the patients a fiduciary duty because its employee was rendering treatment *on its behalf*. *Id.*

[204] No. 91-0390 (R.I. Super. Ct. 1991), appeal docketed No. 93-379A (R.I. Super. Ct. July 19, 1993). Verdict reported in The Providence Journal (Massachusetts ed.) Nov. 20, 1992, at 1. *See also* Debra C. Moss, *Jury Awards Ex-Client $225,000 for Malpractice Despite Competent Representation*, 79 A.B.A. J. 24 (1993).

particular attorney's client. The *Vallinoto* jury found that a member of the firm representing a female divorce client had coerced his client into having sexual relations with him. As a result of her lawyer's conduct, the plaintiff suffered physical injury and severe emotional distress. Although the plaintiff conceded that the attorney did "an excellent job" with respect to obtaining assets during her divorce negotiations, DiSandro deliberately had prolonged the divorce for eighteen months so he could maintain his sexual relations with the plaintiff.[205] The verdict was rendered against the individual attorney as well as the attorney's law firm because the firm had violated its duty to the client.[206]

In a similar case, *Moses v. Diocese of Colorado*,[207] the court found sufficient evidence to prove that a fiduciary relationship existed between a parishioner and the Diocese of Colorado and its bishop.[208] The parishioner's husband came to the bishop to discuss the sexual contact between his wife and the abusive priest.[209] The husband agreed to let the bishop take care of the matter and the bishop subsequently arranged to meet with the abused parishioner.[210] The bishop bound her to secrecy but took no action to help the parishioner.[211] The bishop warned the abusive priest (who had been promoted to another diocese) not to let the incident happen again.[212]

According to the court in *Moses*, the diocese and the bishop had assumed a duty to the parishioner when he acted to resolve the problems between the parishioner and the abusive priest.[213] In finding that the bishop had assumed a duty to help the parishioner, the court noted that "[o]nce a member of the clergy accepts the parishioner's trust and accepts the role of counsellor, a duty exists to act with the utmost good faith for the benefit of the parishioner."[214] Because the bishop and other representatives of the diocese had done nothing to help

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[205] *Id.*
[206] *Id.*
[207] 863 P.2d 310 (Colo. 1993); *see supra* notes 178-82 and accompanying text.
[208] *Id.* at 321.
[209] *Id.* at 315-18.
[210] *Id.* at 317-18.
[211] *Id.* at 18.
[212] *Moses*, 863 P.2d at 18.
[213] *Id.* at 322-23.
[214] *Id.* at 323.

the parishioner after having taken responsibility to do so, the bishop and the diocese also had breached their fiduciary duties.[215]

C. *Non-Delegable Duty Revisited*

Neither the institutional negligence doctrine nor the institutional fiduciary theory holds an employer strictly liable for injuries that occur during the course of the institution's business. In determining institutional liability, courts initially focus on whether the entity owed the plaintiff a duty of care and base liability on the entity's breach of a specific duty.[216]

An approach to liability that would encompass both the fiduciary duty and institutional negligence under a strict liability doctrine is the imposition of a non-delegable duty on health care providers to supply a competent staff and to ensure patients' safety. This view, allows the provider to delegate client responsibility, but prohibits the transfer of liability for a harmed client.[217] Establishing such a strict liability encourages hospital and health care providers to protect patients and to act in the patients' best interests when rendering treatment.

In *Thompson v. Nason Hospital*,[218] the Pennsylvania Su-

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[215] The court noted that the diocese stood in a superior position to the parishioner and was able to exert substantial influence over her. *Id.* at 322. The court placed great emphasis on the fact that the diocese and the bishop assumed a duty to act in the parishioner's best interests and then failed in that duty. *Id.* at 322-23.

[216] It is important to keep the institutional negligence theory separate from the strict liability or respondeat superior theories. Pursuant to the institutional negligence theory the entity owes an independent duty to the patient which it has breached. Though this liability is not strict, the standard of care is very high, not unlike the common carrier standard. In corporate negligence analysis, however, courts require plaintiffs to show actual or constructive knowledge by the members of the administration or board. Constructive knowledge is imputed to the board or administration when one member knows or should know certain information. Purcell v. Zimbelman, 500 P.2d 335, 344-45 (Ariz. Ct. App. 1972).

[217] The *Restatement (Second) of Agency* § 214 (1959), entitled "Failure of Principal to Perform Non-delegable Duty," provides:

> A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.

Id.

[218] 591 A.2d 703 (Pa. 1991); *see supra* text accompanying notes 109-10.

preme Court followed this approach and defined institutional negligence as a non-delegable duty of care.[219] The *Thompson* court set the hospital's standard of care owed to patients as one that "ensure[s] the patient's safety and well-being while at the hospital."[220] This definition implies that a patient need not establish the negligence of a third party, such as a doctor or nurse, to find the hospital liable.[221] The court emphasized that liability was imposed upon the hospital—and not against a third party or against the hospital vicariously—because of its own direct breach.[222]

The modern view of the hospital as a full-service care provider with direct responsibilities to the patients, rather than merely a provider of support services such as tools and operating rooms, was established first in *Darling v. Charleston Community Memorial Hospital*.[223] As discussed above, this landmark case recognized the new relationship emerging between hospitals and patients. *Darling* was among the first cases to view the hospital as an entity that owed a direct duty of care to its patients. Hospitals now are responsible for taking reasonable steps to ensure the safety of their patients.

