

January 1978

Civil Liability in Child Abuse Cases

Rowine Hayes Brown

Richard B. Truitt

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Rowine H. Brown & Richard B. Truitt, *Civil Liability in Child Abuse Cases*, 54 Chi.-Kent L. Rev. 753 (1978).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol54/iss3/5>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

CIVIL LIABILITY IN CHILD ABUSE CASES

ROWINE HAYES BROWN*
RICHARD B. TRUITT** ***

Child abuse is a major, if not the salient, condition encountered in the pediatric patient today.¹ Although documented examples of intentional maltreatment of children have existed since the onset of history,² it has only been within recent years that child abuse per se has been recognized and that its incidence has skyrocketed.³

As the attention paid to child abuse has increased, questions have arisen regarding civil liability in connection with child abuse cases. Courts are being asked to decide whether and under what circumstances doctors, judges and parents may be liable for damages. It can be anticipated that the cause of action on behalf of the intentionally injured child will be more frequently recognized in the future, resulting in an escalation in the number of lawsuits on this issue. Consequently, it is important that the practicing lawyer is well informed on this subject.

The purpose of this article is to examine the civil liability of various people in connection with child abuse. After establishing that child abuse is a severe problem, this paper will discuss the ability of a child and a parent to recover damages.

THE EXISTENCE OF CHILD ABUSE

Statistics

In 1946 Dr. John Caffey⁴ reported a group of six children who had

* Medical Director, Cook County Hospital, Chicago, Il.; Clinical Associate Professor of Pediatrics, University of Illinois Abraham Lincoln School of Medicine; Adjunct Professor of Law, Illinois Institute of Technology/Chicago-Kent College of Law; M.D. University of Illinois; J.D. Chicago-Kent College of Law; Honorary Degree of Doctor of Science, University of Illinois.

** Senior Partner, Truitt, Brown and Truitt, Chicago, Il.; J.D. Chicago-Kent College of Law.

*** The authors express appreciation to Theresa M. Banas of Truitt, Brown, and Truitt for aid in research.

1. Brown, *The Battered Child Syndrome*, 21 J. FOR. SCI. 65 (1976).

2. Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI.-KENT L. REV. 45, 53-55 (1974).

3. *Id.* at 47, 53.

4. Dr. John Caffey is Visiting Professor of Radiology and Pediatrics, School of Medicine, University of Pittsburgh and Roentgenologist, Children's Hospital, Pittsburgh.

subdural hematomas⁵ and a total of twenty-three fractures,⁶ but he did not recognize this condition as the effect of willfully inflicted trauma. It was not until 1961 that Dr. Henry Kempe,⁷ now the foremost medical authority on child abuse, recognized this heinous condition for what it is and surveyed hospitals through the country in an attempt to discover its incidence. His findings were reported in the official publication of the American Medical Association.⁸ Dr. Kempe coined the phrase "Battered Baby" to designate victims of intentional trauma, a phrase that has been largely replaced by the term "child abuse."

In the United States today it is estimated that as many as 500,000 instances of child abuse are recognized annually.⁹ Child abuse is being found in all segments of our society, although the majority of cases are reported among the poor.¹⁰ In Illinois the number of reported cases has risen every year since the Illinois Child Abuse Reporting Act¹¹ went into effect July 1, 1965. During the first fiscal year, a total of 423 cases were reported.¹² During 1977, 8,788 cases were reported in the state and 4,792 of these were from Cook County.¹³ This increased incidence occurs in spite of the fact that the "pill" and freedom to obtain first trimester abortions¹⁴ have long been prevalent and should have drastically reduced the number of "unwanted children," a reservoir in which child abuse is reputedly spawned.¹⁵

Eight hundred sixty-six children in whom a definitive diagnosis of child abuse was made have been admitted to Cook County Hospital since the reporting law became effective.¹⁶ Many cases of less severity have been diagnosed and treated in out-patient clinics. Of those children admitted to Cook County Hospital, 484 (55.8%) were boys, 382

5. Subdural hematoma is a localized collection of blood outside blood vessels between the outer and middle of three membranes covering the brain and spinal cord. 1 MED. ATLAS FOR ATTORNEYS 84 (1961); 7 LAW. MED. CYCLOPEDIA 199 (1962).

6. Caffey, *Multiple Fractures of the Long Bones of Infants Suffering from Chronic Subdural Hematoma*, 56 AM. J. ROENTGENOLOGY 163 (1946).

7. Dr. C. Henry Kempe is a pediatrician in Denver, Colorado. He is a pioneer in child abuse and in charge of the Denver child abuse program.

8. Kempe, Silverman, Steele, Droegmueller & Silver, *The Battered Child Syndrome*, 181 J.A.M.A. 17 (1961).

9. N. Y. Times, Aug. 16, 1971, at 16, col. 3.

10. Granger, *Child Abuse Not Just in City*, Chi. Sun-Times, March 11, 1973, at 6, col. 1.

11. ILL. REV. STAT. ch. 23, §§ 2051-2061 (1977).

12. Statistics received in personal telephone communication of author to Department of Children & Family Services, the Illinois agency responsible for all aspects of child abuse.

13. *Id.* Cook County is a large county in Illinois that includes Chicago.

14. Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

15. See Brown, *The Battered Baby*, 76 CHI. MED. 235 (1973).

16. Statistics kept by the author (R.H.B.) at Cook County Hospital. This author examined the majority of these children and filed child abuse reports on the majority of them to the responsible welfare agency.

(44.2%) were girls. There were 121 (13.9%) infants under six months of age and 227 (26.2%) under one year of age. Five hundred seventy-two (66.0%) were three years of age or less. The mortality rate for these child abuse victims was 7.1 per cent.¹⁷

Child abuse is typically repetitive in nature, which means that the abused children may be subjected to one episode of abuse after another. Each episode may be of increasing severity and may ultimately lead to the death or to permanent damage of the victim. Approximately fifteen per cent of the child abuse patients have been hospitalized on more than one occasion.¹⁸ Sometimes abused children are taken to hospitals other than the one of original admittance in an attempt to avoid recognition of a pattern of abuse. In sixteen per cent of the hospital cases, other children in the family have been victimized in the same manner.¹⁹ This demonstrates the need to be concerned about siblings.

