

Child Abuse Reporting Statutes: The Case for Holding Physicians Civilly Liable for Failing to Report

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The childhood shows the man,
As morning shows the day!¹

'[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.²

INTRODUCTION

In 1963 California enacted the Allen-Cologne Act³ in an attempt

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1. J. MILTON, PARADISE REGAINED, bk. iv, l. 220.
2. Dillon v. Legg, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968).
3. CAL. PENAL CODE § 11161.5 (West Supp. 1975) provides in relevant part:

(a) In any case in which a minor is brought to a physician and surgeon, dentist, resident, intern, podiatrist, chiropractor, or religious practitioner for diagnosis, examination or treatment, or is under his charge or care, or in any case in which a minor is observed by any registered nurse when in the employ of a public health agency, school, or school district and when no physician and surgeon, resident, or intern is present, by any superintendent, any su-

to deal with the problem of "the battered child."⁴ The Act requires that various classes of persons, including physicians, who in the course of their professional activities regularly come into contact with children, report suspected cases of child abuse to local police and juvenile authorities. The Act provides that any person who

pervisor of child welfare and attendance, or any certificated pupil personnel employee of any public or private school system or any principal of any public or private school, by any teacher of any public or private school, by any licensed day care worker, by an administrator of a public or private summer day camp or child care center, or by any social worker, and it appears to the physician and surgeon, dentist, resident, intern, podiatrist, chiropractor, religious practitioner, registered nurse, school superintendent, supervisor of child welfare and attendance, certificated pupil personnel employee, school principal, teacher, licensed day care worker, by an administrator of a public or private summer day camp or child care center or social worker from observation of the minor that the minor has physical injury or injuries which appear to have been inflicted upon him by other than accidental means by any person. . . he shall report such fact by telephone and in writing, within 36 hours, to both the local police authority having jurisdiction and to the juvenile probation department. . . . The report shall state, if known, the name of the minor, his whereabouts and the character and extent of the injuries. . . .

Whenever it is brought to the attention of a director of a county welfare department . . . that a minor has physical injury or injuries which appear to have been inflicted upon him by other than accidental means by any person he shall file a report without delay . . . with the local police authority having jurisdiction and to the juvenile probation department as provided in this section.

No person shall incur any civil or criminal liability as a result of making any report authorized by this section.

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CAL. PENAL CODE § 11162 (West 1972) provides in relevant part:

Any person, firm or corporation violating any provision of this article is guilty of a misdemeanor and is punishable by imprisonment in the county jail not exceeding six months or by a fine not exceeding five hundred dollars (\$500), or by both.

4. The descriptive, widely-adopted term "battered child" was invented by Kempe, Silverman, Steele, Droegmueller & Silver in *The Battered Child Syndrome*, 181 J.A.M.A. 24 (1962). This article is considered to be one of the most important pieces of literature in this field. For general, helpful discussions, see V. FONTANA, *THE MALTREATED CHILD: THE MALTREATMENT SYNDROME IN CHILDREN* (1964); Bain, *The Physically Abused Child*, 31 PEDIATRICS 895 (1963); Bryant, Billingsley, Kerry, Leefman, Merrill, Senecal & Walsh, *Physical Abuse of Children—An Agency Study*, 42 CHILD WELFARE 125 (1963); Caffey, *Multiple Fractures in the Long Bones of Infants Suffered from Chronic Subdural Hematoma*, 56 AM. J. ROENTGENOLOGY 163 (1946); Cameron, Johnson & Camps, *The Battered Child Syndrome*, 6 MEDICINE, SCIENCE & THE LAW 2 (1966); Gwinn, Lewin & Peterson, *Roentgenographic Manifestations of Unsuspected Trauma in Infancy*, 176 J.A.M.A. 926 (1961); Harper, *The Physician, The Battered Child, and the Law*, 31 PEDIATRICS 899 (1963); McHenry, Girdany & Elmer, *Unsuspected Trauma with Multiple Skeletal Injuries During Infancy and Childhood*, 31 PEDIATRICS 903 (1963); Morris, Gould & Matthews, *Toward Prevention of Child Abuse*, 11 CHILDREN 55 (1964); Shepard, *The Abused Child and the Law*, 22 WASH. & LEE L. REV. 182 (1965). For a discussion of child abuse reporting legislation, see McCoid, *The Battered Child and Other Assaults Upon the Fam-*

fails to so report is guilty of a misdemeanor,⁵ and also provides that no civil or criminal liability may attach as a result of making such an authorized report.⁶

Physicians are uniquely equipped to discharge their obligation to report suspected cases of child abuse. First, by the very nature of their occupation they are presented with numerous opportunities to observe injured children. Second, because of their knowledge, training and experience they, unlike the lay members of the class of citizens commanded by the statute to report, are professionally qualified to evaluate injuries with an eye to detecting child abuse. Unfortunately, however, physicians have been reluctant to report instances of child abuse.⁷

The purpose of this article is to examine the proposition that physicians⁸ who fail to report suspected cases of child abuse do so at the cost of incurring civil liability for injuries subsequently inflicted upon these battered children.⁹

ily: Part One, 50 MINN. L. REV. 1, 19-58 (1965). A complete state-by-state compilation of child abuse reporting legislation is found in Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 1-2 & n.2 (1967). See also Note, *The Battered Child: Logic in Search of Law*, 8 SAN DIEGO L. REV. 364 (1971).

5. CAL. PENAL CODE § 11162 (West 1970).

6. CAL. PENAL CODE § 11161.5 (West Supp. 1975).

7. See Note, *The Battered Child: Logic in Search of Law*, 8 SAN DIEGO L. REV. 364, 368-72 (1971).

8. The article focuses on nonreporting physicians, as opposed to other members of the statutorily-defined class, for two reasons. First, it appears that physicians will have an opportunity to observe a greater number of injured and potentially abused children—especially those with the most serious injuries—than will some of the other members of the class. Second, the insurance coverage carried almost universally by physicians makes them a prime target for civil actions brought on behalf of battered children.

However, it must be borne in mind that the other members of the class statutorily ordered to report, *viz.*, dentists, podiatrists, camp and school administrators and teachers, etc., are equally vulnerable to both criminal and civil penalties for nonreporting.

9. This writer first encountered the question of whether liability should attach to a nonreporting physician in the course of his research in the summer of 1972 in connection with the case of *Robison v. Wical*. The lawsuit, the first in California to attempt to hold nonreporting doctors civilly liable for subsequent injuries to a child inflicted by a third party, resulted in a pretrial settlement. The story of baby Robison is concisely summarized in an article in the L.A. Times, Oct. 28, 1972, § 1, at 1, col. 6-8.

The author is indebted to Professor Gary T. Schwartz of the U.C.L.A.

THE ALLEN-COLOGNE ACT

Child abuse is a phenomenon of alarmingly large proportions. According to Dr. C. Henry Kempe, a recognized authority on the physical abuse of children by parents and guardians, 60,000 such cases were reported in 1972.¹⁰ Indeed, this may be a low figure, since many cases go unreported.

In enacting the Allen-Cologne bill, the California Legislature has recognized the gravity of this problem. The statute has, however, gone through several important amendments.¹¹ When the law was first enacted in 1963, the Legislature included a clause which excused doctors from reporting cases of suspected child abuse when, in their opinion, reporting "would not be consistent with the health, care, or treatment of the minor."¹² This first version also failed to specifically exempt doctors from possible civil or criminal liability flowing from filing reports required by the statute. The net result of these shortcomings was a failure on the part of doctors to report.

Subsequent refinements in the statute made reporting mandatory by eliminating the optional reporting clause and explicitly shielding those persons compelled to report from criminal or civil liability resulting from making the authorized reports. Later amendments enlarged the class of persons required to report and set up a record-keeping system designed to keep track of child abuse cases within the same family and to notify police or district attorneys when repetitious patterns of abuse are discovered.

Among the additions made by the 1972 amendment is the require-

Law School faculty for his generous accessibility and many hours of useful discussion and wise suggestions. Professor Schwartz proposed the affirmative duty approach as a means of understanding more clearly the role of a criminal statute in a civil action for negligence.

The author also extends his gratitude to Byron J. Lawler and Jerry A. Ramsey, the Los Angeles lawyers who represented baby Robison, for generously making their files and records of this case available to the author.

10. Johnson, *The Child Beaters: Sick, but Curable*, *The National Observer*, March 24, 1973, at 1, quoting Dr. Kepme in REPORT OF CALIFORNIA ASSEMBLY INTERIM COMMITTEE ON CRIMINAL PROCEDURE, vol. 22, No. 8, at 70 (1963-65); APPENDIX TO JOURNAL OF THE CALIFORNIA ASSEMBLY, vol. 22, Reg. Sess. (1965).

11. For a fuller discussion of the legislative history of this statute and a more complete analysis of the variations it has undergone, see Comment, *The California Legislative Approach to Problems of Willful Child Abuse*, 54 CALIF. L. REV. 1805, 1809-21 (1966). An examination of earlier nationwide reporting and legislative issues may be found in McCoid, *supra* note 4; Paulsen, Parker, & Adelman, *Child Abuse Reporting Laws—Some Legislative History*, 34 GEO. WASH. L. REV. 482 (1966).

12. CAL. PENAL CODE § 11161.5 (West 1963).

ment that the report be made within thirty-six hours of the time that the suspected nonaccidental injury is observed.¹³ Since each amendment to the original statute has given it more "teeth," it is submitted that to hold nonreporting doctors civilly liable would be consistent with the intent of the Legislature in mandating that the reports be made and in continually strengthening the provisions of the Act.