Other courts have followed *Darling*'s lead, finding that the duty of care hospitals owe to their patients cannot be delegated away. Some courts have limited this duty to the emergency room setting, stating that hospitals had assumed an implied duty to protect the patients in this context.[224] In *Jackson v. Power*,[225] for example, the court held that a hospital that had offered emergency room services as required for state accreditation, could not delegate its responsibility for emergency room

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[219] The court stated that the standard "creates a *non-delegable duty* which the hospital owes directly to a patient." *Id.* (emphasis added); *see also* McClellan v. HMO, 604 A.2d 1053, 1059-60 (Pa. Super. Ct. 1992).

[220] *Thompson*, 591 A.2d at 707.

[221] *Id.*

[222] The court acknowledged creation of this new standard when it stated, "[t]oday, we take a step beyond the hospital's duty of care delineated in [another case, which recognized the doctrine of corporate negligence and corporate liability] in full recognition of the corporate hospital's role in the total health care of its patients." *Id.* at 708.

[223] 211 N.E.2d 253 (Ill. 1965), *cert. denied*, 383 U.S. 946 (1966).

[224] In many cases there is an overlap between vicarious liability based on the apparent agency and agency by estoppel theories and direct liability based on the non-delegable duty theory. *See* Jackson v. Power, 743 P.2d 1376 (Alaska 1987).

[225] 743 P.2d 1376 (Alaska 1987); *see supra* text accompanying notes 126-27.

patients. In *Jackson*, the court applied the non-delegable duty analysis to find the hospital strictly liable for negligent treatment performed on the plaintiff in its emergency room.[226] This type of analysis indicates how courts have progressed toward assigning strict liability.

Other courts have not limited the non-delegable duty to emergency rooms but have applied it to any "inherent function" of the hospital.[227] The inherent function rationale is analogous to the enterprise liability theory.[228] When a function is inherent in the operation of an enterprise, the enterprise should be required to bear any losses associated with its performance.

Cases holding hospitals liable for acts by independent doctors performing inherent functions of the hospital have not necessarily relied on a clear non-delegable duty rationale. In *Beeck v. Tucson General Hospital*,[229] for example, the court held that an individual who performs an inherent function of the hospital acts as an agent of the hospital and thus subjects the hospital to liability. The court focused on the non-delegable responsibilities involved in the performance of an inherent function and stated that when a hospital has undertaken a duty to provide a service, it must do so with a commensurate accordance standard of care and responsibility. Although the tasks themselves may be delegated, the responsibility may not.[230]

The inherent function theory has been described in terms of an agency relationship. The court in *Schagrin v. Wilmington Medical Center*[231] described the inherent function theory as

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[226] *Jackson*, 743 P.2d at 1382-85. Though the court was deciding the issue of whether a hospital may be held vicariously liable for negligent health care rendered by independent emergency room doctors, it held that the hospital had a non-delegable duty to provide non-negligent emergency room care.

[227] An "inherent function" is one without which the hospital could not properly achieve its purpose. Beeck v. Tucson Gen'l Hosp., 500 P.2d 1153, 1158 (Ariz. Ct. App. 1972) (finding duties of radiologist to constitute "inherent functions" of hospital).

[228] When an employee delivers a service that is an inherent function of the hospital, that employee can be looked upon "as an integral part of the total 'hospital enterprise.'" Adamski v. Tacoma Gen'l Hosp., 579 P.2d 970, 977 (Wash. Ct. App. 1978).

[229] 500 P.2d 1153 (Ariz. Ct. App. 1972).

[230] *Id.* at 1157.

[231] 304 A.2d 61 (Del. Super. Ct. 1973).

such but used reasoning similar to the non-delegable duty theory. In *Schagrin*, the court stated that "when one has undertaken to do a certain thing or to do it in a particular manner, he cannot, by employing an independent contractor, avoid liability for injury resulting from a nonperformance of duties assumed by the independent contractor under his agreement."[232] In effect, the court employed the non-delegable duty/inherent function analysis.

The Supreme Court of Washington recognized the doctrine of institutional negligence in *Pedroza v. Bryant*,[233] describing it as encompassing a non-delegable duty owed by the hospital to the patient.[234] Previously the court had viewed the inherent function theory only as a way to avoid the respondeat superior requirements;[235] for example, using it to affix vicarious liability on an entity for an independent contractor's acts.[236] In the *Pedroza* case, the court employed the corporate negligence doctrine to impose direct liability on hospitals, going so far as to make that liability a non-delegable one.[237] The court, therefore, adopted the view that an institution that engages an independent contractor to perform an inherent function, without which the entity could not properly achieve its purpose, remains responsible for any resulting harm.[238]

The California Court of Appeals similarly implied that hospitals owed a duty to their patients to ensure their safety while at the hospital—yet without using the term non-delegable duty. Deciding the issue of what constituted professional negligence, the court in *Murillo v. Good Samaritan Hospital*[239] noted that the hospital's professional duty "is primarily to provide a safe environment within which diagnosis, treat-

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[232] *Id.* at 64; *see also Adamski*, 579 P.2d at 977 (discussing the "ostensible agent" theory set forth in the *Restatement (Second) of Agency* § 267).

