The Guardian Ad Litem and Civil Liability in California Child Maltreatment Cases

In this article the author first discusses the role of the person charged with protecting the child's best interests, the guardian ad litem, and suggests that deficiencies in the statutory scheme covering the guardian ad litem's authority and appointment make difficult the effective discharge of that responsibility. The author then surveys various theories upon which the guardian ad litem may predicate liability against people who fail to diagnose the battered child syndrome or report suspected child maltreatment, and people who abuse the child.

Parents or guardians in the United States annually abuse 200,000 to 500,000 children.[1] They severely neglect or sexually molest another 465,000 to 1,170,000 children.[2] In California the incidence of maltreatment is equally tragic.[3] This maltreatment includes emotional assault or deprivation, neglect, sexual exploitation, excessive corporeal punishment, and other forms of physical abuse.[4] In short, parents or guardians maltreat children by any act of commission or omission which endangers or impairs a child's physical or emotional health and development.

This article surveys the rights of children to bring civil actions for injuries sustained from such maltreatment. The law provides for the appointment of a person known as a guardian ad litem to represent and protect the child's best interest because children cannot represent themselves effectively. Since it is the guardian

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[1] A. SUSSMAN & S. COHEN, REPORTING CHILD ABUSE AND NEGLECT: GUIDELINES FOR LEGISLATION 117-118 (1975).

[2] *Id.* Authorities generally agree that the incidence of child maltreatment is even greater than current reporting statistics suggest. S. NAGI, CHILD MALTREATMENT IN THE UNITED STATES 33-58 (1977).

[3] About 55,000 cases a year are reported annually to California child protective services agencies and state officials believe these reports only account for about a fifth of the actual cases of child maltreatment. OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, CHILD ABUSE: THE PROBLEM OF THE ABUSED AND NEGLECTED CHILD 6, PAMPHLET No. 8 (1976).

[4] *Id.* at 1.

ad litem who must vindicate the child's rights, this article first focuses on the guardian ad litem's responsibilities in California's child maltreatment system.[5] It then explores the causes of action against people who fail to diagnose the battered child syndrome[6] or report[7] suspected child maltreatment.[8] Finally, the article examines the possibility of a civil action against the child abuser.[9]

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[5] *See* text accompanying notes 10-45 *infra*. *See also* note 12 *infra* for a brief discussion of the appointment of guardian ad litems in California.

[6] In 1962 Dr. Henry K. Kempe and a team of researchers published a landmark article on the battered child syndrome. Kempe, Silverman, Steele, Droegermueller, & Silver, *The Battered Child Syndrome,* 181 J.A.M.A. 17 (1962). The major diagnostic feature of the battered child syndrome is an unexplained, non-accidental injury. Proper treatment requires not only treating the symptomatic injury but also treating the underlying cause of the injury, the assault or negligence by the child's parents or guardians. Dr. Kempe and his colleagues concluded that proper medical management required the reporting of abused children to proper authorities for investigation and protective custody.

The judiciary first acknowledged the battered child syndrome as an accepted medical diagnosis in People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (4th Dist. 1971). *Accord,* State v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973), People v. Henson, 33 N.Y.2d 63, 304 N.E.2d 358, 349 N.Y.S.2d 657 (1973). By making the battered child syndrome a judicially recognized medical diagnosis, the court made the failure to diagnose, where a reasonably skilled physician would have diagnosed, similiar to other cases of malpractice for a missed diagnosis. Kohlman, *Malpractice Liability for Failing to Report Child Abuse,* 49 ST. BAR. J. 119, 122 (1974).

[7] CAL. PENAL CODE § 11161.5 (West Cum. Supp. 1979) requires a physician, surgeon, dentist, resident, intern, podiatrist, chiropractor, marriage, family, or child counselor, psychologist, or religious practioner to report suspected child maltreatment in any case in which a minor is brought for diagnosis, examination, or treatment, or is under the charge or care of the individual. A registered nurse employed by a public health agency, school, or school district who observes a child also must report if no physician, surgeon, resident, or intern is present. The law also requires a report from a superintendent, principal, teacher, supervisor of school welfare and attendance, or certified public personnel employee of any public or private school system. Finally, the law mandates a report from a licensed day care worker, an administrator of a public or private summer day camp or child care center, and a social worker, peace officer, or probation officer who suspects child maltreatment. The law mandates the report by telephone and in writing within 36 hours to both police and probation departments or, alternatively, either to the county welfare or health department where it appears from observation of the child that someone intentionally inflicted physical injuries, or inflicted injuries in violation of CAL. PENAL CODE § 273a (West Cum. Supp. 1979), or sexually molested the child.