Injuries

The physical abuse of a small child by an unrelated adult is rare. A close family member, usually the mother, is typically the abuser.²⁰ The trauma to which the young victims are subjected is varied.²¹ A majority are beaten and, consequently, have bruises, lacerations, subdural hematomas, fractured or injured bones. Many are burned by such things as hot liquids, open flames, electric grills, ovens and cigarettes. Children who have received severe trauma to the abdomen, including kicks, may suffer from a rupture of an internal organ, such as liver, spleen or kidney, and may arrive at the hospital in severe shock from the resultant internal bleeding. The majority of these children will not survive their internal injuries.

Sexual abuse of young children was not originally included in the spectrum of child abuse. However, it soon became apparent that many young children are victims of sexual abuse and that a fair percentage of such cases are incestuous in nature.²² The physical and emotional trauma suffered by children from sexual abuse cannot be ignored.

17. Statistics from the author's (R.H.B.) series of 866 cases at Cook County Hospital disclose a mortality rate of 7.1 per cent for hospitalized children. For national statistics see BROWN, *The Legal Problems of the Battered Child*, 13 SOCIAL PEDIATRICS 201-208 (Proceedings, International Congress of Pediatrics, Vienna, 1971); Tanous & Vance, *Battered Babies, Their Screams of Terror Go Unheard*, 6 LEGAL ASPECTS OF MED. PRAC. 31 (1978).

18. Statistic from the author's (R.H.B.) Cook County Hospital series.

19. *Id.*

20. *Parents Who Abuse Child Show Four Characteristics*, Pediatric News Dec. 1977.

21. From personal observations and examinations by the authors.

22. Herjanic & Wilbois, *Sexual Abuse of Children*, 239 J.A.M.A. (1978).

A number of child abuse victims die.²³ Many others are left physically or mentally handicapped. Those who were subjected to trauma to the head which resulted in internal hemorrhage may be afflicted with convulsive seizures for the rest of their lives. Many who survive the abuse grow up, have children and tend to become child abusers themselves,²⁴ thus, perpetuating the problem.

Diagnosis

Since Dr. Kempe wrote his first article on child abuse,²⁵ thousands of articles have appeared in the medical, legal and lay literature. Documentaries on child abuse have been shown on the screens of the majority of television stations throughout the country. Radio shows have aired discussions of the problem, and physicians, lawyers, judges and social workers who encounter the child abuse syndrome have discussed it at both professional and lay meetings. Surely no health professional in the United States can claim that he has never heard of the battered child syndrome, battered babies or child abuse. Every professional who has any involvement with children, including lawyers and judges, should know that the existence of child abuse should *always* be considered when:

1. *any* very young child has *any* injury; or
2. any child has a history of repeated injuries (*e.g.*, a fracture today, a burn a month ago, a laceration prior to that); or
3. any child has multiple injuries present at the same time; or
4. any child has injuries out of proportion to the history given by the parent (*e.g.*, a three-month-old infant will not receive a total of twenty fractured ribs from a fall from a sofa); or
5. any child has widespread scars, scratches, or bruises; or
6. the full body x-rays of any child reveal fractures whose presence had not been suspected.²⁶

23. See Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI.-KENT L. REV. 45, 48 (1974).

24. *Id.* at 50.

25. Kempe, Silverman, Steele, Droegmueller & Silver, *The Battered Child Syndrome*, 181 J.A.M.A. 17 (1961). See text accompanying notes 7-8, *supra*.

26. Brown, *Child Abuse: Attempts to Solve the Problem by Reporting Laws*, 60 WOMEN LAW. J. 73, 74-75 (1974).

LAWSUITS ON BEHALF OF THE ABUSED CHILD

Child v. Parent

Children in the United States generally have been denied the right to sue parents who have abused them.²⁷ The immunity of parents from suits by their children for torts to their children has been created by *stare decisis*. The established common law rule in an action for damages caused by maltreatment to an infant is that an unemancipated minor cannot sue his parent in tort.²⁸ This general rule is based upon the court's reluctance to create litigation and strife between members of the family unit²⁹ and its apparent insistence upon maintenance of parental discipline and control.³⁰ The parental immunity doctrine extends to adoptive parents³¹ and persons in *loco parentis*³² and, consequently, would protect the occasional foster parent who was the child abuser.

Currently this immunity is not absolute. An action may now be maintained by a child against his parents for willful and wanton misconduct by them, including intentional torts.³³ However, the great majority of appellate cases allowing a child to recover against his/her parents deal with automobile injuries resulting from reckless driving.³⁴

It has been held that liability attaches to the parent for conduct beyond the bonds of reasonable parental authority or discretion³⁵ but a problem exists regarding the establishment of standards of "reasonable" parental authority and discretion. For example, the question of

27. W. PROSSER, LAW OF TORTS, 865-66 (4th ed. 1971).

28. See *Mroczynski v. McGrath*, 34 Ill. 2d 451, 454, 216 N.E.2d 137, 139 (1966); *Foley v. Foley*, 61 Ill. App. 577, 580 (1895).

29. *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956) (recognizing that this public policy only applies in the case of negligence and not in the case of willful and wanton misconduct on the part of the parent).

30. See, e.g., *Barlow v. Iblings*, 156 N.W.2d 105 (Iowa 1968); *Luster v. Luster*, 299 Mass. 480, 13 N.E.2d 438 (1938); *Rodebaugh v. Grand Trunk W. Ry.*, 4 Mich. App. 559, 145 N.W.2d 401 (1966).

31. See *Foley v. Foley*, 61 Ill. App. 577 (1895); *Franco v. Davis*, 51 N.J. 237, 239 A.2d 1 (1968), *overruled on other grounds*, *France v. A.P.A. Transport Corp.*, 56 N.J. 500, 267 A.2d 490 (1970).