[233] 677 P.2d 166 (Wash. 1984).

[234] *Id.* at 168.

[235] *Id.* at 169; *see also Adamski*, 579 P.2d at 977.

[236] 677 P.2d at 169.

[237] *Id.* at 170.

[238] *Id.* The court defined the standard of care to which the hospital is held as the accreditation standards promulgated by the Joint Commission on Accreditation of Hospitals as well as the hospital's own bylaws adopted pursuant thereto. *Id.* at 170-71.

[239] 160 Cal. Rptr. 33 (Ct. App. 1979).

ment, and recovery can be carried out."[240]

This notion of a non-delegable duty of protection is similar to the innkeeper or common-carrier duty.[241] The non-delegable duty theory emphasizes the fact that patients must rely on the hospital to protect them from employees or others who have access to their rooms and bodies.[242] Once patients have submitted themselves to the care of the hospital they have little control over their environment. The hospital therefore is ultimately responsible for their safety.[243] The non-delegable duty theory, with respect to inherent functions, imposes on the hospital a duty owed directly to the patient "regardless of the details of the doctor-hospital relationship."[244] When a patient is harmed due to the hospital's negligence or its failure to enforce rules and regulations, the hospital has breached its duty.[245]

If an employee harms a third party, the employer may be liable to the third party for its employee's failure to meet the employer's own duty toward that party. Institutional negligence doctrine holds employers directly liable for failing to investigate potential employees or agents properly, to adequately supervise them once chosen, or to terminate them once notice of improper conduct is received. Such liability stems from the employer's direct duty to the client or patient. In some situations, institutions have been found to owe an even higher fiduciary duty to their clients and patients. Employers cannot assume that diligent hiring practices will make them immune to liability. They must be as diligent in their supervisory, disciplinary and retention practices as in their hiring practices, and must be fully cognizant of the duties owed directly to patients and clients.

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[240] *Id.* at 36-37.

[241] *See supra* notes 128-58 and accompanying text.

[242] For example, in G.L. v. Kaiser Foundation Hosp., 757 P.2d 1347, 1354 (Or. 1988), the court reviewed the applicable regulations regarding hospitals that stated that patients' rooms were to remain unlocked at all times to ensure easy access from the hall without a key.

[243] *Murillo*, 160 Cal. Rptr. at 36-37.

[244] Pedroza v. Bryant, 677 P.2d 166, 168 (Wash. 1984).

[245] *Id.* at 170; *see also Murillo*, 160 Cal. Rptr. at 37.

III. MISCELLANEOUS LIABILITY CONSIDERATIONS

A. *Protective Legislation*

Aside from typical employer liability situations, other methods of imposing liability in fiduciary misconduct cases include statutory reporting requirements, obligations between a supervisor and supervisee, and HMOs' liability for their affiliates' acts. At least three states—Minnesota, Illinois and Texas—have enacted legislation aimed at requiring employers to take steps to prevent or report sexual contact between therapist employees and patients. These statutes provide examples of the protective legislation in force in the United States.

The Minnesota statute places substantial responsibility on employers to protect patients from sexually exploitative therapists through specific, mandatory hiring and supervising procedures.[246] The statute requires employers to disclose informa-

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[246] The Minnesota statute states:

(a) An employer of a psychotherapist may be liable under section 148.02 [cause of action for sexual exploitation] if:

(1) the employer fails or refuses to take reasonable action when the employer knows or has reason to know that the psychotherapist engaged in sexual contact with the plaintiff or any other patient or former patient of the psychotherapist; or

(2) the employer fails or refuses to make inquiries of an employer or former employer, whose name and address have been disclosed to the employer and who employed the psychotherapist as a psychotherapist within the last five years, concerning the occurrence of sexual contacts by the psychotherapist with patients or former patients of the psychotherapist.

(b) An employer or former employer of a psychotherapist may be liable under section 148.02 if the employer or former employer:

(1) knows of the occurrence of sexual contact by the psychotherapist with patients or former patients of the psychotherapist;

(2) receives a specific written request by another employer or prospective employer of the psychotherapist, engaged in the business of psychotherapy, concerning the existence or nature of the sexual contact; and

(3) fails or refuses to disclose the occurrence of the sexual contacts.

(c) An employer or former employer may be liable under section 148.02 only to the extent that the failure or refusal to take any action required by paragraph (a) or (b) was a proximate and actual cause of any damages sustained.