THE CALIFORNIA TORT LAW APPROACH

That civil liability may be founded upon the violation of a criminal statute is a principle of ancient vintage, "a doctrine of the common law."¹⁴ Two centuries ago the well-respected English jurist, Chief Justice Holt, set out the rule as follows:

. . . where-ever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law, by the same statute . . .¹⁵

The doctrine has been long-rooted in American jurisprudence as well. Most courts hold that a violation of a criminal statute, except in the face of a valid excuse, is negligence per se, *i.e.*, conclusive proof on the question of negligence. Characteristic of this viewpoint is Judge Edgerton's ruling in *Ross v. Hartman*,¹⁶ a leading modern case:

Violation of an ordinance intended to promote safety is negligence. If by creating the hazard which the ordinance was intended to avoid it brings about the harm which the ordinance was intended to prevent, [the violation] is a legal cause of the harm.¹⁷

13. *Id.* (West Supp. 1975).

14. It was recognized as such by Mr. Justice Pitney, who concluded that, A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916).

15. Anonymous, 87 Eng. Rep. 791 (1703).

16. 139 F.2d 14 (D.C. Cir. 1953), *cert. denied*, 321 U.S. 790 (1954).

17. *Id.* at 15. In *Ross* the plaintiff was run over by the defendant's truck. The defendant's agent, in violation of a safety ordinance, had left the truck unattended in a public alley, with the ignition unlocked and the key in the switch. Two hours later a thief stole the truck and negligently ran over the plaintiff. The appellate court dismissed the defendant's argument that he was not liable since the thief's negligent driving rather than the agent's conduct in violating the statute was the proximate cause of the injury, con-

According to Prosser, a cause of action based upon negligence and giving rise to liability for damages is comprised of the following elements:

- (1) A legally recognized obligation to conform one's acts to a certain standard of conduct, so that others will be protected against unreasonable risks.
- (2) A failure to conform to the required standard.
- (3) A relationship of proximate cause between the actor's conduct and the resulting injury.
- (4) Actual loss or damage to another's interests.¹⁸

The Standard of Conduct

The California approach to the relationship between the existence of a criminal statute and the designation of what is an acceptable standard of conduct was enunciated by Justice Traynor in his widely-cited opinion in *Clinkscates v. Carver*.¹⁹ *Clinkscates* was an action to recover damages for the death of plaintiffs' decedent in an automobile accident. The defendant had failed to observe a stop sign and collided with plaintiffs' decedent. The trial court instructed the jury that construction of the stop sign was authorized by a county ordinance and that if the defendant failed to make the stop and this failure proximately caused the accident the verdict should be in favor of the plaintiffs. The jury found for the plaintiffs and the defendant appealed.

The appeal was predicated on the argument that the stop sign was placed at the intersection illegally and that the trial court's instructions to the jury on that question were therefore prejudicially erroneous. The defendant argued that since the ordinance and the supervisory resolution authorizing the stop sign had never become effective due to certain "defects in publication," and was therefore technically illegal, his ignoring it was not a criminally punishable infraction.

Traynor's response to this line of argument merits quotation:

This contention would make the question of negligence per se turn upon the irregularity of the authorization. Whatever the effect of the irregularity on defendant's criminal liability, it cannot be assumed that the conditions that limit it also limit civil liability. The propriety of taking from the jury the determination of negligence does not turn on defendant's criminal liability. A statute that provides for a criminal proceeding only does not create a civil

cluding that "[t]he fact that the intermeddler's conduct was itself a proximate cause of the harm, and was probably criminal, is immaterial." *Id.* at 15-16.

18. W. PROSSER, *THE LAW OF TORTS* § 30 (4th ed. 1971).

19. 22 Cal. 2d 72, 136 P.2d 777 (1943).

liability; if there is no provision for a remedy by civil action to persons injured by a breach of the statute it is because the Legislature did not contemplate one. A suit for damages is based on the theory that the conduct inflicting the injuries is a common law tort, in this case the failure to exercise the care of a reasonable man at a boulevard stop.²⁰

With this in mind, Traynor then addressed himself to the critical issue of the role of the statute in the establishment of a standard of conduct:

The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in determination of such liability.²¹ The decision as to what the civil standard should be still rests with the court, and *the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it.* In the absence of such a standard the case goes to the jury, which must determine whether the defendant has acted as a reasonably prudent man would act in similar circumstances. The jury then has the burden of deciding not only what the facts are but what the unformulated standard is of reasonable conduct. When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them, (citations omitted) except where they would serve to impose liability without fault (citations omitted).²²

In holding for the plaintiff, Traynor pointed out that:

Even if the conduct [going through the stop sign] cannot be punished criminally because of irregularities in the adoption of the prohibitory provisions, the legislative standard may nevertheless apply if . . . [the] defendant's conduct falls below that of a reasonable man as the court conceives it.²³

In effect, Traynor's argument is that liability attaches when a defendant is deemed to have been "at fault," or in other words, when his conduct has been found to have been "negligent." Tray-

20. *Id.* at 74-75, 136 P.2d at 778.

21. *Citing* O.W. HOLMES, *THE COMMON LAW* 120-29 (1881); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933).

22. 22 Cal. 2d at 75, 136 P.2d at 778 (emphasis added).

23. *Id.* at 75-76, 136 P.2d at 778. In other words, as Professor Morris, discussing Traynor's analysis, puts it:

[T]he significance of criminal legislation in a negligence action lies in the court's willingness to adopt its formulated standard. [T]he court has power to use the criminal proscription in a damage suit even though irregularities might defeat a prosecution under it. Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21, 31 (1949).

nor is saying that the judicial process ultimately determines the question of whether a defendant's conduct is negligent and makes that determination on the basis of the totality of the facts of the case, not merely in automatic response to the fact that a defendant's action violated or did not violate a particular criminal statute. He says that when the court holds liable a person who has violated a "police regulation" or "criminal statute," it does so because it finds that the violator's conduct has fallen below the standard of care demanded of the reasonable man and determines that he is the proper party to bear the burden of damages.

California courts, relying on *Clinkscapes*, have found instances in which the failure to comply with a reporting statute constituted a failure on the part of the violator to conform to a particular standard of due care. For example, it has been held that there exists a cause of action against an automobile dealer who, after requiring insurance as a condition of sale and agreeing to procure it, fails to notify the buyer, as required by California Vehicle Code § 187, that the policy does not provide liability and property damage coverage.²⁴ Likewise, it has been held that false or incomplete reports submitted to the Food and Drug Administration under a statute requiring full reports of investigations which have been undertaken to show whether a drug is safe for use²⁵ give rise to a presumption of the defendant's negligence in a civil action for damages for injuries suffered as result of using the drug.²⁶

Causation

The presumption that the behavior of the violator of a statutory command has fallen below the standard of care demanded of the reasonable man will not form a basis for civil liability unless the violation proximately caused the plaintiff's injuries.²⁷ Further, if a person's negligence is a substantial factor in causing an injury, he will not be relieved of liability because of the intervening act of a

24. *Dana v. Sutton Motor Sales*, 56 Cal. 2d 284, 363 P.2d 881, 14 Cal. Rptr. 649 (1961).

25. Federal Food, Drug, & Cosmetic Act § 505(b), 21 U.S.C. § 355(b) (1972).

26. *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

27. *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 765, 478 P.2d 469, 473, 91 Cal. Rptr. 745, 749 (1970); *Coutrell v. McEachen*, 51 Cal. 2d 448, 460, 334 P.2d 870, 876 (1959); *Nunnally v. Edgar Hotel*, 36 Cal. 2d 493, 498, 225 P.2d 497, 500 (1950); *Satterlee v. Orange Glenn School Dist.*, 29 Cal. 2d 581, 590, 177 P.2d 279, 284 (1947).

third party if such an act was reasonably foreseeable at the time of his negligent conduct.²⁸

It should be noted that while “[p]roximate’ or legal cause has claimed the lion’s share of attention,”²⁹ the cause-in-fact inquiry also involves policy considerations beyond a mere determination of a question of fact. At least one authority has recognized that “matters of policy and estimates of factual likelihood become hopelessly interwoven [sic] with each other”³⁰ in the cause-in-fact analysis. According to Professor Malone:

We can now ask: How great must be the affinity of causal likelihood between the defendant’s wrong and the plaintiff’s injury in order to justify the judge in submitting the cause issue to the jury? The answer is that the affinity must be sufficiently close in the opinion of the judge to bring into effective play the rule of law that would make the defendant’s conduct wrongful.³¹

As may be illustrated by the “failure to warn” cases of products liability, California courts have taken a policy-oriented approach to the cause-in-fact issue. In predicating tort liability on the failure

28. *Vesely v. Sager*, 5 Cal. 3d 153, 164, 486 P.2d 158, 159, 95 Cal. Rptr. 623, 630 (1971) (and cases cited therein); *Connor v. Great Western Savings & Loan Ass’n*, 69 Cal. 2d 850, 869, 447 P.2d 609, 619, 73 Cal. Rptr. 369, 379 (1968); *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972). Both the *Vesely* and *Carlisle* decisions involved the California dram shop law, and the latter quoted with approval the following language from the former:

[One whose negligence] is a substantial factor in causing injury . . . is not relieved of liability because of the intervening act of a third person [the drinker] if such act was reasonably foreseeable at the time of his negligent conduct. 24 Cal. App. 3d at 591, 101 Cal. Rptr. at 248.

29. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956).

30. *Id.* at 72.

31. *Id.* Professor Malone discusses the policies which underlie plaintiff-oriented results in various areas of the law. For example, with regard to the rescue of seamen, he states,

[i]t would be futile for the courts to recognize a duty to provide emergency equipment and to impose an obligation to proceed promptly to the rescue if the defendant could successfully seize upon the uncertainty which nearly always attends the rescue operation as a reason for dismissing the claim. In such situations an insistence on proof by probabilities or better has no place. The ever-present chance that the rescue might fail is a part of the risk against which the rule protects. *Id.* at 77.