32. *Trudell v. Leatherby*, 212 Cal. 678, 300 P. 7 (1931), *overruled on other grounds*, *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); *Bricault v. Deveau*, 21 Conn. Super. 486, 157 A.2d 604 (1960). *But see* *Burdick v. Nawrocki*, 21 Conn. 272, 154 A.2d 242 (1959) (refusing to apply immunity doctrine to stepfather).

Loco parentis occurs when a person temporarily undertakes the care and control of another person in the absence of supervision by this other person's natural parents and without formal legal approval. *Griego v. Hogan*, 71 N.M. 280, 284, 377 P.2d 953, 955 (1963).

33. *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); *Rodebaugh v. Grand Trunk W. Ry.*, 4 Mich. App. 559, 145 N.W.2d 401 (1966).

34. See, e.g., *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); *Rodebaugh v. Grand Trunk W. Ry.*, 4 Mich. App. 559, 145 N.W.2d 401 (1966).

35. See, e.g., *Silesky v. Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968); *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

whether courts should impose culturally or class biased standards arises. Problems also arise with respect to neglect hearings and custody proceedings. "Western man has never been able to make up his mind what a child is—weak and innocent, needing protection, or wild and primitive, needing discipline and education. And adults are still swinging metronomically from one extreme to another."³⁶ The legislatures in typical child abuse statutes³⁷ have not provided standards or guidelines beyond "endangering life or health," but have allowed the courts to formulate their own standards.

Public policy considerations of the parental immunity doctrine may prevent filing suits alleging mere negligence,³⁸ but such policy should not prevent a minor from obtaining redress for willful and wanton misconduct of his parents. "To tolerate such misconduct and deprive a child of relief will not foster family unity but will deprive a person of redress, without any corresponding social benefit, for an injury long recognized at common law."³⁹

Child v. Physician

Failure to Diagnose

Many malpractice actions today are instituted on the theory that failure to diagnose, or failure to diagnose in a timely fashion, constitutes negligence on the part of the physician and injured plaintiffs are recovering on this premise.⁴⁰ In *Landeros v. Flood*⁴¹ a malpractice action was brought against the physician and hospital for failure to properly diagnose and report a battered child syndrome. The trial court dismissed this suit.⁴² On appeal the appellate court upheld dismissal of the malpractice claim⁴³ stating that the battered child syndrome was

36. NEWSWEEK, March 4, 1974, at 75.

37. See, e.g., ILL. REV. STAT. ch. 23, §§ 2353-2355 (1977).

38. *Mroczynski v. McGrath*, 34 Ill. 2d 451, 216 N.E.2d 137 (1966); *Chaffin v. Chaffin*, 239 Or. 374, 397 P.2d 771 (1964).

39. *Nudd v. Matsoukas*, 7 Ill. 2d 608, 619, 131 N.E.2d 525, 531 (1956).

40. Brown, *The Pediatrician and Malpractice*, 57 PEDIATRICS 392, 397 (1976). For criticism of this basis of recovery see Curran, *Failure to Diagnose Battered-Child Syndrome*, 296 NEW ENG. MED. J. 795 (1977). Curran objects to the physician being held liable for injuries actually inflicted on the child by a third party. *Id.*

41. 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976), *rev'g*, 50 Cal. App. 3d 189, 123 Cal. Rptr. 713 (1975).

42. *Id.* at 413, 551 P.2d at 398, 131 Cal. Rptr. at 78.

43. The appellate court upheld the dismissal of the first cause of action in the amended complaint which charged respondents with general negligence for failure to properly diagnose the so-called battered child syndrome and for failure to report the same to the proper authorities. However, the judgment was reversed with directions to overrule the demurrers as to the second and third causes of action which alleged violation of the reporting statutes. The fourth cause of action was abandoned on appeal. 50 Cal. App. 3d 189, 123 Cal. Rptr. 713 (1975).

not an integral part of the skill and learning of medical practitioners.⁴⁴ The court further said that it was not malpractice to fail to recognize the syndrome.⁴⁵ Further, the court stated that the battered child syndrome was far from being well defined or clear-cut.⁴⁶ The court stated that child abuse included a vast array of phenomena, such as physical, sexual, and emotional abuse, as well as nutritional and medical care neglect of the child.⁴⁷ The court also stated that there is no authority contending that a doctor owes a legal obligation to embark on a general investigation or explanation of unknown and unsuspected diseases or disorders to which his attention has not been called in order to pinpoint a specific diagnosis.⁴⁸

The Supreme Court of California reversed⁴⁹ the appellate court, stating that "the diagnosis of the 'battered child syndrome' has become an *accepted medical diagnosis*."⁵⁰ They also added that "[t]rial courts have long recognized the 'battered child syndrome' and it has been accepted as a legally qualified diagnosis on the trial court level for some time."⁵¹

Nonetheless, in *Landeros* the California Supreme Court did not feel that a ruling that the battered child syndrome exists is conclusive in establishing a physician's liability. The court felt that the question remained one of fact to be decided on the basis of expert testimony, concluding that "[p]laintiff is therefore entitled to the opportunity to prove by way of expert testimony that in the circumstances of this case a reasonably prudent physician would have followed these procedures."⁵² The California Supreme Court also considered the statutory negligence of failure to report as well as the medical malpractice action. The court stated that the mandatory reporting provisions of the California statute⁵³ are ambiguous with respect to the required state of mind of the physician. However, the court concluded that to be found guilty of

44. *Id.* at 195, 123 Cal. Rptr. at 719.

45. *Id.*

46. *Id.* at 194, 123 Cal. Rptr. at 718.

47. *Id.*

48. *Id.* at 195, 123 Cal. Rptr. at 719.

49. 17 Cal. 3d 399, 415, 551 P.2d 389, 398, 131 Cal. Rptr. 69, 78 (1976).