(d) No cause of action arises, nor may a licensing board in this state take disciplinary action, against a psychotherapist's employer or former

tion regarding former employees to prospective employers.[247] Employers who fail to perform proper investigations prior to hiring therapists or who fail to handle incidents of employee sexual misconduct properly are subject to statutory liability.[248] In addition, the statute creates a cause of action against a therapist's employer when the employee fails to take reasonable action when the employer knows or has reason to know that the therapist has engaged in sexual contact with a patient or former patient.[249] The Minnesota statute defines a "former patient" as one who was a patient of the psychotherapist within two years prior to the sexual contact.[250]

In Minnesota the statute's effects on the therapeutic community were felt immediately.[251] Many employers, including churches and evaluating pastors, began sending letters of inquiry regarding job applicants and keeping files on past employees after their departure.[252] Such actions on the part of employers curb the problem of repeat offenders who by changing jobs leave no traceable record of sexual misconduct. The statute also encourages employers to disclose information to prospective employers,[253] a crucial element in protecting future patients and subsequent employers.

The Illinois statute also creates a cause of action against employers who fail to take reasonable action regarding sexual contact between therapist/employees and their patients or former patients.[254] Under the Illinois statute a "former patient" is one who received psychotherapy from the therapist

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employer who in good faith complies with this section.

MINN. STAT. ANN. § 148A.03.

[247] *Id.* § 148A.03(b)(2).

[248] *Id.* § 148A.03(a).

[249] *Id.* § 148A.03.

[250] *Id.* § 148A.01(3).

[251] *See* SCHOENER ET AL., *supra* note 3, at 538-40 (discussing reaction to the Minnesota statute).

[252] SCHOENER ET AL., *supra* note 3, at 539.

[253] MINN. STAT. ANN. § 148A.03(b).

[254] ILL. ANN. STAT. ch. 140, para. 1. The statute, in relevant part, states:

> § 3 Liability of employer. An employer of a psychotherapist may be liable under Section 2 [cause of action for sexual exploitation] if the employer fails or refuses to take reasonable action when the employer knows or has reason to know that the psychotherapist engaged in sexual contact with the plaintiff or any other patient or former patient of the psychotherapist.

Id.

within one year prior to the sexual contact with the therapist.[255] A flaw in both the Minnesota and Illinois statutes is their failure to include a definition of what constitutes "reasonable action" on the part of an employer.[256] The result of the vagueness of this requirement is that it may be difficult to prove that an employer's action was not reasonable.

Legislation enacted by Texas to impose a duty on employers to respond to actual or possible sexual contact by their employee-therapists and current or former patients provides the specific means to fulfill this duty.[257] Like Minnesota, the

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[255] *Id.* ch. 140, para. 1(b).

[256] *See* ILL. ANN. STAT. ch. 140, para. 3; MINN. STAT. ANN. § 148A.03.

[257] TEX. CIV. PRAC. & REM. CODE ANN. § 81. The section that deals with the liability of the employer reads in relevant part:

> (a) An employer of a mental health services provider is liable to a patient or former patient of the . . . provider for damages if the patient or former patient is injured as described by section 81.002 [Sexual exploitation cause of action] and the employer:
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> (1) fails to make inquiries of an employer for former employer, whose name and address have been disclosed to the employer and who employed the . . . provider within the five years before the date of disclosure, concerning the possible occurrence of sexual exploitation by the . . . provider of patients or former patients of the . . . provider; or
>
> (2) knows or has reason to know that the . . . provider engaged in the sexual exploitation of the patient or former patient and the employer failed to:
>
> (A) report the suspected sexual exploitation as required by Section 81.006 [Duty to report]; or
>
> (B) take necessary action to prevent or stop the sexual exploitation by the . . . provider.
>
> (b) An employer or former employer of a . . . provider is liable to a patient or former patient of the . . . provider for damages if the patient or former patient is injured as described by Section 81.002 and the employer or former employer:
>
> (1) knows of the occurrence of the sexual exploitation by the . . . provider of the patient or former patient;
>
> (2) receives a specific request by an employer or prospective employer of the . . . provider, engaged in the business of providing mental health services, concerning the possible existence or nature of sexual exploitation by the . . . provider; and
>
> (3) fails to disclose the occurrence of the sexual exploitation.
>
> (c) An employer or former employer is liable under this section only to the extent that the failure to take the action described by subsection (a) or (b) was a proximate and actual cause of damages sustained.