Likewise, in cases dealing with the failure of a defendant to provide fire escape devices,

[w]hen the defendant is unable to make a positive showing that compliance with the law would have been futile under the circumstances, and where the matter is fairly open to speculation, the issue of cause almost always reaches the jury which, in the reported

of manufacturers of dangerous substances to provide adequate warning of the product's dangerous qualities, no attention has been focused on the obvious question of whether the warning would have made a difference. For example, where a drug company's promotion of a drug was found to have diluted the effectiveness of warnings given as to the drug's possible side-effects, the court did not address itself to the issue of whether such a warning would have deterred the particular doctor in the case from prescribing the drug to the particular plaintiff-patient.³² Similarly, in a wrongful death action involving the explosion of an unlabeled drum of sulphuric acid, the court did not undertake any inquiry into whether proper labeling would have averted the accident.³³

Limitations on the Doctrine

Even in cases in which a duty is imposed by a statute and violation of the statute is found to be the proximate cause of the plaintiff's injury, the latter has a cause of action for negligence only if he is a member of the class of persons for whose benefit or protection the statute was enacted.³⁴

Thus, for example, the complaint of a plaintiff whose automobile was struck by that of an intoxicated motorist was held to state a cause of action against the owner of a bar who had continued to serve drinks to the motorist in violation of a statute prohibiting the sale of alcoholic beverages to any obviously intoxicated person.³⁵ Since the statute "was adopted for the purpose of protecting members of the general public from injuries to person and damage to property resulting from the excessive use of intoxicating liquor," the court held that the plaintiff was within the class of persons for whose protection it was enacted.³⁶ On a like theory, a car buyer had a valid cause of action against a dealer who set back the odometer of the car he had purchased in violation of a provision of the

cases at least, seldom fails to return a verdict for the plaintiff. *Id.* at 78.

"Thus," Malone concludes, "cause and duty are telescoped into a single inquiry which can be resolved in favor of the victim." *Id.* at 79.

32. *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973).

33. *Gall v. Union Ice Co.*, 108 Cal. App. 2d 303, 239 P.2d 48 (1951).

34. *Richards v. Stanley*, 43 Cal. 2d 60, 271 P.2d 23 (1954); *Hudson v. Craft*, 33 Cal. 2d 654, 204 P.2d 1 (1949); *Routh v. Quinn*, 20 Cal. 2d 488, 127 P.2d 1 (1942); *Olsen v. McGillicuddy*, 15 Cal. App. 3d 897, 93 Cal. Rptr. 530 (1971).

35. *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

36. *Id.* at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631.

California Vehicle Code.³⁷ The court held that “[a]ny injured member of the public for whose benefit the statute was enacted may bring the action.”³⁸ And although a safety statute has been enacted primarily for the benefit of one particular group of individuals, this does not preclude others from falling within its protective shield.³⁹

It is also well settled that a plaintiff may not recover damages in an action predicated on a statutory violation unless the injury suffered was of the type which the statute was designed to prevent or protect against.⁴⁰ This rule goes back at least one hundred years, when an English court held that violation of a statute requiring separate pens for animals transported by boat did not result in a cause of action for the loss overboard of the plaintiff’s sheep during a storm. Since the purpose of the law was not to prevent animals from falling overboard, it was held that “the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs.”⁴¹

This approach has also been adopted by California courts. For example, a plaintiff has been denied recovery for injuries sustained as a result of diving into an unexpectedly shallow area of a swimming pool. Although the owners violated a regulation requiring ropes and buoys in the pool, it was held that this rule was designed to prevent drownings, not diving accidents.⁴²

37. *Laczko v. Jules Meyers, Inc.*, 276 Cal. App. 2d 293, 80 Cal. Rptr. 798 (1969).

38. *Id.* at 295, 80 Cal. Rptr. at 799.

39. *Cappa v. Oscar C. Holmes, Inc.*, 25 Cal. App. 3d 982, 102 Cal. Rptr. 207 (1972). In *Cappa* a contractor’s violation of a safety order requiring the fencing of unprotected openings in construction areas, although “primarily intended for the benefit and protection of workmen” could also form the basis of a cause of action by a trespasser injured on the premises.

40. *Nunnally v. Edgar Hotel*, 36 Cal. 2d 493, 497, 225 P.2d 497, 499 (1950); *Satterlee v. Orange Glenn School Dist.*, 29 Cal. 2d 581, 177 P.2d 279 (1947); *Harris v. Joffe*, 28 Cal. 2d 418, 170 P.2d 454 (1946); *Asplund v. Driskell*, 225 Cal. App. 2d 705, 37 Cal. Rptr. 652 (1964).

When it is the plaintiff who has violated a statute and is attempting to rebut a charge of contributory negligence, a like standard applies: no presumption of contributory negligence arises if the plaintiff’s violation has not led to the type of injury which the statute contemplated. See *Hyde v. Avalon Air Transport, Inc.*, 243 Cal. App. 2d 88, 52 Cal. Rptr. 309 (1966).

41. *Gorris v. Scott*, L.R. 9 Ex. 125 (1874).

42. *Atkins v. Bisigier*, 16 Cal. App. 3d 414, 422, 94 Cal. Rptr. 49, 54 (1971).

Similarly, a plaintiff has been refused damages for injuries suffered when he tripped and fell while pursuing a car which had negligently collided with his own parked vehicle, and whose occupants did not stop and identify themselves as required by the California Vehicle Code.⁴³ The court denied recovery on the ground that while the statute was meant to protect owners of unattended vehicles from financial loss caused by irresponsible persons "hitting and running" without leaving a name or other identifying evidence, it "was not designed to protect the owner of an unattended vehicle from personal injuries sustained in the chase of one suspected of being responsible for damages to an owner's unattended vehicle."⁴⁴ The court concluded that although the plaintiff was a member of the class of persons for whose benefit the statute was enacted, the harm he suffered was not the harm that the statute was designed to prevent. Therefore, the defendant owed no duty of care to the plaintiff with respect to the particular injury suffered.⁴⁵ Thus, the absence of one element necessary for tort liability to attach acted to negate the existence of the most basic element of such liability, the duty owed by the defendant to the plaintiff.⁴⁶

Finally, even if all of the elements of a cause of action for a statutory violation are present, it is still possible that liability will not attach if the defendant's conduct is excused. According to a leading case,

. . . where a person has disobeyed a statute he may excuse or justify the violation by evidence that he did what might be reasonably expected of a person of ordinary prudence acting under similar circumstances who desired to comply with the standard of conduct established by the statute.⁴⁷

Thus, an injured plaintiff who operated a hay derrick in close proximity to high voltage wires in violation of a statute and safety order was held not contributorily negligent as a matter of law in his action against the electric company.⁴⁸ The court held that "[n]onnegligent ignorance of the facts which bring a regulation into operation will support a finding that violation thereof is civilly excusable."⁴⁹ Similarly, it has been held that while ignorance of the law requiring lighted taillights on a moving vehicle does not excuse

43. *Miglierini v. Havemann*, 240 Cal. App. 2d 570, 49 Cal. Rptr. 795 (1966).

44. *Id.* at 573, 49 Cal. Rptr. at 797.

45. *Id.*

46. *Id.*

47. *Alarid v. Vanier*, 50 Cal. 2d 617, 622, 327 P.2d 897, 899 (1958). See the discussion of the case law on excuse, *id.* at 622-24, 327 P.2d at 899-900.

48. *Nevis v. Pacific Gas & Elec. Co.*, 43 Cal. 2d 626, 275 P.2d 761 (1954).

49. *Id.* at 633, 275 P.2d at 765.

a violation of the law, ignorance of the fact that one's taillight is in fact unlighted, where ordinary care has been exercised, is a legally sufficient excuse.⁵⁰

Codification of the Doctrine

In 1967 the California Legislature codified the foregoing authority so that, if the proper prerequisites are met, a presumption of negligence arises as a result of a statutory violation. The new law also sets forth how such a presumption may be rebutted. Thus, California Evidence Code § 669 now provides:

- (a) The failure of a person to exercise due care is presumed if:
 - (1) He violated a statute, ordinance, or regulation of a public entity;
 - (2) The violation proximately caused death or injury to person or property;
 - (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
 - (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.
- (b) This presumption may be rebutted by proof that:
 - (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law;

. . . .

Clearly, the Legislature has codified the existing tort law and has not sought to alter any of its basic precepts; the statutory language is identical, or nearly identical with that found in the case law.⁵¹ Further, decisions handed down after the enactment of Evidence Code § 669 are consistent with and rely upon the language and holdings in earlier cases.⁵² Finally, the Legislature has correctly

50. *Berkovitz v. American River Gravel Co.*, 191 Cal. 195, 215 P. 675 (1923). In this case it appeared that the defendant had in fact begun his trip with his taillight functioning, since two witnesses testified that they had seen it burning only a few miles from the scene of the accident.

51. Compare, for example, CAL. EVID. CODE § 669(b)(1) (West Supp. 1974) with the language in *Alarid v. Vanier*, 50 Cal. 2d 617, 622, 327 P.2d 897, 899 (1958).