[8] *See* text accompanying notes 46-111 *infra*.

[9] *See* text accompanying notes 112-142 *infra*.

I. The Guardian Ad Litem's Responsibilities

The guardian ad litem's major responsibility in the California child maltreatment system is to protect the child's best interests.[10] The present statutory framework, however, fails to give the guardian ad litem the authority necessary to discharge that responsibility effectively and also creates a potential conflict of interest between the guardian ad litem and the child.[11] These statutory infirmities necessarily inhibit the guardian ad litem's ability to protect the best interests of the child.

A. The Guardian Ad Litem's Role

The law provides for the early appointment of a guardian ad litem in a child maltreatment case.[12] It requires the court to appoint the guardian ad litem when a social worker or probation officer files a petition to make the child a dependent of the court based on alleged neglect or abuse.[13] A criminal prosecution against the parent or guardian arising from alleged neglect or abuse leads also to appointment of a guardian ad litem.[14]

The guardian ad litem must assume several roles in protecting the child's best interests.[15] The guardian ad litem must be an investigator, uncovering all relevant facts, laying them before the court, and insuring that the court is aware of the available op-

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[10] For an excellent discussion of the guardian ad litem's responsibilities *see* Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 Cal. W. L. Rev. 16 (1976). *See also* Note, *Appointment of Counsel for the Abused Child: Statutory Schemes and the New York Approach*, 58 Cornell L. Rev. 177 (1972).

[11] For an overview of California's child maltreatment system *see* Goodpaster & Angel, *Child Abuse and the Law: The California System*, 26 Hastings L. J. 1081 (1975). *See also* Comment, *The California Legislative Approach to Problems of Willful Child Abuse*, 54 Calif. L. Rev. 1805 (1966).

[12] California law traditionally has allowed the appointment of a guardian ad litem in civil cases whenever a minor is a party to a suit or whenever the court deems such an appointment expedient. Cal. Civ. Proc. Code §§ 372, 373 (West 1975). *See generally* Rodda, *About G.A.L.'S*, 41 L.A. Bar Bull. 237 (1966). The courts also have viewed appointment of a guardian ad litem as falling within their equitable jurisdiction. Mabry v. Scott, 51 Cal. App. 2d 245, 124 P.2d 659 (2d Dist. 1942), *cert. denied*, 317 U.S. 670 (1942). The law now requires the appointment of a guardian ad litem in all child maltreatment cases. Cal. Welf. & Inst. Code § 326 (West Cum. Supp. 1979).

[13] Cal. Welf. & Inst. Code § 326 (West Cum. Supp. 1979). The court may appoint a probation officer, social service worker, or some other adult as guardian ad litem. *Id.*

[14] *Id.*

[15] Fraser, *supra* note 10, at 33-34.

tions.[16] The guardian ad litem also must act as counsel and advocate, articulating an independent viewpoint as to what is in the child's best interest.[17] Perhaps most importantly, the guardian ad litem must serve as a genuine guardian, caring for the child and protecting the child's best interests.[18]

The guardian ad litem must assume these roles in several forums. The most common forum is juvenile court.[19] There the guardian ad litem helps the court decide whether to declare the child a dependent of the court.[20] If the court declares the child a dependent of the court, the guardian ad litem represents the child at the dispositional hearing and other subsequent proceedings.[21]

The guardian ad litem also may have to represent the child in a criminal prosecution against the parent or guardian.[22] Because of the ability to advocate a course of conduct that is in the child's best interests, the guardian ad litem's role in a criminal matter is critical.[23] The guardian ad litem, for example, may determine that a criminal action against the parent or guardian is not in the child's best interests.[24] In such a situation the guardian ad litem

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[16] *Id.* The case may have a significant history by time the court appoints the guardian ad litem. The events leading up to the guardian ad litem's appointment probably began with a report of suspected child maltreatment. *See* note 7 *supra.* Authorities possibly dispatched a peace officer, probation officer, social worker, or multi-disciplinary Suspected Child Abuse and Neglect (SCAN) team to the scene. If the child's home is unfit by reason of neglect, cruelty, depravity, or physical abuse, or if the detention of the minor is a matter of immediate and urgent necessity for the minor's protection, a peace officer may detain the child. CAL. WELF. & INST. CODE § 309 (West Cum. Supp. 1979). Authorities must release the minor within 48 hours, however, unless they file within that time a petition to declare the child a dependent minor of the court. CAL. WELF. & INST. CODE § 313 (West Cum. Supp. 1979). If such a petition is filed, only then does the court appoint the guardian ad litem. CAL. WELF. & INST. CODE § 326 (West Cum. Supp. 1979).

[17] Fraser, *supra* note 10, at 33-34.