Id. § 81.003. The duty to report reads in pertinent part:

> (a) If a mental health services provider or the employer of a . . . provider has reasonable cause to suspect that a patient has been the victim of

Texas statute requires employers to investigate potential employees' prior sexual misconduct before hiring them by requesting such information from their former employers.[258] Former employers are required to respond to prospective employers' inquiries and to answer all questions regarding any occurrence of sexual contact between the therapist in question and any former or current patients.[259]

The statute also requires employers to take appropriate action when they know or suspect sexual contact between an employee-therapist and that therapist's patient or former patient.[260] The statute allows former patients to bring their actions by proving their emotional dependence on the mental health professional at the time the sexual exploitation began[261] and requires that the sexual exploitation must have started within two years of the termination of the mental health services.[262] The employer cannot be held liable if these conditions are not met.[263] The Texas statute also requires employers to report *suspected* as well as actual sexual contact to the county prosecuting attorney and to any state mental health licensing board.[264]

Texas' statute is broader than that of Minnesota and Illinois because it includes clergy members. Liability for the acts

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> the sexual exploitation by a . . . provider during the course of treatment, or if a patient alleges sexual exploitation by a . . . provider during the course of treatment, the . . . provider or the employer shall report the alleged conduct not later than the 30th day after the date the person became aware of the conduct or the allegations to:
>
> (1) the prosecuting attorney in the county in which the alleged sexual exploitation occurred; and
>
> (2) any state licensing board that has responsibility for the . . . provider's licensing.
>
> . . .
>
> (e) A person who intentionally violates subsection (a) or (d) [privileged information] is subject to disciplinary action by that person's appropriate licensing board and also commits an offense. An offense under this subsection is a Class C misdemeanor.

Id. § 81.006.

[258] *Id.* § 81.003(a)(1).

[259] *Id.* § 81.003(b).

[260] *Id.* § 81.003(a)(2)(B).

[261] *Id.* § 81.005(b).

[262] TEX. CIV. PRAC. & REM. CODE ANN. § 81.005(b).

[263] *Id.*

[264] *Id.* § 81.006(a).

of a clergy member providing mental health services is limited to the church, congregation or parish in which the clergy member carried out his or her pastoral duties.[265] Minnesota does not make this distinction.

As these statutes demonstrate, legislatures have begun to recognize the problem of therapist abuse and respond with legislation aimed at preventing or punishing it. These statutes also demonstrate legislators' increasing awareness that employers can be powerful agents in the prevention of abuse. While not all states have such legislation, Texas, Illinois and Minnesota demonstrate a trend among states toward preventing employers from escaping liability for abuse perpetrated by their employees.

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[265] The Texas statute states:

> If a mental health professional who sexually exploits a patient of former patient is a member of the clergy and the sexual exploitation occurs when the professional is acting as a member of the clergy, liability if any under this section, is limited to the church, congregation, or parish in which the member of the clergy carried out the clergy member's pastoral duties:
>
> (1) at the time the sexual exploitation occurs, if the liability is based on a violation of Subsection (a); or
>
> (2) at the time of the previous occurrence of sexual exploitation, if the liability is based on a violation of Subsection (b) [fails to respond to a request for information].

TEX. CIV. PRAC. & REM. CODE ANN. § 81.003(d). Section 81.003(e) states:

> Nothing in subsection (d) shall prevent the extension of liability under this section beyond the local church, congregation, or parish where the current or previous sexual exploitation occurred, as appropriate under subsection (d), if the patient proves that officers or employees of the religious denomination in question at the regional, state, or national level:
>
> (1) knew or should have known of the occurrences of sexual exploitation by the mental health services provider;
>
> (2) received reports of such occurrences and failed to take necessary action to prevent or stop such sexual exploitation by the . . . provider and that such failure was a proximate and actual cause of the damages; or
>
> (3) knew or should have known of the mental health professional's propensity to engage in sexual exploitation.

Id. § 81.003(e).

B. *Supervisor Liability*

1. Therapists

Therapists often employ consultants or supervisors to review their therapeutic techniques or to provide advice regarding particular clients or cases. Several legal theories address how and when such consultants and supervisors may be liable for the therapists to whom they provide their services. For liability purposes, the distinction between a consultant and a supervisor is important:

> Consultation implies an arrangement in which an outside clinician is invited to provide information to the clinician with responsibility for the patient's care without assuming any clinical responsibility for the case. . . . In contrast, in a supervisory relationship the supervisor shares some degree of responsibility for the patient's care flowing from the structure of the situation rather than from an invitation.[266]

Consultant relationships often are educational in nature.[267] The consultant makes suggestions to the therapist that the therapist is free to accept or reject. In contrast, supervisory relationships most often occur in formal training programs where the supervisory clinician has ultimate responsibility for the outcome of the case (often evidenced by the supervisor's billing the patient).[268] In supervisory situations, the treating therapist is not free to ignore the supervisor's suggestions or instructions.

The American Psychiatric Association issued guidelines stating that in supervisory relationships the supervising psychiatrist retains direct responsibility for the patient's care, giving professional direction and active guidance to the treating therapist.[269] The guidelines specify that consultants, in contrast, generally do not assume the same degree of responsi-

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[266] PAUL APPELBAUM & THOMAS GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 201 (2d ed. 1991).