52. *Mark v. Pacific Gas & Elec. Co.*, 7 Cal. 3d 170, 496 P.2d 1276, 101 Cal. Rptr. 908 (1972); *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal.

realized that all of the elements set out in section 669 (a) (1) through (4) must be present in order for tort liability to attach.⁵³

THE NONREPORTING DOCTOR AND CALIFORNIA TORT LAW

The Negligence Approach

It is now possible to examine the conduct of a nonreporting physician in the light of California case law and its codification in Evidence Code § 669. First, his failure to exercise due care is presumed since he violated a statute, Penal Code § 11161.5. Thus, California law has gone beyond the *Clinkscales* holding that a legislatively-formulated standard becomes a judicially imposed one only because a court accepts it as a standard to determine civil liability.⁵⁴ A presumption of negligence now arises as soon as a person violates a statute, ordinance, or regulation of a public entity.⁵⁵ In the child abuse context, then, the conduct of a doctor who fails to report a case of suspected child abuse, in addition to being criminally punishable, would obviously fall below that standard of conduct which the Legislature requires of a reasonably prudent man, to say nothing of the standard it expects of a prudent professional physician.⁵⁶

Second, the statutory violation standing alone is not enough. A subsequent injury to the battered child must have occurred. The injury must have resulted from an occurrence of the nature which the statute was designed to prevent,⁵⁷ and the child must have been one of the class of persons for whose protection the measure was enacted.⁵⁸ Clearly, both these prerequisites are satisfied in the case of a child who is injured as the result of a battering subsequent to the initial, unreported abuse. The type of harm which the stat-

Rptr. 623 (1971); *Atkins v. Bisigier*, 16 Cal. App. 3d 414, 94 Cal. Rptr. 49 (1971); *Olsen v. McGillicuddy*, 15 Cal. App. 3d 897, 93 Cal. Rptr. 530 (1971).

53. Of course, liability may still attach upon proof of negligence, the statutory violation aside. The Law Revision Commission notes that:

[e]ven though a party fails to establish that a violation occurred or that a proven violation meets all the requirements of subdivision (a), it is still possible for the party to recover by proving negligence apart from any statutory violation. *Nunnally v. Edgar Hotel*, 36 Cal. 2d 493, 225 P.2d 497 (1950) (plaintiff permitted to recover even though her injury was not of the type sought to be prevented by statute). CAL. EVID. CODE § 669, Law Revision Commission Comment (West Supp. 1974).

54. *Clinkscales v. Carver*, 22 Cal. 2d 72, 75, 136 P.2d 777, 778 (1943).

55. CAL. EVID. CODE § 669(a) (1) (West Supp. 1974).

56. For a discussion of the standard of care to which a physician is generally held, see W. PROSSER, LAW OF TORTS § 32 (4th ed. 1971).

57. CAL. EVID. CODE § 669(a) (3) (West Supp. 1974).

58. CAL. EVID. CODE § 669(a) (4) (West Supp. 1974).

ute was designed to prevent is nonaccidental injury to a child at the hands of "any person."⁵⁹ And certainly the battered child falls within, and indeed constitutes, the class of persons for whose protection the statute was enacted.

Finally, for liability to attach to the nonreporting physician his nonfeasant conduct must be the proximate cause of another abusive injury which the child later suffers.⁶⁰ This is easily the most complicated of the statutory and tort law prerequisites to recovery of damages from the doctor. As a starting point, there should be no dispute as to the "foreseeability" of the child's being further physically abused, since the prevention of such abuse and its resulting injury is the *raison d'être* of the California reporting law.

The fact that a third party inflicts the subsequent injury to the child—*i.e.*, is the cause-in-fact of the harm—does not alter the physician's liability. That is, a nonreporting doctor's conduct is negligent precisely because it creates a risk that a third person may act improperly in continuing to physically abuse the child. Again, the fact that a criminal intervenor, the adult who inflicts the abuse, acts in such a way as to bring about precisely the harm the statute is intended to prevent does not relieve the originally negligent defendant-doctor of liability.⁶¹ Further, according to Professor Paulsen:

The fact that a defendant's negligence is established by the violation of a statute does not answer the question whether the defendant's misconduct is the proximate cause of the plaintiff's injury. Yet, in some cases, a rather close connection between the failure to report child abuse and subsequent injuries suffered by the child at the hands of his caretakers can be perceived. It is well-settled that intervening negligence, and intervening criminal acts (of parents or other caretakers) which the defendant might reasonably anticipate, do not supersede or cut off the defendant's liability for his own act or omission.⁶²

In fact, the argument for liability is strengthened because the conduct of the nonreporting doctor heightens the very risk that the California Legislature, in enacting a child abuse reporting statute, has endeavored to diminish. This can best be illustrated by

59. CAL. PENAL CODE § 11161.5 (West Supp. 1975).

60. CAL. EVID. CODE § 669(a) (2) (West Supp. 1974).

61. See the cases cited in note 28, *supra*.

62. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 36 (1967).

looking at the interrelationship between the concepts of proximate causation and duty. According to Prosser, it is possible to examine the issues relating to proximate cause with reference to a single question: "was the defendant under a duty to protect the plaintiff against the event which did in fact occur?"⁶³ In Prosser's view,

Such a form . . . [serves] to direct attention to the policy issues which determine the extent of the original obligation and of its continuance, rather than to the mechanical sequence of events which goes to make up causation in fact.⁶⁴

Thus a nonreporting physician may contend that while he violated Penal Code § 11161.5, he should not be held liable since he had no duty to the child. How, the doctor will ask, can I be responsible for harm which befalls a patient when he is away from my office and out of my care? The answer is, in part, that to so charge him would comport with and further the legislative policy behind the child abuse reporting law. That is, such statutes have been enacted in an attempt to curtail incidents of physical abuse to children by imposing a duty to report such incidents. Children, especially infants who cannot speak out about harm inflicted upon them, are uniquely deserving of protection. By virtue of their training and experience, and because injured children pass through their offices, physicians are in a unique position to determine whether a particular injury could have resulted from an accidental cause, as the parent is likely to claim, or whether it may in fact be the result of abusive treatment.⁶⁵ Thus, if a physician fails in this duty to report and a child is again abused, it can be reasonably said that the physician's nonreporting proximately caused the subsequent injury to the child.

The statute has designated the physician as the conduit to the outside world for the pain of the inarticulate child. Proximate causation is found because a nonreporting doctor allows the battered or otherwise injured child to be returned to parents or guardians who are likely to abuse him again. A nonreporting doctor effectively blocks police and juvenile welfare authorities from aiding the helpless child. A nonreporting doctor should, therefore, bear the civil consequences of his wrongdoing.⁶⁶

Looking to the case law, there is a startling dearth of reported

63. W. PROSSER, *LAW OF TORTS* § 42, at 244 (4th ed. 1971).

64. *Id.*

65. This is an area in which the concepts of "proximate cause" and "standard of care" are closely related. See note 56 *supra*.

66. See text accompanying note 64 *supra*.

decisions which deal with a doctor's negligent noncompliance with a reporting statute.

The Ohio case of *Jones v. Stanko*⁶⁷ involved a doctor who failed to comply with a state statute that required him to report cases of contagious infectious diseases to appropriate health authorities. The doctor's patient contracted a highly infectious form of smallpox known as black smallpox. The patient's neighbor, Stanko, was not informed of the dangerously contagious condition of his stricken friend and continued to visit him and in so doing exposed himself to the disease. Stanko subsequently contracted black smallpox and died.

In a wrongful death action against the doctor, the plaintiff, Stanko's widow, requested that the judge instruct the jury to the following effect:

... [I]f you further find that said defendant [Dr. Jones] failed to comply with said provisions of the statute [*i.e.*, failed to report the existence of contagious disease to health authorities] and that such failure to comply with said provisions of the statute was the proximate cause of the death of the decedent, Stephen Stanko . . . your verdict must be for the plaintiff.⁶⁸

The trial court refused to so instruct the jury and the jury then found for Dr. Jones.

The appellate court reversed, ruling that the trial court's failure to give the above-quoted jury instruction was prejudicial error. Dr. Jones then appealed and the Supreme Court of Ohio, ruling in favor of Stanko, affirmed the appellate court's reversal of the original trial verdict in favor of Dr. Jones. In so doing the court held that Dr. Jones' failure to comply with the contagious disease reporting statute was a proximate cause of the plaintiff's husband's death. Since Stanko's death was the result of the defendant's negligence, first in improperly diagnosing the case of black smallpox, and second in failing to report the existence of the disease, and since his death was the harm which the reporting statute was designed to prevent (by giving people sufficient warning of the existence of contagious

67. 118 Ohio St. 147, 160 N.E. 456 (1928).

68. *Id.* at 150, 160 N.E. at 457. See also *Davis v. Rodman*, 147 Ark. 385, 227 S.W. 612 (1921); *Hofmann v. Blackmon*, 241 So. 2d 752 (Fla. App. 1970); *Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663 (1919); *Wojcik v. Aluminum Co. of America*, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (Sup. Ct. 1959).

diseases to enable them to avoid contact with those diseases), the court ruled that the widow was entitled to damages from the negligent Dr. Jones.

In *Medlin v. Bloom*⁶⁹ an infant became blind as a proximate result of the failure of the attending physician to comply with his statutory duty, under Massachusetts law, to report cases of eye disease in newly born infants to the State Board of Health. The statute was designed to insure that newly born infants who showed signs of eye disease would receive "immediate and scientific treatment" in order that their sight might be saved.⁷⁰ Since violation of the statute was criminally punishable, the doctor's failure to report was adjudged to be evidence of negligence properly presentable to the jury.

The plaintiff in *Medlin* had requested a jury instruction to the effect that a finding that the doctor failed to comply with the reporting statute would constitute evidence of negligence which could be a proximate cause of the plaintiff's blindness.⁷¹ The refusal of the trial court to give this instruction and its ruling that the defendant's unnecessary delay in making the statutorily required report of the plaintiff's eye disease was not evidence of negligence was reversed by the Supreme Judicial Court of Massachusetts. The court pointed out that:

[i]t was for the jury to determine whether the defendant immediately gave the notice required by the statute. If he failed in this respect, such failure was evidence of negligence which could have been found to have resulted as the proximate cause of the plaintiff's blindness.⁷²

In another decision of interest, *Dietsch v. Mayberry*,⁷³ it was held that the violation by a doctor of an "inflammation of the eyes of the new born" reporting statute was negligence per se rather than evidence of negligence. In *Medlin* the report was actually made and the question posed to the jury was whether it was made within the time required, while in *Dietsch* no report was made at all. Thus, the court concluded:

[i]n this respect the situation is more unfavorable to the doctor than it was in *Medlin v. Bloom, supra*, where a report was actually made and the jury question was whether it was made within the time required. If not, the court said it 'could have been found to have resulted as a proximate cause of the plaintiff's blindness.' What would that court have said had no report ever been made?