50. *Id.* at 409, 551 P.2d at 393, 131 Cal. Rptr. at 73 (quoting *People v. Jackson*, 18 Cal. App. 3d 504, 506, 95 Cal. Rptr. 919, 920 (1971)); *accord*, *People v. Henson*, 33 N.Y.2d 63, 73-74, 304 N.E.2d 358, 363, 349 N.Y.S.2d 657, 665 (1973).

51. *Id.*

52. 17 Cal. 3d at 410, 551 P.2d at 1394, 131 Cal. Rptr. at 74. In a footnote the court stated that although expert testimony on the issue of a duty to report is admissible, it is not mandatory. *Id.* at 410 n.8, 551 P.2d at 394 n.8, 131 Cal. Rptr. at 74 n.8. The plaintiff's case is simplified for him if expert testimony is not required.

53. CAL. PENAL CODE §§ 11160, 11161, 11161.5 (West 1970) (amended 1971).

statutory negligence, willful misconduct on the part of the physician must be established.

Failure to Treat

Some parents have refused to consent to treatment for their minor abused child.⁵⁴ Although the majority of child abuse laws include "neglect" as a facet of abuse and failure to permit necessary medical treatment can be interpreted as neglect, common law did not recognize the denial of medical care as an act constituting neglect.⁵⁵ If there is substantial evidence that the lack of medical care presents an imminent threat to the child's life, there is little doubt that a court will make a finding of neglect and order the proposed treatment.⁵⁶

Today every state has legislation designed to protect neglected children.⁵⁷ The judiciary, on petition, has the authority to order the custody and control of a minor deemed neglected transferred from the parents to facilitate necessary treatment.⁵⁸

The trend is to enlarge the rights of minors and, consequently, many statutes now permit minors to consent to their own treatment under certain circumstances.⁵⁹ In some cases, courts have found older children competent to consent to their own treatment.⁶⁰ With the expansion of children's rights it is not impossible to foresee future suits instituted by minors against physicians who refused to treat them because they feared the lack of adequate consent. The allegation will be that delay in beginning therapy, while the issue of consent was being settled, led to deterioration of, and subsequent damage to, the child's health.

Failure to Report

There is a strong societal interest in correcting problems of child abuse, either by removing the child from its dangerous situation or by treating and rehabilitating the family. The first step towards the solution is to make the child's situation known by reporting it to the proper authorities. Physicians are most likely to come in contact with children

54. See text accompanying notes 107-11, *infra*, for a discussion of parental consent to treatment.

55. Larson, *Child Neglect in the Exercise of Religious Freedom*, 32 CHI.-KENT L. REV. 283 (1954).

56. *Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952), *cert. denied*, 344 U.S. 824 (1952).

57. See Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641 (1978).

58. See ILL. REV. STAT. ch. 37, §§ 702-4(1)(b), 705-2(d) (1977).

59. Brown, *The Pediatrician and Malpractice*, 57 PEDIATRICS 392, 396 (1976).

60. See *Bonner v. Moran*, 126 F.2d 121, 123 (D.C. Cir. 1941).

who have been abused, inasmuch as these injured children will be brought to the physician for treatment. Therefore, there is a strong public interest in encouraging physicians to comply with the statutory law of their state and report instances of child abuse to the proper authorities.

Although all fifty states, Washington D.C., and the Virgin Islands have passed child abuse reporting statutes,⁶¹ most of which mandate the filing of reports, and many of which impose criminal penalties for failure to comply,⁶² physicians remain reluctant to file such reports because of the following reasons:

1. Misconstruction of doctor and patient relationship, not understanding whether his responsibility is to child or his/her parent;
2. Fear of civil actions (*e.g.*, libel, slander, breach of confidential relationship);
3. Desire to avoid involvement in criminal or civil prosecution of the parents (testifying at trial, etc.);
4. Refusal to believe or recognize a case involves child abuse, therefore, failure to diagnose battered child syndrome;
5. Feeling threatened by the requirement that they report suspected abuse or neglect, particularly if their livelihood depends upon a positive image in their community and referrals from other neighboring health professionals; and
6. Fear of testifying in court, part of which is justified because of their lack of training to assume this role.⁶³

A survey demonstrated that only 1.6% of the child abuse reports filed in the United States came from private physicians,⁶⁴ even though physicians are legally required to report.

There are no cases of criminal prosecution of physicians for failure to report under child abuse statutes imposing criminal sanctions.⁶⁵ Criminal sanctions have had little effect in encouraging physicians to file reports.

61. Brown, *Child Abuse: Attempts to Solve the Problem by Reporting Laws*, 60 WOMEN LAW. J. 73-74 (1974); V. DEFRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970's, (rev. ed. The Amer. Humane Ass'n., Children's Division 1974).

62. Brown, *Child Abuse: Attempts to Solve the Problem by Reporting Laws*, 60 WOMEN LAW. J. 73, 74, 76 (1974).

63. Helfer, *Why Most Physicians Don't Get Involved In Child Abuse Cases and What to Do About It*, 4 CHILDREN TO-DAY 30 (1975).

64. American Medical News, Dec. 19, 1977, at 8, col. 1.

65. See generally Comment, *Civil Liability for Failing to Report Child Abuse*, 1977 DET. C. L. REV. 135, 136.

One possible solution to the widespread failure to report is to impose civil liability upon those who are required by statute to file a report and fail to do so. Imposition of such civil liability could act as a financial deterrent to noncompliance with the statute, and at the same time it could help to pay for injuries sustained by the child. Until recently there was a substantial question as to whether a person would be civilly liable to the injured minor if he did not make the report required by law. Several law suits have been filed recently against physicians who failed to report child abuse as required by the terms of a mandatory reporting statute.⁶⁶ In these suits, the allegation is made that the physician failed to file the report as required by law, thus precluding the possibility of the social and protective agencies to rescue the endangered child from its hazardous environment. It is alleged that when the physician permitted the child to return to its home the child suffered additional crippling episodes of abuse.