[267] *Id.*

[268] *Id.*

[269] ROBERT SIMON & ROBERT SADOFF, PSYCHIATRIC MALPRACTICE, CASES AND COMMENTS FOR CLINICIANS 34-35 (1992) (quoting the American Psychiatric Association's *Guidelines for Psychiatrists in Consultative, Supervisory, or Collaborative Relationships with Non-Medical Therapists*).

bility. Instead, they merely offer observations and professional opinions that the practitioner is not obligated to accept.[270]

Health insurance carriers have also acknowledged the nature of supervisory relationships and have written rules to address these relationships. Blue Shield of Massachusetts, for example, will cover only those charges incurred by care providers for services performed under their direct supervision.[271]

Sexual misconduct cases involving supervisee practitioners and their patients present a variety of policy concerns over supervisors' liability. For example, one could argue that punishing a supervisor who did not actually engage in the sexual activity will not deter the abusive therapist at all. On the other hand, holding supervisors responsible for the acts of supervisees will cause supervisors to be more diligent in their supervision.

2. Physicians

Supervisor liability also may create vicarious lability on an attending non-employee doctor for misconduct by nurses and

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[270] *Id.* The issue of case consultation versus supervision is complicated by the fact that historically, in the counseling and psychotherapy fields, practitioners have used, and continue to use, the term "supervision" to describe case consultation. Many private practitioners purchase "supervision," which involves periodic meetings with a "supervisor," who is actually a consultant, during which the practitioner shares clinical material which is of concern. The supervisor may not even know of the existence of any more than a few of the clients being treated. SCHOENER ET AL., *supra* note 3, at 279-80.

[271] The Rules state:

> Rule 2. Generally, Blue Shield will pay a participating provider for services performed by an assistant: . . . (c) who performs the services under the direct, personal and continuous supervision of a Blue Shield participating provider who practices in the same or related field;
>
> . . .
>
> "Direct, personal and continuous supervision" under this Rule means that the participating provider must perform or participate in an initial examination or evaluation of the patient and actively participate in the continuing management of the patient's treatment. While the provider need not be in the room where the assistant renders his or her services, that provider must be on the same premises and immediately available to provide personal assistance and direction. Availability by telephone or other electronic communication does not constitute direct, personal and continuous supervision. The participating provider must also document his/her supervision of assistants in the clinical record of the patient.

BLUE SHIELD OF MASSACHUSETTS, INC., RULES AND REGULATIONS (1988).

ty then extends only to the doctor, although the hospital may be liable under other theories.[272]

Under the borrowed-servant and captain-of-the-ship doctrines a physician who exerts control over or supervises the support staff ultimately is responsible for patient care. In *Hoffman v. Wells*,[273] the plaintiff sued a doctor and a hospital for injuries resulting from negligently performed surgery.[274] The court dismissed the claim against the hospital for the actions of the support personnel and instead held the doctor responsible for the staff member's negligence.[275] The court reasoned that because the hospital had loaned its employee to the physician, the physician had controlled the employee's actions and had become vicariously liable for the employee's negligence.[276]

The borrowed-servant and captain-of-the-ship doctrines, both rules of vicarious liability, are premised on the doctor's supervisory position in the operating room. Although both doctrines still exist, courts recently have turned away from strict interpretations of them, instead moving toward imposing liability on the person with actual control over the staff members. Recognizing the limited scope of a physician's actual control over staff members—as opposed to the physician's apparent control and necessary reliance on the members of the health care team—courts have also begun to impose joint doctor-hospital liability.[277]

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[272] *See* ABA SECTION OF TORTS & INSURANCE, PRACTICE LIABILITY ISSUES FOR HEALTH CARE PROVIDERS IN A CHANGING ENVIRONMENT A-137 (1994) [hereinafter ABA-TIPS].

[273] 397 S.E.2d 696 (Ga. 1990).

[274] *Id.* at 698.

[275] A stricter "borrowed servant" rule holds the physician responsible for any act which the doctor has the right to control, whether or not control was actually exercised. ABA-TIPS, *supra* note 272, at A-137.

[276] *Hoffman*, 397 S.E.2d at 697-98; *see also* Rudeck v. Wright, 709 P.2d 621 (Mont. 1985) (holding attending surgeon liable for negligent actions of sponge nurse).

[277] ABA-TIPS, *supra* note 272, at A-138; *see also* Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253 (Ill. 1965) (discussing hospital's overall obligation to supervise quality of patient care services), *cert. denied*, 383 U.S. 946 (1965).

Similar to the joint liability of hospitals and physicians, associates practicing together in a clinic or other office setting may also be held liable for an individual member's misconduct. *See* Van Dyke v. Bixby, 448 N.E.2d 353 (Mass. 1983) (holding association liable for acts of associate). In *Van Dyke*, for example, the court

C. *HMOs: Special Considerations*

The legal community has begun looking at HMOs in much the same manner as it does hospitals in imposing liability. HMOs are managed care systems that combine the features of health care organizations with those of health insurance providers. HMOs come in many forms but all feature a comprehensive approach to health care coverage and delivery. Whether by choice or necessity many Americans now obtain their health care services through HMOs.[278] Because the growth of HMOs is relatively recent, courts have not had the opportunity to fully address the issue of HMO liability.