69. 230 Mass. 201, 119 N.E. 773 (1918).

70. *Id.* at 206, 119 N.E. at 775.

71. *Id.* at 205, 119 N.E. at 775.

72. *Id.* at 206, 119 N.E. at 775.

73. 70 Ohio App. 527, 47 N.E.2d 404 (1942).

Can it be said that because this defendant completely ignored the statute, he can escape any civil responsibility which may follow from his dereliction of duty? *Jones v. Stanko, supra*, answers this.⁷⁴

Even if all of the statutory prerequisites in Evidence Code § 669 (a)(1) through (4) are satisfied, *i.e.*, if the failure of a physician to use due care must be presumed, the physician may rebut this presumption, if he can justify or excuse his conduct.

This burden of rebuttal would be difficult to meet. First, a physician may not contend that he was fearful of the consequences of making such a report if it turned out that the child had not in fact been abused. The reporting statute specifically provides that "[n]o person shall incur any civil or criminal liability as a result of making any report authorized by this section."⁷⁵

Next, the physician may argue that since the parent (and suspected child abuser), as well as the child is his patient, to report the parent would violate a confidential relationship existing between him or her and the physician. While such a situation may pose a considerable ethical dilemma, the legal issue appears to be more straightforward. Article 6 of the California Evidence Code (which deals with the physician-patient privilege) defines "patient" to mean "a person who consults a physician or submits to an examination by a physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental or emotional condition."⁷⁶ Thus, since a patient is one who consults a physician about his own condition, the child and not the parent is the patient in this instance and the privilege does not apply. Further, one of the statutorily-defined exceptions to this privilege is relevant in that it provides that:

. . . there is no privilege under this article if the services of a physician were sought or obtained to enable or aid anyone . . . to escape detection or apprehension after the commission of a crime or a tort.⁷⁷

74. *Id.* at 534, 47 N.E.2d at 408.

75. CAL. PENAL CODE § 11161.5 (West Supp. 1975).

76. CAL. EVID. CODE § 991 (West 1966).

77. CAL. EVID. CODE § 997 (West 1966). If making the required report results in a criminal charge being brought against the parent, it should be noted that Evidence Code § 998 provides that "[t]here is no privilege under this article in a criminal proceeding."

Another justification which might be offered by a physician is that in his opinion, despite the injury suffered, it would be better for the child to stay undisturbed with his parents than to face foster placement, protective custody in juvenile hall, or other disruptions of family life which could result from his reporting the incident.

That the physician's estimation may, in some cases, be correct is indisputable. But it is equally clear that it is no longer the intent of the Legislature to leave the question of whether to report to the discretion of the physician. The elimination of language in the original Act which excused the physician from reporting when in his opinion to do so would not be consistent with the health, care, or treatment of the child makes this clear.⁷⁸

In fact, the problem with a physician offering this purported excuse points up the fatal flaw in all of the above-described explanations. Instead of trying to show that the physician "did what might reasonably be expected of a person . . . who desired to *comply* with the law," as required by the statute,⁷⁹ each justification above begins from the premise that the physician did not intend to comply with the law at all, and is seeking to justify his action in intentionally breaking it. Thus, these excuses are inadequate to the extent that they fall short of the requirements of Evidence Code § 669(b) (1), which has codified the law of excuse in California.

The Affirmative Duty Approach

While the traditional role of a criminal statute in a civil action for negligence is to posit a reasonable standard of conduct,⁸⁰ some of these statutes may be viewed, alternatively, as setting up an affirmative duty⁸¹ running from a potential defendant to a potential

78. See the discussion of the development of California's child abuse reporting statute in notes 11-13 *supra* and accompanying text.

79. CAL. EVID. CODE § 669(b) (1) (West Supp. 1974) (emphasis added).

80. See notes 19-26 *supra* and accompanying text.

81. Where a statute sets up an affirmative duty, the failure to act at all represents at least as much of a violation as does the failure to act properly. Clearly, at this stage in legal development, a court should not distinguish between these two types of transgressions in an action for civil liability.

At common law the distinction between misfeasance (the improper commission of an affirmative action) and nonfeasance (the failure to act at all) was an important one, since it was frequently held that tort liability would not attach in the face of the latter. One author, Professor Thayer, takes the view that this dichotomy should apply when there is a violation of a criminal statute which may be characterized as an instance of nonfeasance rather than misfeasance. Thayer's argument, as expounded in his "classic article on the subject," Thayer, *Public Wrong and Private Action*, 27 HARV.

plaintiff-victim. Thus civil liability attaches⁸² not only because the defendant has failed to satisfy a codified standard of care, but be-

L. REV. 317 (1914), has been summarized by Professor Morris:

[W]henever criminal legislation calls for an affirmative act, so that violators are guilty of nonfeasance rather than misfeasance, civil liability should not follow the criminal law. [The] reasoning is: No mere omission is a basis for tort liability at common law. Criminal statutes do not create civil liability. They merely formulate a new and more exact standard for trying the issue of breach of the duty to use care. That issue arises only when the common law of torts poses it by establishing a duty of care. Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21, 25 (1949).

According to Harper and James, "Thayer's distinction . . . has received little if any support. . . ." 2 HARPER & JAMES, LAW OF TORTS § 17.6 at 1007 (1956). Morris agrees, concluding:

[Thayer] does not consider this alternative: the civil court is faced with a novel set of facts when the defendant, who would have been neither civilly nor criminally liable before the passage of the statute, is now criminally liable. In this new situation, expanded civil duties may be—but are not necessarily—appropriate. The desirability of expanding civil liability should not be determined by a legalistic distinction between misfeasance and nonfeasance—for some misfeasances are minor slips, some nonfeasances are major misdeeds. Morris, *supra*, at 26.

Nonreporting by a doctor is, of course, a classic instance of nonfeasance rather than misfeasance. But to apply the old common law distinction in the face of an affirmative statutory command would, in this case, represent the triumph of an archaic technicality over sound modern policy. In the child abuse context, nonreporting is no "minor slip," but instead, a "major misdeed."

82. A distinction should be made between the two judicial approaches to the problem of basing civil liability on the violation of a criminal statute. In one set of cases, which typically involves federal laws, courts have found remedies "hidden" in statutes which themselves are silent on the subject, looking to congressional intent in passing the law and to the power of the judiciary to fully enforce it. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (private right of action exists for violation of section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a)); *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1947) (action in contravention of provisions of the Communications Act of 1934 could be basis of civil suit for damages); *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (civil remedy exists for violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and rule 10b-5, 17 C.F.R. § 240.10b-5 (5)). See also *Colligan v. Activities Club*, 442 F.2d 686 (2d Cir. 1971) (court refused to find congressional purpose to empower consumers to sue under § 43(a) of the Lanham Trade-Mark Act).

In the other type of case, a court, looking to a criminal statute, will imply a common law civil remedy by analogy. This was the approach employed in *Clinkscales v. Carver*, 22 Cal. 2d 72, 136 P.2d 777 (1943), and the other California cases cited herein. This is the appropriate approach to follow with respect to implying civil liability from a violation of the child abuse reporting law.

cause he has failed to perform a duty set out by the Legislature in statutory form.

The best known example of such a law in California is the one which requires a motorist involved in an accident to stop and give assistance to persons injured in the accident.⁸³ This duty to stop and render aid exists irrespective of any legal responsibility on the part of the motorist for the original injuries, and irrespective of whether the injured person was contributorily negligent.⁸⁴ A motorist's breach of such a duty will give rise to civil liability if it is a proximate cause of further injury or death, and the motorist has no legally sufficient excuse.⁸⁵ A California court has also recognized the existence of an affirmative duty based on a violation of the Dram Shop Act⁸⁶ by upholding a cause of action grounded on the failure of bar owners (who had violated a statute in serving liquor to an alcoholic) to render aid to the patron "when he became sick, unconscious, and helpless upon their premises as a result of his intoxication."⁸⁷

California's child abuse reporting law may be analyzed as a variation on the duty to rescue them. In setting up an affirmative duty, *i.e.*, the duty on the part of members of the designated class of citizens to make the required reports, it argues for the imposition of civil liability on violators where the proximate result of the breach is further harm to the injured victim, the battered child. As Professor Franklin states:

[a]fter the legislature has clearly created an express duty, a decision that imposes a civil sanction for violation of that duty is more readily anticipated than is the *sua sponte* judicial creation of an affirmative duty to rescue as [sic] matter of common law, and therefore should come as no surprise⁸⁸

Thus, a good case may be made for the proposition that from the violation of a statute which lays down a duty to aid, there arises a rebuttable presumption, analogous to that codified by California

83. CAL. VEH. CODE §§ 20001, 20003 (West 1971) (formerly codified as §§ 480 and 482, respectively).

84. *Brooks v. E.J. Willig Truck Transp. Co.*, 40 Cal. 2d 669, 255 P.2d 802 (1953); *Escobedo v. Travelers Ins. Co.*, 227 Cal. App. 2d 353, 38 Cal. Rptr. 645 (1964); *Summers v. Dominguez*, 29 Cal. App. 2d 308, 84 P.2d 237 (1938).