In one case, *Robison v. Wical*,⁶⁷ five-month-old Thomas Robison was admitted to Arroyo Grande Community Hospital, in California, where x-rays disclosed a long skull fracture. The boy's seventeen year-old mother, who was living with an AWOL soldier after the infant's father had left the home, said the infant had "fallen off a bed."⁶⁸ Three days later, the child was returned to his mother without a report being filed, although the examining physician had noted contusions, many old bruises, blood blisters on the penis, and had suspected child abuse.⁶⁹ The hospital record showed the doctor questioned the mother about the cause of the child's lesions and did not believe her replies.⁷⁰

Eight days later the child was readmitted with marked swelling and discoloration of the left arm from elbow to finger tips. The mother signed the child out⁷¹ and took him to the Sierra Vista Hospital where he was kept "regarding possible child abuse, but was being discharged in the hope that it was not so."⁷²

At the end of May the child was brought again to the Arroyo Grande Community Hospital for injuries that included burned fingers, puncture wounds of the neck, and welts on the back. On this occasion strangulation marks were present and the child was not breathing. During prolonged attempts at resuscitation, and before respiration was

66. See, e.g., *Leach v. Chemung*, No. 75-2652 (Chemung City Sup. Ct. N.Y. filed May 18, 1976).

67. Civil No. 37607 (Cal. Sup. Ct., San Luis Obispo filed Sept. 4, 1970).

68. *Id.* at 375.

69. *Id.* at 374.

70. *Id.* at 375.

71. *Id.*

72. *Id.*

finally restored, the child suffered so much brain damage from insufficient oxygen supply that he was ultimately institutionalized. At the time of trial, when the child was three-years-old, his I.Q. was twenty-four and his physical development was extremely retarded. The mother's "boyfriend" was convicted of child beating and sentenced from one to ten years in prison.⁷³ The mother was not charged with anything. The child's father brought a \$5,000,000 suit against four doctors with whom the child came in contact for failing to report the attacks, and against the police chief and "John Does, 1 to 20" of the police department for failing to investigate adequately when a fifth doctor who saw the child ultimately filed a report. The doctors who failed to report the battered child syndrome were included as defendants in the suit on a theory of *negligence per se*.⁷⁴ A judgment of \$600,000 was entered against the four physicians⁷⁵ in a settlement which was the first of its kind. The money was placed in a trust fund set up for the boy and was made inaccessible to others.⁷⁶

In a later California case, *Landeros v. Flood*,⁷⁷ the issue of liability in a civil action against a physician for failure to report was also raised. This landmark case involved an eleven-month-old infant who was taken to a hospital with an injured leg. The examining physician made a diagnosis of a comminuted spiral fracture of her right leg. He also noted she had bruises and lacerations on other areas of her body. She was treated and released to her parents. A child abuse report was not filed. Subsequently inflicted trauma resulted in permanent severe injuries to this child. The infant's Guardian Ad Litem brought a malpractice suit against the hospital and the physician for failure to diagnose child abuse and an action in negligence against the physician and hospital for failing to comply with the California statute which required child abuse to be reported to the police. The California Supreme Court agreed that the plaintiff on the issue of reporting should have been allowed to present a case of negligence at the trial level.⁷⁸

Mandatory reporting statutes in the past have imposed an affirmative duty on the physician to report certain recognized and diagnosed contagious diseases presenting a known threat to others.⁷⁹ Therefore, a precedent exists for imposing a duty to report on the physician and

73. Time, Nov. 20, 1972 at 74 col. 2.

74. *Robison v. Wical*, Civil No. 37607 at 376 (Cal. Sup. Ct., San Luis Obispo filed Sept. 4, 1970).

75. *Pediatric News*, March 1973 at 1.

76. See Time, Nov. 20, 1972, at 74, col. 2; *Pediatric News*, March 1973 at 1, col. 1.

77. 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976). For a further discussion of the *Landeros* case, see text accompanying notes 41-53, *supra*.

78. *Id.*

79. See, e.g., *Jones v. Stanko*, 118 Ohio St. 147, 160 N.E. 456 (1928).

subjecting him to civil liability for failure to report.⁸⁰

Use of Photographs or X-rays

It is a well-established legal principle that taking photographs without appropriate legal consent constitutes invasion of privacy.⁸¹ Because of possible liability for invasion of privacy, it is inadvisable for a physician to take photographs of an abused child without the written consent of the parent or guardian. This is unfortunate in that photographs are useful as evidence in litigation of abuse cases.⁸² Colored photographs could demonstrate the condition of the child at the time of the injury. Courts have held such photographs admissible as evidence provided their nature is such that they would not be inflammatory.⁸³

Photographs are of no real therapeutic value, except for the fact that serial progress photographs can document the healing process. In contrast, x-rays serve a major therapeutic purpose. X-rays of obviously injured areas may be needed to show the nature and extent of the injury. Full body x-rays are a helpful fact-finding diagnostic aid. For example, in one case a full body x-ray of a child brought to the hospital emergency room because of a fracture of one arm revealed the previously unknown presence of a fracture of the skull and a total of twenty fractured ribs.⁸⁴ A diagnosis of all existing trauma is essential prior to the institution of all necessary therapy. Consequently, physicians can defend the ordering of x-rays for their therapeutic value in face of charges that the child's right to privacy had been violated.

X-rays are admissible as evidence in child abuse litigation to demonstrate the extent and severity of injuries. Parents charged with abuse may object to being compelled to pay for x-rays which are subsequently used in court as evidence against them, and they may object to the physician's customary practice of ordering x-rays without their consent. To overcome these objections, several child abuse statutes have sections authorizing those who investigate child abuse incidents to have photographs and x-rays taken.⁸⁵ Such statutory provisions protect the physician from fear of suit for an invasion of privacy when he orders

80. *Id.*

81. J. WALTZ & F. INBAU, *MEDICAL JURISPRUDENCE* 279 (1st ed. 1971).

82. See Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI.-KENT L. REV. 45, 71 (1974).

83. *Albritton v. State*, 221 So. 2d 192, 197 (Fla. App. 1969).