[18] *Id.*

[19] Juvenile court considers petitions based on abuse or neglect to make the child a dependent minor of the court. *See generally* Note, *Dependency Proceedings: What Standard of Proof? An Argument Against the Standard of "Clear and Convincing,"* 14 SAN DIEGO L. REV. 1155 (1977), Comment, *Dependency Hearings: What Rights for the Parents?*, 6 U.C. DAVIS L. REV. 240 (1973).

[20] *See* note 19 *supra.*

[21] *See* note 19 *supra.*

[22] CAL. WELF. & INST. CODE § 326 (West Cum. Supp. 1979).

[23] This assumes that the court appoints an independent guardian ad litem rather than the District Attorney. *See, e.g.*, CAL. WELF. & INST. CODE § 351 (West Cum. Supp. 1979). The appointment of a District Attorney creates a potential conflict of interest. *See* text accompanying notes 36-45 *infra.*

[24] Some commentators feel strongly that a criminal action is inappropriate in

can urge family crisis counselling for the parents in lieu of the criminal prosecution.[25]

Finally, the guardian ad litem may represent the child's best interests in a civil matter.[26] Because the criminal sanctions of the mandatory reporting statute[27] have not worked,[28] civil actions are necessary to induce enumerated reporters to report suspected child maltreatment.[29] The guardian ad litem, therefore, has a responsibility to consider the appropriateness of a civil action on the child's behalf.[30]

B. The Guardian Ad Litem's Authority

The present statutory framework, unfortunately, fails to fully provide the guardian ad litem with the authority necessary to protect the child's best interests.[31] While the statute is silent,[32]

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child maltreatment cases. *See* V. FONTANA & D. BESHAROV, THE MALTREATED CHILD: THE MALTREATMENT SYNDROME IN CHILDREN: A MEDICAL, LEGAL, SOCIAL ANALYSIS 63 (3rd. ed. 1977).

[25] CAL. PENAL CODE § 273ab (West Cum. Supp. 1979).

[26] While California relies on common law tort theories to afford civil redress to the child, at least five states have specific liability provisions subjecting all persons mandated to report to civil liability for failing to report. ARK. STAT. ANN. § 42-816(b) (Supp. 1975), COLO. REV. STAT. § 19-10-104(4)(b) (Supp. 1975), IOWA CODE ANN. § 235A-9(2) (West Cum. Supp. 1978), MICH. COMP. LAWS ANN. § 25.248(13) (Supp. 1976). *See* J. COSTA & G. NELSON, CHILD ABUSE & NEGLECT: LEGISLATION, REPORTING, & PREVENTION 30 (1978).

[27] CAL. PENAL CODE § 11161.5 (West Cum. Supp. 1979), *set forth* in note 7 *supra.*

[28] One reason the criminal statutes have not worked is because authorities are reluctant to impose criminal sanctions on a reporter when there are such limited resources for dealing with a case, even if the person reports it. CAL. ASSEMBLY HUMAN RESOURCES COMMITTEE, HEARING ON CHILD ABUSE 135-137 (Nov. 29, 1977)(Testimony of Kathy Baxter, Director of the San Francisco Child Abuse Council) [hereinafter cited as ASSEMBLY HEARINGS].

[29] As one commentator put it, "The criminal process has not responded well to the problems of the battered child; only private damage claims against non-complying doctors and hospitals can give the child abuse reporting statute the desired prophylactic effect." Kohlman, *supra* note 6, at 122.

[30] *See generally,* Isaacson, *Child Abuse Reporting Statutes: The Case for Holding Physicians Civilly Liable for Failure to Report,* 12 SAN DIEGO L. REV. 743 (1975); Comment, *Civil Liability for Failing to Report Child Abuse,* 1 DETROIT COLLEGE OF LAW L. REV. 135 (1977); Note, *The Battered Child: Logic in Search of Law,* 8 SAN DIEGO L. REV. 364 (1971); Comment, *The Battered Child - A Doctor's Civil Liability for Failure to Diagnose and Report,* 16 WASHBURN L. J. 543 (1977).

[31] *See generally,* Fraser, *supra* note 10, at 33-34.