85. *Brooks v. E.J. Willig Truck Transp. Co.*, 40 Cal. 2d 669, 255 P.2d 802 (1953); *Karl v. C.A. Reed Lumber Co.*, 275 Cal. App. 2d 358, 79 Cal. Rptr. 852 (1969).

86. CAL. BUS. & PROF. CODE § 25602 (West 1964).

87. *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 592, 101 Cal. Rptr. 246, 248 (1972).

88. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 56-57 (1972).

Evidence Code § 669,⁸⁹ that the violator breached an affirmative duty owed the plaintiff-victim. The ready counterpoise to this argument is that the common law doctrine that there is no duty to aid a stranger is so firmly established in the jurisprudence as to prohibit this approach.⁹⁰

A Background—The “No Duty” Rule

It is submitted that the alleged force and continuing vitality of the “no duty” rule, which has come under strenuous attack for a number of years,⁹¹ is a poorly documented proposition, particularly with respect to California law. Most of the cases cited time and again by the commentators in support of the rule are very dated.⁹²

89. See text accompanying note 51 *supra*.

90. *But see* Vermont's recently-enacted “Duty to Aid the Endangered” Act, VT. STAT. ANN., tit. 12, § 519 (1973), which repudiates the common law rule, *quoted and discussed in* Franklin, *supra* note 88, at 54.

91. See, e.g., B.N. CARDOZO, PARADOXES OF LEGAL SCIENCE 25-26 (1928); Ames, *Law and Morals*, 22 HARV. L. REV. 97, 113 (1908):

One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death.

Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 316 (1908); McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1289 (1949):

At least in the situation where one can readily aid another in saving life, limb or property, without danger and without serious inconvenience, it seems that the law should add to the roster of present affirmative duties the duty of humanitarianism.

Seavey, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960); Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631, 635 (1952):

This intermittent emphasis on moral obligation and occasional equating of it with legal obligation, coupled with an increasing number of common law and statutory exceptions, indicate a tendency toward the principle that legal consequences will attach to conduct displaying indifference to the peril of a stranger.

92. See, e.g., *Allen v. Hixson*, 111 Ga. 460, 36 S.E. 810 (1900); *Hurley v. Eddingfield*, 156 Ind. 416, 59 N.E. 1058 (1901); *Union Pac. Ry. Co. v. Cap-pier*, 66 Kan. 649, 72 P. 281 (1903); *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928); *People v. Beardsley*, 150 Mich. 206, 113 N.W. 1128 (1907); *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809 (1898); *King v. Interstate Consol. St. Ry. Co.*, 23 R.I. 583, 51 A. 301 (1902).

For more recent authority, see *Wilmington Gen. Hosp. v. Manlove*, 174 A.2d 135 (Del. 1961) (defendant hospital not under duty to render emergency care to sick baby in absence of showing custom on part of hospital

What is less frequently mentioned in discussing the older cases is that there also exist equally venerable decisions pointing in the opposite direction.⁹³ In fact, it is for the inhumane and unyielding language, more than for anything else, that these cases are famous. Consider, for instance, the often-quoted passage from *Buch v. Amory Manufacturing Co.*:

With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have, prevented or relieved. Suppose A., standing close by a railroad, sees a two year old babe on the track, and a car approaching. He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death.⁹⁴

There is a well-known statement in *Union Pacific Railway Co. v. Cappier*:

The moral law would obligate an attempt to rescue a person in a perilous position—as a drowning child—but the law of the land does not require it, no matter how little personal risk it might in-

to accept emergency cases such as the one at bar); *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959) (no affirmative duty to rescue drowning man unless defendant was responsible for placing him in the perilous position). *Contra*, see another modern case involving a drowning, *Hutchinson v. Dickie*, 162 F.2d 103 (6th Cir. 1947), in which the court found a legal duty to rescue:

We take no stock in appellant's contention that he was under no legal obligation to rescue decedent. Dickie was an invited guest upon appellant's cruiser. When appellant heard the cry "Man Overboard" . . . we think it was his duty to use reasonable care to rescue him. This was certainly a moral duty, universally recognized and acted upon. Dickie was drowning and appellant's cruiser was the only instrumentality by which he might be rescued. *Id.* at 106.

93. See, e.g., *Bessemer Land & Improvement Co. v. Campbell*, 121 Ala. 50, 25 So. 793 (1898); *Southern Ry. Co. v. Sewell*, 18 Ga. App. 544, 90 S.E. 94 (1916); *Carey v. Davis*, 190 Iowa 720, 180 N.W. 889 (1921); *Adams v. Chicago Great W. R.R. Co.*, 156 Iowa 31, 135 N.W. 21 (1912); *Depue v. Plateau*, 100 Minn. 299, 111 N.W. 1 (1907); *Yazoo & M.V.R.R. v. Byrd*, 89 Miss. 308, 42 So. 286 (1906); *Dyche v. Vicksburg, S. & P.R.R.*, 79 Miss. 361, 30 So. 711 (1901); *Whitesides v. Southern Ry. Co.*, 128 N.C. 229, 38 S.E. 878 (1901); *Larkin v. Saltair Beach Co.*, 30 Utah 86, 83 P. 686 (1905). Also cited with some frequency is language from the English case of *Heaven v. Pender*, 11 Q.B.D. 503, 509 (1883) (Brett, J., concurring) to the effect that

whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other a duty arises to use ordinary care and skill to avoid such danger.

94. 69 N.H. 257, 258, 44 A. 809, 810 (1898).

volve, provided that the person who declines to act is not responsible for the peril.⁹⁵

But what is most notable is that which is obscured by the very breadth of the above-quoted dicta: it is merely dicta, and the writer has found no reported case with facts as extreme and terrible as those posited therein. There have been no instances of able-bodied adults failing to rescue two-year-old children in the process of drowning in six inches of water.⁹⁶

California Law and the "No Duty" Rule

While California decisions have cited the "no duty to aid a stranger" rule, it has never been an emphatic theme in the case law. There is no California case among the frequently noted "elder statesmen" of the "no affirmative duty" decisions. Indeed, the California Supreme Court opinions which make reference to the doctrine are few and far between.⁹⁷ None cite any California authority for the proposition, and none are cases involving the failure to rescue a helpless stranger.

As has been the case in other jurisdictions, California courts have circumvented the full thrust of the no duty doctrine by relying on an expanding field of "special relationships" which permit the imposition of an affirmative duty. Beginning from the general premise that in the absence of some special relationship, a person is under no duty to take affirmative action to aid another, to protect him from harm emanating from a third party,⁹⁸ or to control the conduct of a third person so as to prevent him from causing harm

95. 66 Kan. 649, 651, 72 P. 281, 283 (1903).

96. It is instructive to look at the future development of the law in the courts in which the well known "no duty" opinions were written. For example, the strict "no duty" position adopted in *Hurley v. Eddingfield*, 156 Ind. 416, 59 N.E. 1058 (1901), has been eroded in Indiana. See *L.S. Ayres & Co. v. Hicks*, 220 Ind. 86, 40 N.E.2d 334 (1942); *Tubbs v. Argus*, 140 Ind. App. 695, 225 N.E.2d 841 (1967).

97. See *Schwartz v. Helms Bakery Ltd.*, 67 Cal. 2d 232, 238, 430 P.2d 68, 72, 60 Cal. Rptr. 510, 514 (1967); *Malloy v. Fong*, 37 Cal. 2d 356, 366, 232 P.2d 241, 247 (1951); *Silva v. Providence Hosp.*, 14 Cal. 2d 762, 775, 97 P.2d 798, 804 (1939).

98. If, however, one promises to warn another of potential harm from a third party and fails to give the warning, he may be liable if the injured person can show reliance on the promise. *Morgan v. County of Yuba*, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964).

to another,⁹⁹ the courts have undertaken to elaborate upon relationships recognized by the common law as well as to enunciate more original ones.¹⁰⁰

Thus, the long-established liability of an innkeeper for injury to his patron finds modern expression in the duty of a restaurant owner to use reasonable care to protect his invitees from assaults by third persons also on the premises.¹⁰¹ Likewise, a common carrier has a duty to protect his passengers from assaults both by third persons¹⁰² and by animals.¹⁰³ And although the relation of passenger and carrier terminates when a bus passenger alights upon a public street and clears the car from which he alights, the duty of the carrier ends when the passenger is discharged into a relatively safe area, and not merely if he alights safely from the bus when discharged into a dangerous area.¹⁰⁴ Thus a carrier has been held liable for discharging an adult passenger into an area where he was subsequently hit by a car, even though the bus driver was not in a position to have observed that the car would go into the bus zone and then hit the plaintiff.¹⁰⁵

It has been held, moreover, that the relationship between a land occupier and his invitee may not only make a warning necessary, but also render a warning inadequate and impose a requirement of positive action to defend the potential victim from harm.¹⁰⁶ On

99. *Schwartz v. Helms Bakery, Ltd.*, 67 Cal. 2d 232, 238-39, 430 P.2d 68, 72, 60 Cal. Rptr. 510, 514 (1967); *Richards v. Stanley*, 43 Cal. 2d 60, 65, 271 P.2d 23, 26 (1954); *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal. App. 2d 69, 72, 70 Cal. Rptr. 136, 138 (1968); *Matthias v. United Pac. Ins. Co.*, 260 Cal. App. 2d 752, 755, 67 Cal. Rptr. 511, 513 (1968); *Wright v. Arcade School Dist.*, 230 Cal. App. 2d 272, 277, 40 Cal. Rptr. 812, 814 (1964). It is also well established that one who voluntarily engages in affirmative action has a duty to use care in performing the assumed task. *Perry v. D.J. & T. Sullivan Inc.*, 219 Cal. 384, 389-90, 26 P.2d 485, 487 (1933); *Johnston v. Orlando*, 131 Cal. App. 2d 705, 709, 281 P.2d 357, 360 (1955); *Valdez v. Taylor Automobile Co.*, 129 Cal. App. 2d 810, 817, 278 P.2d 91, 95 (1954); *Griffin v. County of Colusa*, 44 Cal. App. 2d 915, 923, 113 P.2d 270, 274 (1941). Thus, if it was determined that a nonreporting physician who treated a child was a "volunteer" within the scope of this rule, a standard of care issue would arise: is the filing of the report within the scope of the necessary treatment, so that the failure to file would mean that the doctor's conduct did not meet the required standard of due care?