84. Child seen by the author (R.H.B.) in Children's Division Cook County Hospital in 1977.

85. New York provides by statute that a physician "may at the time of the initial examination or as soon as practical thereafter take or arrange to have taken photographs of the area of trauma visible on a child who is the subject of the report." N.Y. SOC. SERV. LAW § 416 (McKinney 1976).

such documentary evidence. In addition, some states by statute⁸⁶ provide a source of payment, thus relieving the parent or hospital of assuming this financial burden.⁸⁷

Child v. Judge

Courts have been reluctant to extend constitutional rights, privileges and immunities to children.⁸⁸ A child's rights in a hearing to determine custody, including cases involving child abuse, have been defined as "best interests and welfare of the child."⁸⁹ These rights have not been described as fundamental constitutional rights as have parental rights to custody of the child.⁹⁰

The rights of children in a custody hearing are created by statute. These rights are not protected by federal law; the law of each state controls. Therefore, it is unlikely a child could bring an action against a judge under the Civil Rights Act.⁹¹ Further, even if an action were found to lie for abuse of due process, the doctrine of judicial immunity probably would bar recovery.⁹²

It would be difficult for an abused child to prevail in a suit against a judge, even if the doctrine of judicial immunity did not exist. The suit, if allowed, would have to be brought as an action for negligence, and proving the elements thereof would be difficult to do. The plaintiff would have to establish that the judge's decision either to change plaintiff's custody or let it continue as it was, was the proximate cause of further injury to the child. The plaintiff would also have to prove that the judge should have foreseen that the consequences of his decision would have been additional injury to the child.⁹³

86. See, e.g., ILL. REV. STAT. ch. 23, § 2056 (1977).

87. The Illinois statute states, in relevant part:

Any person required to investigate cases of suspected child abuse or neglect may take or cause to be taken, at Department expense color photographs and x-rays of the area of trauma on the child who is the subject of a report.

ILL. REV. STAT. ch. 23, § 2056 (1977). The intent of this section is to help secure evidence for civil liability defense and to allow the physician to perform a complete medical examination. The precise language "of the area of trauma on the child" might preclude the taking of full body x-rays.

88. *In re Gault*, 387 U.S. 1 (1967), is the first United States Supreme Court case breaking with the prohibition in affording due process protection to minors.

89. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD*, at 4 (1973).

90. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

91. 42 U.S.C. § 1983 (1970).

92. *Stump v. Sparkman*, 98 S. Ct. 1099 (1978).

93. Cf. *Landeros v. Flood*, 30 Cal. App. 3d 189, 123 Cal. Rptr. 713 (1975), *rev'd* 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976) (discussing the elements required in an action for negligence against a doctor).

An action against a judge does not involve malpractice. A judge is not held to the same standard that a physician would be with respect to the foreseeability of repeated abuse in the battered child syndrome. For these reasons, it is unlikely that a child will be successful in bringing an action against a judge.

Child v. Other Parties

Under a large number of the reporting statutes, many categories of people are required to report incidents of child abuse.⁹⁴ Certain non-physician professionals, such as social workers, nurses, agency employees and teachers, who are exposed to incidents of child abuse, may be held liable for failure to report. Nonetheless, difficulty may be encountered in proving that the non-physician had reasonable cause to personally diagnose obvious child abuse, or in fact did believe it and could foresee further injury to the child.

*Robison v. Wical*⁹⁵ is the only case of record charging non-physicians with statutory non-compliance. In *Robison* the police department was charged with not thoroughly investigating a child abuse matter, but this issue was settled out of court. *Robison*, thus, does not settle the issue of whether a non-physician may be held liable for failure to report cases of suspected child abuse.

In *Landeros v. Flood*⁹⁶ the appellate court indicated that it might be unconstitutional to hold non-physicians liable. In that case the court pointed out that physicians are in the best position to recognize child abuse and that they alone possess the necessary skills to diagnose child injuries and distinguish accidental ones from those intentionally inflicted.⁹⁷ The court felt that the extension of civil liability to those other than medical professionals for mere failure to report would raise serious questions of fairness and would subject the statute to a constitutional challenge for unreasonableness, uncertainty, and unfairness.⁹⁸

The social worker or welfare agency worker who inadvertently places a child in a foster home or emergency shelter where the child is abused rather than protected is a likely target for suit. Cases of this type are sometimes picked up by the lay press⁹⁹ which is quick to be

94. Brown, *Child Abuse: Attempts to Solve the Problem by Reporting Laws*, 60 WOMEN LAW. J. 73, 74 (1974).

95. Civil No. 37607 (Cal. Sup. Ct., San Luis Obispo filed Sept. 4, 1970). See *Battered Child Syndrome*, 1 PEPPERDINE L. REV. 377 (1974).

96. 30 Cal. App. 3d 189, 123 Cal. Rptr. 713 (1975) (dicta), *rev'd*, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

97. *Id.* at 199, 123 Cal. Rptr. at 725.

98. *Id.* (citing *People v. Madearos*, 230 Cal. App. 2d 642, 41 Cal. Rptr. 269 (1964)).

99. A three-year-old child abuse victim recently was removed from her family and placed in

critical and prejudicial to the agencies.¹⁰⁰ If the social or agency worker used due professional care in investigating the foster home setting, following their usual criteria for foster home placement, no action should lie. To recover, the plaintiff must prove that negligence occurred, that the worker should have foreseen that it could be a poor placement and the child was in fact in peril.

LAWSUITS BY THE PARENT OF AN ABUSED CHILD

Parent v. Child Abuser

The common law doctrine of interspousal immunity prohibits either spouse from maintaining an action for a tort committed during coverture.¹⁰¹ Consequently, one parent cannot sue the other for abusing their child while the marriage is in effect. However, a parent does have a right of action to recover damages for injuries to his child by a third party when such injuries deprive the parent of the child's services.¹⁰² Generally this right of action accrues to the father because at common law it is the father who is entitled to the services of the children.¹⁰³ If the parents are divorced, and the mother has legal custody of the children, she is legally entitled to the services of the children, and she could, therefore, sue either her former husband or any third party who injured the child and deprived her of the child's services.