[32] The California statute simply provides for the guardian ad litem's appoint-

the Juvenile Court Rules do allow the guardian ad litem to inspect police, probation officer, and social worker reports, and all other documents filed with the court or made available to the probation officer or social worker in preparing the dependency petition.[33] By authorizing the guardian ad litem's access to all relevant reports, the rule helps the guardian ad litem protect the child's best interests.[34] The statutory framework, however, also should guarantee the guardian ad litem's authority to interview, introduce, examine, and cross-examine witnesses in both the adjudicational and dispositional hearings, make recommendations, and participate to the degree appropriate.[35] The guardian ad litem can represent the child effectively only if the statute prescribes such authority. Otherwise, the guardian ad litem must depend on the voluntary cooperation of social service workers, police officers, and other people who have no legal obligation to provide the guardian ad litem with relevant information or assist the guardian ad litem in any way. The absence of such statutorily guaranteed powers may not inhibit institutional representatives, such as social workers or probation officers, since they already may have cooperative arrangements with the various agencies. The lack of authority, however, may affect non-institutional guardian ad litem's who must work through the system without the benefit of such informal arrangements.

C. The Guardian Ad Litem's Potential Conflict of Interest

By permitting the appointment of a probation officer or social worker as guardian ad litem,[36] or the District Attorney as the minor's attorney,[37] the statutory framework also creates a potential conflict of interest in child maltreatment cases.[38] This poten-

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ment without mentioning any grant of authority. CAL. WELF. & INST. CODE § 326 (West Cum. Supp. 1979).

[33] CAL. JUV. CT. R. § 1333(b) (West 1979).

[34] Unlike California, some states give the guardian ad litem a statutory grant of authority. *See, e.g.*, COLO. REV. STAT. ANN. § 19-3-101(4)(1973). *See also* J. COSTA & G. NELSON, *supra* note 26, at 42.

[35] *See* Fraser, *supra*, note 10, at 33-34.

[36] CAL. WELF. & INST. CODE § 326 (West Cum. Supp. 1979).

[37] CAL. WELF. & INST. CODE § 351 (West Cum. Supp. 1979).

[38] The possible application of the law creates the potential conflict of interest. The law permits the appointment of a probation officer, social worker, or some other adult as guardian ad litem. CAL. WELF. & INST. CODE § 326 (West Cum. Supp. 1979). If the court determines that there is a conflict of interest between the child and the parent or guardian, the law also mandates appointment of an attorney, who may be the District Attorney, to represent the child. CAL. WELF.

tial conflict arises from the law's failure to fully acknowledge the various interests in a child maltreatment case.[39] In its traditional role of parens patriae,[40] the state has an interest in asserting jurisdiction over the child and intervening with the family if necessary to protect the child from harm. The child's interests may conflict with the disposition urged by the state or with the parent's or guardian's interest in maintaining custody.[41] A social worker, for example, may desire to leave the child with the family because budget constraints make it difficult to place the child elsewhere.[42] An independent guardian ad litem can argue for action which is in the child's best interest without having the decision shaded by institutional bias.

Another illustration of the potential conflict involves civil actions. Social workers, probation officers, or county counsel may be less sensitive than private attorneys to the possibility of bringing civil actions.[43] Moreover, their own negligence in a child mal-

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& INST. CODE §§ 317, 318 (West Cum. Supp. 1979). If the courts read these statutes together to provide a framework for independent representation then the child is unharmed. The conflict of interest erodes any meaningful representation, however, to the extent that courts appoint the state's or parent's counsel to represent the child.

[39] The parents, the minor, and the probation officer or social service worker who represents the state are the three basic parties to a dependency proceeding. As petitioner, the state seeks to have the child brought under the jurisdiction of the court. Presumably, the parents are fighting to retain custody of the child, and the child is caught in the middle. Notwithstanding the adversarial position of the state and the parents, California law still says that the court shall appoint as guardian ad litem the probation officer or social worker who brought the petition, unless the court appoints another adult. CAL. WELF. & INST. CODE § 326 (West Cum. Supp. 1979).

[40] "(T)he state, as a sovereign - referring to the sovereign power of guardianship over persons under disability, such as minors . . . ." BLACK'S LAW DICTIONARY 1269 (rev. 4th ed. 1978).

[41] A federal district court recently held unconstitutional a statute similiar to California's own statutory scheme for the appointment of guardian ad litems. Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977), *prob. juris. noted*, 99 S. Ct. 306 (1978) (No. 78-6, 1978 Term). The Texas statute allowed any party to represent the child if there were no adversarial interests. The court thought the statute unconstitutional as applied to the extent that courts appointed the state to represent the child. Emphasizing the separate competing interests involved in child maltreatment cases, the court held that the law violated the due process clause of the Constitution by not requiring independent representation for the child. *Id.* at 1194.

[42] One study found that less than 20% of the CPS workers polled felt it their role to protect the child's best interests. NEW YORK CITY TASK FORCE ON CHILD ABUSE AND NEGLECT, FINAL REPORT 98 (1971).

[43] Social workers or probation officers are not trained to bring civil actions.

treatment case may expose them to liability.[44] Under such circumstances they realistically cannot bring a civil action against themselves on the child's behalf.[45] In short, the statutory framework fails to recognize that what the state or parents desire is not always in the child's best interests.