100. RESTATEMENT (SECOND) OF TORTS §§ 315-20 (1965).

101. *Winn v. Holmes*, 143 Cal. App. 2d 501, 505, 299 P.2d 994, 996 (1956).

102. *Terrell v. Key Sys.*, 69 Cal. App. 2d 682, 159 P.2d 704 (1945).

103. *Westwater v. Southern Pac. Co.*, 38 Cal. App. 2d 369, 101 P.2d 154 (1940).

104. *Parker v. City and County of San Francisco*, 158 Cal. App. 2d 597, 323 P.2d 108 (1958).

105. *Id.* at 601, 323 P.2d at 111.

106. *Taylor v. Centennial Bowl, Inc.*, 65 Cal. 2d 114, 121-24, 416 P.2d 793, 797-99, 52 Cal. Rptr. 561, 565-67 (1966).

this theory, the proprietors of a bowling alley were held liable for injuries sustained by a patron as the result of an assault in their parking lot.¹⁰⁷ A warning given to the plaintiff by the bouncer employed by the bowling alley to the effect that she should not go out to the lot "because that goofball is out there" was considered insufficient. "Had the warning adequately informed plaintiff of the danger, which it did not, the warning would not have enabled her to avoid the harm without relinquishing the right to enter the parking lot and obtain her car."¹⁰⁸ Therefore, the defendant breached an affirmative duty to protect the plaintiff in his failure to dispatch the bouncer to accompany her outside to her car.¹⁰⁹

The courts have also looked to the "special relationship" exception where one of the parties is a child. For example, in *Ellis v. Trowen Frozen Products, Inc.*,¹¹⁰ the driver of an ice cream truck was held to have a duty to anticipate that children-customers might be in the vicinity of his truck and to maintain a lookout for their safety. He was therefore held liable for injuries suffered by a five year old child who was struck by a car as she crossed the street to purchase ice cream. Liability attached even though the driver had not stopped for the benefit of that child and had not even seen her before she was struck by the car.¹¹¹ It has also been held that a camp operator was civilly liable for the rape of a camper by an unknown third person after the child had been as-

107. *Id.*

108. *Id.* at 123, 416 P.2d at 799, 52 Cal. Rptr. at 567.

109. *Id.* at 124, 416 P.2d at 800, 52 Cal. Rptr. at 568.

110. 264 Cal. App. 2d 499, 70 Cal. Rptr. 487 (1968).

111. *Id.* at 501, 70 Cal. Rptr. at 489. The *Ellis* court relied heavily on the case of *Schwartz v. Helms Bakery, Ltd.*, 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967), in which it was held to be error to grant a nonsuit in favor of a bakery truck company whose four-year-old customer had been struck by a car while crossing the street to patronize its truck. The *Schwartz* decision was narrower than *Ellis* because there had been prior contact between the child and the driver. The former asked the latter to wait while he went home to get a dime and the driver agreed to meet him up the street. Thus the court was able to base its decision on the ground that two concomitant relationships had arisen between the parties, first when the driver undertook to direct the child's conduct and second, when the driver invited the child to become a customer of his business. Therefore *Ellis*, beginning where *Schwartz* left off, is the wider-ranging decision. *Schwartz*, however, laid the groundwork for *Ellis* and for future cases, by virtue of its emphasis on the duty of the driver to take affirmative action to look out for the child and to exercise greater vigilance since he was dealing with a child rather than an adult.

signed to sleep in a room without proper supervision and derelicts were known to be found in the vicinity of the camp.¹¹² Similarly a camp operator was held to have a duty to protect a camper from injury resulting from a rifle shot by another youth.¹¹³

The cases cited above demonstrate that the "no duty" rule has been subject to numerous exceptions in California, particularly where children are concerned. With this background in mind, we place the doctor-patient relationship in its proper perspective in this analysis.

If the child is a regular patient, it is plausible to conclude that a special relationship exists, giving rise to an affirmative duty on the part of the doctor to attempt to protect the child from the potentially injurious acts of third parties by filling out a report of suspected child abuse and submitting it to the proper authorities. Arguably, a special relationship exists even if the doctor has not attended the child before.¹¹⁴ That is, if the driver of an ice cream truck has a duty to protect a child he has not even seen from being struck by an equally unknown motorist, then a doctor should be charged with the duty to protect a child whose injuries he is treating from future danger from a known source. That the truck driver is in the business of selling ice cream in the street is no significant distinction. The physician is not only in the business of treating the sick and injured, but hopefully is in the practice of preventive medicine as well.

112. *Wallace v. Der-Ohanian*, 199 Cal. App. 2d 141, 18 Cal. Rptr. 892 (1962).

113. *Wishart v. Claudio*, 207 Cal. App. 2d 151, 24 Cal. Rptr. 398 (1962). There are, of course, a number of cases which support the proposition that with respect to the issue of standard of care, greater care must be exercised for the safety of children than for adults. *Crane v. Smith*, 23 Cal. 2d 288, 144 P.2d 356 (1943); *Holmes v. City of Oakland*, 260 Cal. App. 2d 378, 67 Cal. Rptr. 197 (1968); *Geren v. Lowthian*, 152 Cal. App. 2d 230, 313 P.2d 12 (1957); *Edler v. Sepulveda Park Apts.*, 141 Cal. App. 2d 675, 297 P.2d 508 (1956).

114. See *Tarasoff v. Regents of the University of California*, 13 Cal. 3d 177, 183, 529 P.2d 553, 555, 118 Cal. Rptr. 129, 131 (1974), *rehearing granted*.

In *Tarasoff*, a psychotherapist was informed by his patient, in confidence, that the patient intended to kill his girlfriend who at that time was in South America. Neither the girlfriend nor her family was informed of the threat. One day after her return, the patient killed her. Finding the psychotherapist to be civilly liable, the court held that psychotherapists who have reason to believe a patient may harm someone have a duty to warn the potential victim. Because there already exists a statutory duty to report child abuse (analogous to the duty to warn), *Tarasoff* is weighty authority for imposing civil liability on doctors who breach that duty. See, Comment, *Tarasoff and the Psychotherapist's Duty to Warn*, 13 SAN DIEGO L. REV. 932 (1975).

And even if the necessary relationship is not found to exist, the "special circumstances" doctrine may override the "special relationship" prerequisite. According to the California Supreme Court,

Richards [v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954), which emphasized the "special relationship" requirement] would not bar the door to recovery in all cases. Special circumstances which impose a greater potentiality of foreseeable risk or more serious injury, or require a lesser burden of preventative action, may be deemed to impose an unreasonable risk on, and a legal duty to, third persons.¹¹⁵

In the child abuse context, such "special circumstances" are present in that serious injury is reasonably foreseeable. Further, the required course of preventive action, completing and submitting a report with no possibility of civil liability in case of error, imposes a very insubstantial burden on the physician himself.

The Significance of the Structure of California Tort Law

Another argument in favor of rejecting the influence of the "firmly rooted" common law "no affirmative duty" doctrine in California is found in the structure of the state's tort law itself. Since 1872 the basis of that law has been California Civil Code § 1714, which provides:

Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except insofar as the latter has, willfully or by want of ordinary care, brought the injury upon himself

According to the California Supreme Court, "[section 1714] states a civil law and not a common law principle."¹¹⁶ If this is the case, then California tort law is not grounded in the common law and to apply the ancient precepts of the latter may not be appropriate.

Although Civil Code § 1714, "[t]he declared public policy of this state,"¹¹⁷ speaks to "protection from negligence,"¹¹⁸ it may be

115. *Hergenrether v. East*, 61 Cal. 2d 440, 444, 393 P.2d 164, 166, 39 Cal. Rptr. 4, 6 (1964).

116. *Rowland v. Christian*, 69 Cal. 2d 108, 112, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

117. *Malloy v. Fong*, 37 Cal. 2d 356, 366, 232 P.2d 241, 247 (1951).

118. *Brown v. Merlo*, 8 Cal. 3d 855, 870, 506 P.2d 212, 223, 106 Cal. Rptr. 388, 399 (1973).

viewed as a basis upon which to predicate a general affirmative duty as well. This is especially true in the light of California Civil Code § 3281, the state's general statutory pronouncement regarding compensatory relief, also enacted in 1872, which provides:

Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.

By explicitly covering liability for omissions, section 3281 strengthens the case for the recognition of affirmative duties, the omission of which would be actionable.

In any case, the approach taken by Civil Code §§ 1714 and 3281 has been widely approved to the extent that "some common law judges and commentators have urged that the principle embodied in section 1714 serves as the foundation of our negligence law,"¹¹⁹ Further, the California Supreme Court in *Rowland v. Christian*,¹²⁰ emphasized that "it is clear that in the absence of statutory provisions declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy."¹²¹

The *Rowland* court then set out the various factors which would have to be balanced in order to determine whether a departure from the section 1714 principle would be justified in a particular case:

[T]he major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant, and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.¹²²

Again, although these considerations were originally applied to the inquiry into the existence of a duty to use due care rather than the existence of an affirmative duty to warn, they are still extremely useful in the latter situation.

It is thus possible to apply the *Rowland* factors to the duty to report problem at hand, making the assumption that the plaintiff-

119. *Rowland v. Christian*, 69 Cal. 2d 108, 112, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968), citing the famous dictum of Brett, J., in *Heaven v. Pender*, 11 Q.B.D. 503, 509 (1883), note 93 *supra*.