In order for such suits to lie the parent must have a legal interest in the child's services, *i.e.*, the child cannot have become emancipated or have reached his majority.¹⁰⁴ This right of action is distinct from that of the child's, but it is based upon and arises out of the child's cause of action. Therefore, the parent cannot recover unless the child has a good cause of action.¹⁰⁵ The parent who seeks such a recovery must prove that he/she was not at fault (*e.g.*, was not negligent in supervision of the child or had knowledge of the abuse being inflicted upon the child but failed to report it). Damages which a parent could recover in actions of this type would usually be limited to deprivation of services during the period of the injury, and the expense and trouble of caring

a foster home where the thirteen-year-old son of the foster parents inflicted serious injuries upon the child which resulted in the child's death. This case was reported in all Chicago newspapers. *See, e.g.*, Chicago Tribune, Aug. 21, 1977, § 2, at 1, col. 1.

100. *Id.*

101. *See Welch v. Davis*, 410 Ill. 130, 101 N.E.2d 547 (1951).

102. *Stafford v. Rubens*, 115 Ill. 196, 3 N.E. 568 (1885); *Stephens v. Weigel*, 336 Ill. App. 36, 82 N.E.2d 697 (1948).

103. *See R. BREMMER, CHILDREN AND YOUTH IN AMERICA, A DOCUMENTARY HISTORY 1600-1865*, at 123 (1970). *See also 5 FORDHAM L. REV.* 460 (1936).

104. *Mercer v. Jackson*, 54 Ill. 397 (1870).

105. *Jones v. Schmidt*, 349 Ill. App. 336, 341, 110 N.E.2d 688, 691 (1953).

for the damaged child.¹⁰⁶

Parent v. Physician

Often an abused child is brought to a hospital emergency room or to a physician's office by the police, social or welfare agency employee, or a relative other than the parents, none of which has authority to consent to examination and treatment of the child. Absent a statute to the contrary, or an emergency medical situation, the general rule is that minors cannot consent to their own therapy but that their parents must consent to their treatment.¹⁰⁷ Occasionally a statute will state that police can give consent for therapy of injured children they transport.¹⁰⁸ Court decisions generally hold that the physician should render emergency treatment, without delay or consent, to safeguard the life or prevent serious harm to an abused or neglected child.¹⁰⁹ Emergency medical care is authorized under the well-established doctrine of implied consent.¹¹⁰ The statutes of several states authorize examination by a physician or by those required to report a child suspected of being abused, even where no emergency exists.¹¹¹

Physicians have long been faced with the problem of the parent who takes his sick child from the hospital "against medical advice" to the subsequent detriment of the child's health. They are also faced with the acts of parents of an abused child who became alarmed in the hospital emergency room, usually following questioning by the physician relative to the cause of the child's injuries, and who take their injured child and flee.

Several of the child abuse statutes¹¹² have sections similar to the Illinois law,¹¹³ which states:

Any physician who has before him a child he reasonably believes may be abused or neglected may take or retain temporary protective custody of the child without the consent of the child's parent or guardian, whether or not additional medical treatment is required, if the circumstances or conditions of the child are such that continuing in his place of residence . . . presents an imminent danger to that child's life or health¹¹⁴

106. *Seltzer v. Saxton*, 71 Ill. App. 229 (1897).

107. *Brown*, *The Pediatrician and Malpractice*, 57 PEDIATRICS 392, 396 (1976).

108. *Id.*

109. *Id.*

110. *Jackovach v. Yocom*, 212 Iowa 914, 927, 237 N.W. 444, 450 (1931).

111. *See, e.g.*, N.Y. SOC. SERV. LAW § 417 (McKinney 1976).

112. *See, e.g.*, KY. REV. STAT. § 199.355(4) (1977); N.Y. SOC. SERV. LAW § 417 (McKinney 1976).

113. ILL. REV. STAT. ch. 23, § 2055 (1977).

114. *Id.*

This section is to assure that the child is protected from the immediate danger which threatens him if he remains in his home setting. It is foreseeable that the parents might sue the physician who seized such custody asserting they have been deprived of their right to the children without due process of law and in violation of their constitutional rights. This section of the Illinois law attempts to safeguard the rights of the family and the child by requiring that the physician immediately notify both the parents and the protective agency of his action. The agency may then petition the court for a "temporary custody" order.¹¹⁵

All states provide immunity from suit to persons who report suspected child abuse in "good faith" under the provisions of the federal Child Abuse Prevention and Treatment Act of 1974,¹¹⁶ and also under their own state statutes on child abuse.¹¹⁷ Such protection was desired by physicians who feared civil suits by the parents or other offenders. In spite of the immunity clause, however, some physicians are still afraid to become involved in child abuse cases.

A 1977 court case of first impression arising in Philadelphia alarms members of the medical profession because it demonstrates that a physician can be sued for reporting child abuse, as required by law.¹¹⁸ In this case, Dr. Carolyn S. Crawford, Chairman of the department of neonatology at Albert Einstein Medical Center, Northern Division, was charged with violating seventeen-year-old Rochelle Gary's civil rights by filing a report of suspected abuse in "bad faith."¹¹⁹ The physician said she filed the report after seeing what she believed was clear evidence of negligence involving this woman's four-month-old infant.¹²⁰ The physician stated, "The decision to file the report was a consensus. I didn't act in a vacuum."¹²¹ She followed the written guidelines that were established by the hospital for filing a report.

The Pennsylvania law¹²² grants immunity from suit to persons who file the reports in good faith in the course of their professional duties.¹²³ The law assumes the "good faith" of the person reporting the suspected abuse. Unless the presumption can be rebutted, a person act-

115. This section of the Illinois Act became effective July 1, 1975, and to date no actions have been filed under it.

116. 42 U.S.C. §§ 5101-5106 (Supp. IV 1974).

117. V. DEFRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970's (rev. ed. The Amer. Humane Ass'n, Children's Division 1974). See, e.g., ILL. REV. STAT. ch. 23, § 2059 (1977).