II. Children's Rights to Recover Against People Who Fail to Diagnose or Report

Despite the statutory shortcomings,[46] the guardian ad litem still must consider civil actions against certain individuals who fail to diagnose the battered child syndrome[47] or report suspected child maltreatment.[48] In considering their liability, the guardian ad litem must determine whether the potential tortfeasor is a medical or non-medical person enumerated in the mandatory reporting statute.[49] This division reflects the potential differences in liability which may occur because of the factual distinctions between the two groups of reporters.[50] These reporters face liabil-

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While county attorneys could bring such actions, private attorneys may be more sensitive to initiating civil claims because of the constant assertion of plaintiffs' rights involved in private practice.

[44] In bringing an action against probation officers, social workers, school officials, or other government employees, the guardian ad litem should have little problem with California's limited governmental tort immunity. Cal. Gov't Tort Claims Act, Cal. Gov't Code §§ 820-822.2 (West Cum. Supp. 1979). The courts interpret the law as affording immunity only for basic policy decisions. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 446-447, 551 P.2d 334, 350, 131 Cal. Rptr. 14, 30 (1976) (rejecting government immunity for publicly employed psychotherapists who failed to warn or protect an endangered third party); Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). (rejecting immunity for a parole officer who failed to warn foster parents of the dangerous propensities of a parolee placed in their home).

[45] *See* text accompanying notes 46-111 *infra*.

[46] The statutory scheme governing California's central registry system also may have some shortcomings. In Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977), *prob. juris. noted,* 99 S. Ct. 306 (1978) (No. 78-6, 1978 Term), the court struck down a registry similiar to California's. It held that the information gathering and dissemination of the Texas Child Abuse Reporting and Inquiry System (CANRIS) violated due process and the right to privacy. The California Department of Justice maintains a similar registry pursuant to Cal. Penal Code §§ 11110, 11161.5 (West Cum. Supp. 1979). While the department claims that it does not enter unfounded cases into the registry files, California law does not regulate the filing, review, appeal, or expungement of data.

[47] *See* note 6 *supra*.

[48] *See* note 7 *supra*.

[49] Cal. Penal Code § 11161.5 (West Cum. Supp. 1979), *set forth in* note 7 *supra*.

[50] *See* notes 59-60 and accompanying text *infra*.

ity under the negligence or professional malpractice theory[51] and the negligence per se or statutory theory.[52]

A. The Negligence or Professional Malpractice Theory

The first theory which exposes enumerated reporters to civil liability is the common law negligence theory. In *Landeros v. Flood,*[53] the California Supreme Court held that a physician faces liability under the negligence theory if a reasonably skilled physician of ordinary skill would have diagnosed the battered child syndrome and suspected child maltreatment.[54] Thus, the *Landeros* court found that a physician who failed to x-ray[55] a child, diagnose the battered child syndrome, and report sus-

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[51] *See* text accompanying notes 53-91 *infra.*

[52] *See* text accompanying notes 92-111 *infra.*

[53] Landeros v. Flood, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976). Although *Landeros* was the first child abuse case to reach the court, an earlier case successfully obtained the liability of a physician for failing to report. Robinson v. Elvin Wical, M.D., et. al., Civil No. 37607 (Cal. Sup. Ct., San Luis Obispo, filed Sept. 4, 1970). The parties settled on the third day of trial for $500,000 when the court indicated that it would direct a verdict for the plaintiff leaving the issue of damages for the jury. TIME, Nov. 20, 1972, at 74; L.A. TIMES, Oct. 28, 1972, at 1, col. 6. For a discussion of the case by the plaintiff's attorneys *see* Ramsey & Lawler, *The Battered Child Syndrome,* 1 PEPPERDINE L. REV. 372 (1974).

[54] Landeros v. Flood, 17 Cal. 3d 399, 409, 551 P.2d 389, 392-393, 131 Cal. Rptr. 69, 72-73 (1976).