The various types of HMOs have organizational differences that could effect decisions regarding organizational liability. Currently, five common types of HMOs exist in the health care market. The *Staff Model* HMO typically employs health care providers directly and provides services at HMO-owned facilities.[279] Many group health plans represent this traditional HMO model.[280] The *Group Model* HMO contracts with a single group practice to provide primary and specialty care services to clients.[281] The group is a "closed" panel that chooses its own members.[282] The *Direct Contract Model* HMO contracts directly with individual physicians and groups, generally requiring each enrollee to designate a primary care physician from their list to coordinate the patient's medical care and to control referrals. The HMO may pay the physicians on either a fee-for-service basis or a primary care capitation basis.[283] An

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held that medical partners are ordinarily jointly liable for the individual partners' malpractice. *Id.* at 355. The court in Ruane v. Cooper, 127 A.D.2d 524, 512 N.Y.S.2d 38 (1st Dep't 1987), adopted a similar view but focused on the manner in which the doctors had held themselves out to the public. The patient Ruane had met with two physicians of the practice, but had received treatment from only one. Yet the two physicians held themselves out as a joint venture, and therefore each was held liable for the other's malpractice. *Id.* at 525, 512 N.Y.S.2d at 39.

[278] Jane Birnbaum, *Health Care Plans of a New Generation*, N.Y. TIMES, Nov. 6, 1993, § 1, at 39; Robert Pear, *The Health Care Debate*, N.Y. TIMES, Aug. 23, 1994, at A12.

[279] ABA-TIPS, *supra* note 272, at A-46.

[280] ABA-TIPS, *supra* note 272, at A-46.

[281] ABA-TIPS, *supra* note 272, at A-46.

[282] ABA-TIPS, *supra* note 272, at A-46.

[283] ABA-TIPS, *supra* note 272, at A-47. A per capita fee is based upon the total number of subscribers to the HMO rather than payment for the actual service

Individual Practice Association ("*IPA*") HMO contracts with individual physicians or groups of physicians who belong to a separate legal entity—the IPA.[284] Physicians provide medical care in their own offices and may maintain separate private practices.[285] The HMOs usually pay the IPAs on an all-inclusive capitation basis, but may also choose to pay on a set percentage of premium fee.[286] IPAs are usually open to any physician who meets the credentials requirements set by the IPA.[287] The *Network Model* HMO contracts with a combination of medical groups, IPAs and other providers to provide health care to HMO subscribers.[288] The HMO usually compensates these individuals and groups on an all-inclusive physician capitation basis.[289]

Depending on the type of HMO involved, liability may be imposed in the same manner as it is on hospitals or other health care organizations. An HMO's liability may be vicarious by the theories of respondeat superior, ostensible agency or agency by estoppel, job-created authority, or common carrier liability. Alternatively HMO liability may be direct on the basis of negligent hiring, supervision and credentialing, breach of institutional fiduciary duty, or breach of a nondelegable duty of care.

An HMO can be vicariously liable on the basis of respondeat superior for the acts of a physician associated with it.[290] For example, the court in *Sloan v. Metro Health Council*, held that a staff model HMO could be vicariously liable for its physicians' acts, stating that where the usual requisites of agency or an employer-employee relationship exist, a corporation may be held vicariously liable for the acts of its employee-physicians.[291] The court based its decision on the following circumstances: the HMO physicians received an annual salary

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provided.

[284] ABA-TIPS, *supra* note 272, at A-47.

[285] ABA-TIPS, *supra* note 272, at A-47.

[286] ABA-TIPS, *supra* note 272, at A-47.

[287] ABA-TIPS, *supra* note 272, at A-47.

[288] ABA-TIPS, *supra* note 272, at A-48.

[289] ABA-TIPS, *supra* note 272, at A-90.

[290] Sloan v. Metropolitan Health Council, 516 N.E.2d 1104 (Ind. 1987).

[291] *Id.* at 1109; *see also* Schleier v. Kaiser Foundation Health Plan, 876 F.2d 174 (D.C. Cir. 1989) (holding HMO vicariously liable on the basis of respondeat superior for acts of its consultant physicians).

and benefits, could not work outside the HMO without consent, and final authority rested in the supervising HMO medical director. The court noted that the HMO had advertised itself as a complete health care system "employing" the participating physicians.[292]

HMOs have also been found vicariously liable for acts of their apparent or ostensible agents. In *Boyd v. Albert Einstein Medical Center*,[293] the plaintiff sued the IPA model HMO for malpractice that led to his wife's death. The defendant HMO contracted to provide health care to its subscribers, selected the physicians with whom it associated, and conducted a review process before admitting them.[294] The HMO promulgated extensive rules regarding patient selection of doctors and referrals,[295] and member patients paid the HMO for care who then paid the doctors on a capitation basis.[296] The court held that the patient reasonably looked to the HMO rather than to the particular physician for treatment and the HMO, in turn, had held the physician out as its agent.[297] The court found all the factors required for ostensible agency in this relationship and held the HMO vicariously liable for the physician's negligence.[298]

In *McClellan v. HMO of Pennsylvania*,[299] a primary care physician whom the plaintiff's wife had chosen from a list provided by the HMO,[300] performed a biopsy on a mole but failed to send the biopsied material to a lab for examination.[301] The patient subsequently died from a malignant melanoma.[302]

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[292] *Sloan*, 516 N.E.2d at 1105. The physicians entered into an "employment contract" whereby the HMO was the "employer" and the physician was the "employee." *Id.*

[293] 547 A.2d 1229 (Pa. Super. Ct. 1988).