118. *Immunity Not Absolute for M.D. Reporting Child Abuse*, Pediatric News, Dec. 1977 at 3.

119. *Id.* at 3.

120. *Id.*

121. *Id.* at 54.

122. 11 PA. CONS. STAT. ANN. § 2201-2224 (Supp. 1977).

123. *Id.* at § 2211.

ing under the statute will be protected even if it later turns out that no abuse occurred. Failure to report suspected abuse is a misdemeanor under the Pennsylvania law.¹²⁴

The mother alleged in her suit that, as a consequence of the report being filed, she lost custody of her baby through a court order. The mother further alleged that there was no danger threatened to the infant when the report was filed, for the baby was then safe in the hospital.¹²⁵ She also stated that the doctor failed to take steps to resolve the problem with her and her relatives before filing the report.¹²⁶

A four-day trial of the case in the summer of 1977 resulted in a hung jury.¹²⁷ U.S. District Court Judge Charles Weiner then granted judgment in favor of Dr. Crawford as the case awaited retrial.¹²⁸ The judge ruled there was "insufficient" evidence to prove Dr. Crawford's actions violated the plaintiff's constitutional rights or interfered with the "personal relationship between the plaintiff and her child."¹²⁹ He stated that in this type of case the plaintiff must prove "bad faith," and that "the evidence clearly demonstrates that the doctor acted in good faith believing she was confronted with a situation that involved child abuse."¹³⁰

A physician has no legal responsibility to the parent of an abused child. The child, not the parent, is the doctor's patient, and, even if the doctor had also been treating the parent, all cases hold that no physician/patient privilege exists in a child abuse case.¹³¹ Consequently, if a physician files a report of child abuse, he is in no way violating a confidential relationship between the parent and himself. It not only is permissible for a physician to report suspected cases of child abuse, it is also ethically mandatory and is required by the statute.¹³²

Parent v. Judge

When a case of child abuse has been adjudicated and the judge has determined that the child should be removed from the custody of the family, the family may attempt to recover damages for loss of cus-

124. *Id.* at § 2212, which states that willful failure to report shall be punishable by a fine not exceeding \$300, and in default thereof imprisonment not exceeding ninety days.

125. *Immunity Not Absolute for M.D. Reporting Child Abuse*, *Pediatric News*, Dec. 1977 at 54.

126. *Id.*

127. *Id.* at 3.

128. *Id.*

129. *Id.* at 54.

130. *Id.*

131. *See, e.g., In re John Children*, 61 Misc. 2d 347, 306 N.Y.S.2d 797 (1969).

132. *See, e.g., ILL. REV. STAT. ch. 23, § 2054 (1977); 11 PA. CONS. STAT. ANN. § 2204 (Supp. 1977).*

tody under the Civil Rights Act.¹³³ Parental rights have been held by the courts to be fundamental rights entitled to constitutional protection, and courts have frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential,"¹³⁴ "basic civil rights of man,"¹³⁵ and "rights far more precious than property rights."¹³⁶ The United States Supreme Court has stated, "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹³⁷ The integrity of the family unit has found protection in the due process clause¹³⁸ and the equal protection clause¹³⁹ of the fourteenth amendment,¹⁴⁰ and the right to privacy in the ninth amendment.¹⁴¹

Counterbalanced against parental rights is state interest in the health and education of its citizens.¹⁴² The state's interest forms the basis of the constitutionality of statutes affecting custody of children and termination of parental rights.¹⁴³ Statutes specifically confer judicial jurisdiction in matters affecting custody.¹⁴⁴

Judges are cloaked with absolute immunity for acts committed within their judicial jurisdiction,¹⁴⁵ and such immunity applies even when the judge is accused of acting maliciously or corruptly.¹⁴⁶ This doctrine also applies if the suit is based directly on constitutional right or privilege.¹⁴⁷ Liability against the judge will lie only where his action was clearly outside the court's jurisdiction, not merely in excess of its jurisdiction.¹⁴⁸ State statutes specifically confer jurisdiction upon all courts except those of very limited jurisdiction, which by their very nature are restricted in what they can hear.

133. 42 U.S.C. § 1983 (Supp. IV 1974) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

134. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

135. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

136. *May v. Anderson*, 345 U.S. 528, 533 (1953).

137. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

138. *Meyer v. Nebraska*, 262 U.S. 390, 393 (1923).

139. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

140. U.S. CONST. amend. XIV, § 1.

141. *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965).

142. *Meek v. Pittenger*, 374 F. Supp. 639, 652 (E.D. Pa. 1974).

143. ILL. REV. STAT. ch. 23, § 2353 (1977).

144. *See, e.g.*, ILL. REV. STAT. ch. 37, § 705-2(d) (1977).

145. *See Stump v. Sparkman*, 98 S. Ct. 1099 (1978).

146. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

147. *Lowery v. Hauk*, 422 F. Supp. 490, 493 (C.D. Cal. 1976).

148. *Clark v. Zimmerman*, 394 F. Supp. 1166, 1175 (M.D. Pa. 1975).

Policy considerations are of utmost importance concerning a judge's personal liability for his judicial decisions. A free and independent judiciary is essential. Judges should not have to fear that unsatisfied or dissatisfied litigants may pursue them with litigation charging malice, corruption or deprivation of civil rights.¹⁴⁹ Consequently, a civil suit should not lie against a judge who removes a child from the custody of his/her parents in a court proceeding on child abuse where he judged such removal was necessary to protect the child. If the court has exceeded its authority, the proper remedy is to appeal for a reversal on the basis of abuse of discretion.¹⁵⁰

149. *Adkins v. Underwood*, 370 F. Supp. 510 (N.D. Ill. 1974), *aff'd*, 520 F.2d 890 (7th Cir. 1974); *White v. Brinkman*, 73 P.2d 254, 23 Cal. App. 2d 307 (1937).

150. *Stump v. Sparkman*, 98 S. Ct. 1099 (1978).