[55] Since a major characteristic of child abuse is its repetitive nature, positive results with an x-ray trauma survey strongly indicate that someone intentionally injured the child. These x-rays will show various bone injuries in various stages of healing. Physicians may have to resort to subterfuge to x-ray a child, however, despite their potential liability for failing to x-ray. Lashley v. Koerber, 26 Cal. 2d 83, 156 P.2d 441 (1945). Parents' reluctance to consent to a trauma survey of the minor has led some states to give the physician or hospital administration the right to x-ray without parental permission or even against parental wishes. COLO. REV. STAT. ANN. § 19-10-106 (Cum. Supp. 1976); PA. STAT. ANN. tit. 11, § 2207 (Purdon Cum. Supp. 1979). Physicians also have to worry about being paid for the x-rays since California, unlike some other states, has no law permitting x-rays at public expense in child maltreatment cases. MISSOURI ANN. STAT. § 210.120 (Vernon Cum. Supp. 1978); N.Y. SOC. SERV. LAW § 416 (McKinney 1975). *See* J. COSTA & G. NELSON, *supra* note 26, at 25. *See generally* Silverman, *Radiologic Aspects of the Battered Child Syndrome* 41, in THE BATTERED CHILD (2d ed. R. Helfer & C. Kempe eds. 1974). Authorities may also want a qualified photographer to photograph the victim. *See* Ford, Smestek, & Glass, *Photography of Suspected Child Abuse and Maltreatment,* 3 BIOMEDICAL COMMUNICATIONS 12 (1975). CAL. PENAL CODE § 11161.5 (West Cum. Supp. 1979) grants immunity for the taking of photographs used in report of suspected child maltreatment.

pected child abuse faced liability for the injuries proximately caused[56] by his conduct.

While *Landeros* explicitly holds a medical reporter liable for failing to diagnose the battered child syndrome,[57] the liability of a non-medical reporter remains uncertain. In addition to medical reporters, the reporting statute enumerates non-medical reporters such as social workers, probation officers, and certain school officials.[58] The courts may decline to impose liability on the non-medical reporters under the negligence theory, however, because of the factual distinctions between them and the medical reporters enumerated in the statute.[59] The courts may decide, for example, that it is unfair to impose a civil penalty on a non-medical person for failing to make a difficult medical diagnosis that eludes many physicians.[60]

The reasons which justify holding non-medical reporters liable, however, parallel the policies which justify liability against medical reporters.[61] The non-medical reporter helps prevent child mal-

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[56] The *Landeros* court held that a physician's failure to report is a proximate cause of the child's injuries if the abuser's conduct was foreseeable. If it is foreseeable, the abuser's conduct is not an intervening factor relieving the physician from liability. Under such circumstances the physician's omission constitutes a substantial factor in causing the child's injuries and satisfies the proximate cause requirement. Landeros v. Flood, 17 Cal. 3d 399, 411, 551 P.2d 389, 395, 131 Cal. Rptr. 69, 75 (1976).

[57] *Id.* at 409, 551 P.2d at 392-393, 131 Cal. Rptr. at 72-73.

[58] CAL. PENAL CODE § 11161.5 (West Cum. Supp. 1979), *set forth* in note 7 *supra.*

[59] The California Court of Appeals that considered *Landeros*, for example, thought it reasonable to impose civil liability on physicians for failing to report suspected child maltreatment. It expressed serious reservations, however, about extending liability to other enumerated reporters. Landeros v. Flood, 123 Cal. Rptr. 713, 725, (1st Dist. 1975), *rev'd*, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

[60] The guardian ad litem may want to characterize the non-medical reporter's standard of care as whether a reasonably skilled professional in that profession would have suspected child maltreatment, as opposed to whether the person would have diagnosed the battered child syndrome. The real inquiry should be whether a reporter, using the skills and care reasonable to that position, should have suspected child maltreatment. A non-medical reporter may be unable to detect the battered child syndrome because of an inability to take x-rays and medically assess the child's condition. It is a different matter when the child has bruises, broken bones, and other superficial trauma indicating intentionally inflicted injuries. Even in the absence of sophisticated medical skills and technology, the nature of the injuries should induce a suspicion of child maltreatment. The suggested characterization of the issue avoids the pitfalls of arguing that a non-medical reporter should have made a medical diagnosis.

[61] *See* text accompanying notes 28-30 *supra.* In one early study a fifth of the

treatment.[62] They sometimes receive special training in the detection and care of the battered child,[63] and often have positions and relationships to children which justify the imposition of an affirmative duty to use due care.[64] The law should hold them to a standard of care which a reasonably skilled person in their profession would exercise.[65]

Even if reporters diagnose the battered child syndrome and suspect maltreatment, they act negligently if they fail to report the abuse.[66] Although the *Landeros* court confuses the source of this duty to report,[67] it appears that two theories justify finding such a duty. One analysis suggests that the reporting requirement arises because proper medical care of the battered child syndrome includes reporting the case to authorities.[68] At least with medical reporters, therefore, the failure to report constitutes conduct below that which a reasonably skilled and prudent physician would exhibit. The trier of fact may not expect the non-medical reporter to satisfy this medical standard of care,[69] although a non-medical reporter's standard of care arguably requires reporting. The trier of fact, for example, may determine that reasonably

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surveyed physicians said they rarely or never considered abuse when seeing an injured child and a fourth said they would not report suspected child maltreatment even though the law protected them from a civil suit for a false report. Bensel, *The Neglect and Abuse of Children: The Physician's Perspective,* 8 CREIGHTON L. REV. 757, 769 (1975).