[294] *Id.* at 1232-33.

[295] *Id.* at 1233.

[296] *Id.* at 1233-34.

[297] *Id.* at 1234-35.

[298] 547 A.2d at 1235; *see also* Dunn v. Praiss, 606 A.2d 862 (N.J. Super. Ct. App. Div. 1992). *But see* Raglin v. HMO, 595 N.E.2d 153, 156 (Ill. App. Ct. 1992) (holding an IPA-model HMO was not vicariously liable under an ostensible agency theory because HMO played only an administrative role in the health care delivery process); Chase v. Independent Practice Ass'n, 583 N.E.2d 251 (Mass. App. Ct. 1991) (holding an IPA-model HMO not liable under a theory of ostensible agency).

[299] 604 A.2d 1053 (Pa. Super. Ct. 1992).

[300] *Id.* at 1054.

[301] *Id.* at 1055.

[302] *Id.*

The court held that an HMO has a non-delegable duty to its subscribers to select and retain only competent primary care physicians. The modified IPA model HMO could be liable for the negligence of a primary care physician whom it had negligently hired or failed to terminate.[303]

HMOs may also be responsible for the negligent acts of caregivers under misrepresentation or breach of contract theories.[304] Advertisements or brochures that state or imply that affiliated doctors are employees of the organization or are trained in specialties may open HMOs to liability. An HMO may make statements in an advertisement intended to lead future patients to believe that its affiliated doctors are employees of the HMO or that they possess certain qualities that allow them to affiliate themselves with the HMO. Such representations, if false, can lead to HMO liability for misrepresentation or for breach of contract or breach of warranty.[305]

The cases involving theories of vicarious liability or direct corporate liability demonstrate that courts are appropriately beginning to treat HMOs in the same way they do hospitals. HMOs are not merely structures or administrative groups that help patients find doctors. HMOs are profit-making entities that provide subscribers with a limited number of physicians and regulated health insurance. Just as patients rely on their hospitals, HMO subscribers rely on the HMO entity for their health care. Some courts have begun to hold these organizations accountable for that relationship.

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[303] *Id.* at 1059. The court stated that to state a cause of action under section 323 against an IPA-model HMO, a complaint must contain factual allegations sufficient to establish the legal requirement that the HMO has undertaken

> (1) [t]o render services to the plaintiff subscriber, (2) which the HMO should recognize as necessary for the protection of its subscriber, (3) that the HMO failed to exercise reasonable care in selecting, retaining, and/or evaluating the plaintiff's primary care physician, and (4) that as a result of the HMO's failure to use such reasonable care, the risk of harm to the subscriber was increased.

Id.

[304] *See* Raglin v. HMO, 595 N.E.2d 153, 156 (Ill. App. Ct. 1992) (reviewing case law and stating that potential exists for HMOs to be held liable for medical malpractice based on tort theories, including respondeat superior or ostensible agency and corporate negligence based upon negligent selection and control of doctors or independent acts of the HMO, and contract theories, including breach of contract and breach of warranty).

[305] *Id.* at 156.

CONCLUSION

Employers can be held either vicariously liable for the acts of employees or directly liable for their own negligence. Under the theory of respondeat superior, an employer is liable for the acts of an employee that are within the employee's scope of employment or for which the motivation is to serve the employer. Various jurisdictions interpret the motivation test differently and modify it accordingly. Some jurisdictions rely on the *Restatement* test requiring in addition to a motivation to serve that the act take place within work-related time and space limits.

Courts are beginning to explore the theory of job-created authority by holding employers liable for the acts of employees outside the scope of employment on the basis of the job authority vested in the employee. This theory of liability could prove to be fertile ground for plaintiffs in sexual abuse cases because therapists, physicians and other professionals exert at least apparent authority over their patients and clients.

Courts have found independent contractors to be employees in situations where the employer has held the contractor out as its agent and where the client or patient has reasonably relied on this representation. Supervisory personnel, consultants and seemingly independent agents associated with health maintenance organizations ultimately also are tied to institutions for liability purposes.

Employers often are held directly liable for their own negligence in hiring, supervising, and retaining employees whose actions harm third parties. Some jurisdictions recognize that the institution itself owes a fiduciary duty to clients or patients. Other jurisdictions also recognize that the duty of care owed by an institution is a non-delegable duty.

Given the fact that abusive therapists have often abused in the past and continue to practice only because of the silence or tacit approval of other therapists or employers, it behooves the plaintiff's attorney to closely examine the employment, consulting or supervisory relationships in which the therapist is functioning.