120. *Id.*

121. *Id.* at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100.

122. *Id.* at 113, 443 P.2d at 564, 70 Cal. Rptr. at 100.

child has been rebattered after the defendant-doctor's failure to file the required report. First, it is reasonably foreseeable that a child who was returned to an abusive parent without a doctor notifying the authorities or taking any other steps to prevent further "accidents" would be reinjured by the parent in the future. Second, the fact that the plaintiff suffered an injury would be obvious by inspection. Third, while the plaintiff's reinjury by definition required the intervening act of a third party, its connection with the defendant's conduct is not too remote, since the defendant may have been the only person in a position to trigger a process which would result in the plaintiff's removal from danger. Fourth, it is certainly reasonable to conclude that moral blame would attach to the conduct of a doctor who, because of a reluctance "to get involved," failed to make the slightest effort to rescue the child, despite the fact that the necessary step, filling out a form, was not only simple to perform and required by law, but riskless to him. Fifth, to hold a nonreporting doctor liable would serve the policy of preventing child abuse, as codified in Penal Code § 11161.5, since the prospect of being faced with a large verdict would deter other physicians from neglecting their duty. Sixth, the consequences to the community would be salutary rather than unfavorable in that hopefully the number of battered children would decline. Finally, insurance considerations argue in favor of the imposition of liability for breach of duty, since physicians and hospitals are heavily insured and, if this type of liability is not already covered, its addition to the pre-existing insurance burden would be insignificant.

Another case¹²³ which uses the balancing of factors approach and which is cited with approval in *Rowland*, lists, among the elements it will consider, two which are relevant here. The first is the kind of person with whom the actor is dealing. Where the person is a helpless and injured child, the actor's affirmative duty may reasonably be magnified. The second is the body of statutes and judicial precedents which color the parties' relationship.¹²⁴ Here, of course, the command of Penal Code § 11161.5 and the immunity with which it clothes reporting physicians are of vital importance.

In sum, then, it may be plausibly contended that Civil Code

123. *Raymond v. Paradise Unified School Dist.*, 218 Cal. App. 2d 1, 31 Cal. Rptr. 847 (1963).

124. *Id.* at 8, 31 Cal. Rptr. at 851.

§§ 1714 and 3281 are in the very least worthy counterpoises to the old common law "no duty to aid a stranger" rule insofar as the development of California tort law is concerned. In fact, these civil law statutes arguably lay a strong foundation for the imposition of an affirmative duty to aid and protect, even in a case which does not fit into the special relationship mold. Moreover, applying the balancing of factors approach, now well established in duty of due care analysis, to the duty to act situation, only reinforces the conclusion that it requires no inordinately long logical jump for a court to find and enforce such an affirmative duty.

There are still other indications that California jurisprudence is not wedded to the old common law principle and in fact provides an atmosphere conducive to the germination of a duty to act rule. The state's "stop and render assistance" law,¹²⁵ which requires a motorist involved in an accident to stop and aid any person injured in that accident, regardless of fault, has already been discussed.¹²⁶

California became the first state to enact, in 1965, legislation to compensate citizen-volunteers for any injury, death, or damages sustained while preventing the commission of a crime or apprehending a criminal. A 1969 amendment expanded the coverage to citizens who aid in "rescuing a person in immediate danger of injury or death as a result of fire, drowning, or other catastrophe . . ." ¹²⁷

One California statute which was passed to encourage rescuers is directed specifically at physicians.¹²⁸ It exempts doctors who render emergency care at the scene from civil damages arising from their actions; i.e., it suspends the requirement of due care in this particular situation so that they will not be deterred from acting by a fear of civil liability in the case of a mistake.¹²⁹ In making this provision, the emergency care statute takes the same approach as does the child abuse reporting law. Further, this statute manifests a public policy encouraging the taking of affirmative action by physicians to render aid, and lends support to an argument that doctors have an affirmative duty to act in particu-

125. CAL. VEH. CODE §§ 20001, 20003 (West 1971).

126. See authorities cited notes 83-85 *supra* and accompanying text.

127. The present law is codified at CAL. GOV'T CODE § 13972 (West Supp. 1975). See also a related law, which compensates the victims of violent crimes, CAL. GOV'T CODE §§ 13959-69 (West Supp. 1975) and Geis & Edelhertz, *California's New Crime Victim Compensation Statute*, 11 SAN DIEGO L. REV. 880 (1974).

128. CAL. BUS. & PROF. CODE § 2144 (West 1974).

129. See the discussion of the statute, Note, 34 CALIF. STATE B.J. 583 (1959); see also Note, *Torts: California Good Samaritan Legislation: Exemptions from Civil Liability While Rendering Emergency Medical Aid*, 51 CALIF. L. REV. 816 (1963).

lar circumstances, and especially when so mandated by the Legislature.

The case law is also instructive in that it demonstrates a judicial willingness to discard well established "sacred cows" of tort liability when they no longer stand up to rigorous analysis. Thus, the California Supreme Court has abolished the common law doctrine of charitable immunity¹³⁰ and the common law distinctions which characterized the relationships between land owners or occupiers and the individuals who come onto the land.¹³¹ Nor are statutory barriers to liability of long tenure immune, it was recently proven, when the court struck down the state's automobile guest statute.¹³² In so doing, the court stated with approval the rationale underlying the *Rowland* decision: "A man's life or limb does not become less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose."¹³³

The reasoning of the *Rowland* court, although addressed to the issue of standard of care, has important implications for the present discussion: with respect to the landowner, the trespasser is a stranger. There is no "special relationship" as there may be, for example, between the landowner and his business invitee. Still, the duty of care owed to each was the same and no distinction would be made on the ground that one was not only a stranger, but an unwelcome one. This analysis might apply in the affirmative duty context. The court may be opening the door to the conclusion that a special relationship is not an indispensable prerequisite to the duty to aid or protect another, and that a stranger is not to be ignored merely because of his status as such. In any event, the decisions abolishing charitable immunity, the automobile guest statute,

130. *Malloy v. Fong*, 37 Cal. 2d 356, 232 P.2d 241 (1951); *Silva v. Providence Hosp.*, 14 Cal. 2d 762, 97 P.2d 798 (1939). The California Supreme Court also abolished contributory negligence in favor of a comparative negligence standard in *Li v. Yellow Cab*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

131. *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

132. *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

133. 69 Cal. 2d 108, 118, 70 Cal. Rptr. 97, 104, 443 P.2d 561, 568 (1968), quoted in *Brown v. Merlo*, 8 Cal. 3d 855, 870, 506 P.2d 212, 222, 106 Cal. Rptr. 388, 398 (1973).

and the invitee-licensee-trespasser distinction, each notably recognizing with approval the underlying policy expressed in Civil Code § 1714, like the legislation discussed above, show a strong state interest both in compensating those who have suffered harm and in encouraging citizens to protect others from that harm. To find that a physician has an affirmative duty to report and to hold him liable for a breach of that duty is clearly consistent with each of these objectives.

The little world of childhood with its familiar surroundings is a model of the greater world. The more intensively the family has stamped its character upon the child, the more it will tend to feel and see its earlier miniature world again in the bigger world of adult life.¹³⁴

CONCLUSION

This article has explored the case for the imposition of civil liability upon a physician in the face of his failure to report an instance of suspected child abuse. As a result of a paucity of authority in the doctor-patient area, the article has analyzed the conduct of the nonreporting doctor in terms of the principles of the law of negligence and those of affirmative duty, as they have developed in this state.

As the California Supreme Court has noted, “[d]uty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”¹³⁵ A breach of a child abuse reporting statute should be considered a particularly apt occasion for the implication of civil liability since such a breach paves the way for the commission of the harm which the statute was intended to prevent and since helpless children so clearly compose the class of individuals which the Legislature is striving to safeguard. Such a step, too, would hold out the hope that we may begin to eradicate the tragic “battered child” syndrome, and in so doing put substance in these sentiments:

How beautiful is youth! How bright it gleams
With its illusions, aspirations, dreams!
Book of Beginnings, Story without End,
Each maid a heroine, and each man a friend!
.....
All possibilities are in its hands,
No danger daunts it, and no foe withstands;

134. Jung, *The Theory of Psychoanalysis*, in 4 THE COLLECTED WORKS OF C. J. JUNG (1913).

135. *Dillon v. Legg*, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968).

In its sublime audacity of faith,
"Be thou removed," it to the mountain saith,
And with ambitious feet, secure and proud,
Ascends the ladder leaning on the cloud!¹³⁶

We wish to the new child
A heart that can be beguiled by a flower
That the wind lifts as it passes
Over the grasses after a summer shower,
A heart that can recognize
Without aid of the eyes
The gifts that life holds for the wise.
When the storms break for him,
May the trees shake for him their blossoms down.
In the night that he is troubled
May a friend wake for him
So that his time be doubled,
And at the end of all loving and love,
May the Man Above
Give him a crown.¹³⁷

136. A poem by H. Longfellow, *Morituri Salutamus*, in *A COLLEGE BOOK OF AMERICAN LITERATURE* 590-91 (2d ed. 1949).

137. Irish poem, author unknown, *reprinted in* ROSE F. KENNEDY, *A TIME TO REMEMBER* 439-40 (1974). For a helpful collection of well-constructed, cogently written articles on various issues within the context of studying child abuse in its various dimensions, see *THE BATTERED CHILD* (2d ed. R. Helfer & C. Kempe eds. 1974). See also Kohlman, *Malpractice Liability for Failing to Report Child Abuse*, 49 CALIF. S.B.J. 118 (1974) for a brief summary and overview of the principles supporting holding a doctor civilly liable for nonreporting.