[62] The reporters naturally come into contact with children and are often the first to notice the unusual emotional problems or physical injuries which accompany maltreatment. Their report to authorities leads to the state's intervention and the prevention of further harm to the child.

[63] For example, many police departments, such as the Los Angeles Police Department and the San Diego Police Department, are known for their specialized child abuse units. These multi-disciplinary units, often called Suspected Child Abuse and Negligence (SCAN) teams, typically include a physician, social worker, and police officer, or a similiar combination of trained professionals.

[64] RESTATEMENT (SECOND) OF TORTS § 315 (1979).

[65] Landeros v. Flood, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

[66] *Id.*

[67] In discussing the negligence or malpractice theory, the court suggested that once a physician diagnosed the battered child syndrome the mandatory reporting statute supplied the duty to report. *Id.* at 410 n.8, 551 P.2d at 393 n.8, 131 Cal. Rptr. at 73 n.8. In using the negligence theory, however, it is more precise to characterize a duty to report as arising independent of the reporting statute as a consequence of a special relationship between the reporter and child. RESTATEMENT (SECOND) OF TORTS § 315 (1979).

[68] Landeros v. Flood, 17 Cal. 3d 399, 410, 551 P.2d 389, 393, 131 Cal. Rptr. 69, 73 (1976).

[69] *See* note 59 *supra.*

skilled social workers or probation officers would suspect and report a child maltreatment case in the reasonable exercise of their professional responsibilities. This argument becomes more tenuous when applied to certain other kinds of non-medical reporters, such as day camp counselors or licensed day care workers, because the standard of care for these reporters probably would not include reporting child maltreatment, absent a statutory mandate.[70]

The more compelling analysis, especially for the non-medical reporters, suggests that the existence of a special relationship between the reporter and the child imposes an affirmative duty to report the child maltreatment.[71] The courts already view the physician-patient relationship as a special relationship.[72] Similarly, the courts should find that a special relationship also exists between non-medical reporters and children. Non-medical reporters regularly come into contact with children, exercise a significant degree of control over them, and generally have some responsibility for their safety and welfare.[73] The courts already have held that certain non-medical reporters have a special relationship to children.[74] The responsibility and control exercised by non-medical reporters over children argues for finding such a special relationship between them in child maltreatment cases. This special relationship imposes the affirmative duty on the reporter

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[70] California courts traditionally have been reluctant to impose a duty on a person to control the conduct of another, Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Wright v. Arcade School District, 230 Cal. App. 2d 272, 40 Cal. Rptr. 812 (3rd Dist. 1964), or warn those endangered by such conduct. RESTATEMENT (SECOND) OF TORTS § 314, Comment c (1979). This reluctance stems from the common law distinction between misfeasance and nonfeasance and the desire of the court not to impose liability for the latter. *See* Harper & Kime, *The Duty to Control the Conduct of Another,* 43 YALE L. J. 886, 887 (1934).

[71] RESTATEMENT (SECOND) OF TORTS § 315 (1979).

[72] Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 437, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976).

[73] Social workers, probation officers, school personnel, day camp counselors, and licensed day care workers are all examples of non-medical reporters who often see children and who are charged with some responsibility for their safety and welfare. For a list of other enumerated reporters *see* CAL. PENAL CODE § 11161.5 (West Cum. Supp. 1979), *set forth* in note 7 *supra.*

[74] For example, California courts have found special relationships exist between teachers and students. Dailey v. Los Angeles Unified School District, 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970); Taylor v. Oakland Scavenger Co., 17 Cal. 2d 594, 110 P.2d 1044 (1941).

to report suspected child maltreatment under the negligence theory.[75]

In addition to the situation in *Landeros* where the medical reporter actually observed the child, a reporter who has not actually observed the child may still face liability under the negligence theory. In *Tarasoff v. Regents of the University of California,*[76] the California Supreme Court held that a therapist who determines pursuant to the standards of the profession that a patient presents a serious danger of violence to another person has a duty to use reasonable care under the circumstances to protect the intended victim against such danger.[77] The law imposes this affirmative duty to control the dangerous patient or warn third parties endangered by the patient because of the special relationship which exists between the psychotherapist and the patient.[78] Thus, the duty to protect articulated in *Tarasoff* should impose on a psychotherapist a duty to protect a child endangered from maltreatment by the patient, even if the therapist has not observed the child.[79] A child maltreated by a patient is the kind of endangered third party envisioned by the *Tarasoff* court.[80] Once the therapist learns of the situation the child's vulnerability requires more than a simple warning of the danger.[81] *Tarasoff* demands that the therapist report the maltreatment to the police or other authorities who can intervene to protect the child from further danger.[82]

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[75] RESTATEMENT (SECOND) OF TORTS § 315 (1979).

[76] 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

[77] *Id.* at 440, 551 P.2d at 345, 131 Cal. Rptr. at 25.

[78] *Id.* at 434-435, 551 P.2d 342-343, 131 Cal. Rptr. at 22-23.

[79] This conclusion conflicts with a pre-Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), opinion by the California Attorney General's Office holding that a psychotherapist has no duty to report a patient who admits to child maltreatment. 57 OPS. ATT'Y GEN. 205 (1974). When a therapist observes a patient who is actually the victim of maltreatment the duty to report under CAL. PENAL CODE § 11161.5 (West Cum. Supp. 1979) prevails over the therapist-patient privilege. 58 OPS. ATT'Y GEN. 824 (1975).

[80] "(O)nce the therapist does . . . determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger." Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 440, 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25 (1976).

[81] The reporter must do more than merely warn, otherwise the child remains in danger. The child may be so young, frightened, or hurt that a warning is just a useless exercise. Common sense dictates a standard of care from the reporter higher than merely warning a young child of potential or continued abuse.

[82] The psychotherapist-patient privilege contained in EVID. CODE § 1014

The affirmative duty to protect also should extend to other medical reporters such as physicians, psychiatrists, or psychologists and children endangered by a patient of theirs. The *Tarasoff* court considered psychotherapists comparable to doctors and included psychiatrists and psychologists in its analysis.[83] The opinion suggests that no distinction exists between the various professional-patient relationships for purposes of imposing the affirmative duty.[84]

Whether the application of the negligence theory suggested by *Tarasoff* exposes a non-medical reporter to civil liability depends on whether a special relationship exists between the reporter and the child analogous to the one found in *Tarasoff*.[85] The guardian ad litem may be able to prove the existence of an analogous special relationship in some cases. A parolee may tell a probation officer that the parolee is abusing a child, for example, or a parent may similiarly confess to a social service worker. Both scenarios are the analog to the physician who must act to protect a child from harm by a patient.[86] In all three cases the court should find that a special relationship exists between the reporter and the person seeking assistance.[87] In a child maltreatment case this special relationship should give rise to an affirmative duty to protect the endangered third party, the battered child.[88]

The imposition of liability in child maltreatment cases which have facts similiar to *Tarasoff's* seems prudent when balanced against the potential harm to children and their parents. The

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(West Cum. Supp. 1979) is not an obstacle in apprising authorities of the child's plight. The therapist has no privilege if there is reasonable cause to believe the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another, and that disclosure of the communication is necessary to prevent the threatened danger. CAL. EVID. CODE § 1024 (West Cum. Supp. 1979). *See generally* Comment, *Dangerous Patient Exceptions and the Duty to Warn,* 9 U.C. DAVIS L. REV. 549 (1976). The therapist also has no privilege for information which the law requires to be reported to public employees. CAL. EVID. CODE § 1026 (West Cum. Supp. 1979). If the psychotherapist actually observes the child, CAL. EVID. CODE § 1027 (West Cum. Supp. 1979) abrogates the privilege.

[83] Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 439, 551 P.2d 334, 345, 131 Cal. Rptr. 3d 425, 439 (1976).

[84] *Id.*

[85] *See, e.g.,* Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

[86] These examples are analogous to a patient telling a psychotherapist that the patient is abusing a child. *See* text accompanying notes 80-82 *supra.*

[87] RESTATEMENT (SECOND) OF TORTS § (1979).

[88] *Id.*

absence of intervention by the state may expose the child to continued abuse from the parent or guardian.[89] By requiring suspected child abuse reports, the state can intervene to treat the parent or guardian and spare the child from further harm. The imposition of a civil penalty for failing to report encourages reporters to discharge their legal obligations.[90]

The possibility of incurring civil liability for filing a false report, however, legitimately may concern a reporter who has not observed the child. The law presently affords immunity for a report only where the reporter observes the child.[91] The legislature should amend the statute to provide immunity for a report from a reporter who has not observed the child, unless the reporter knows or should have known that the report was false.

B. The Negligence Per Se or Statutory Theory

The negligence per se or statutory theory also imposes civil liability on reporters who fail to report suspected child maltreatment.[92] The civil liability arises under certain circumstances be-

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[89] Parents or guardians who abuse a child once are likely to do so again. Landeros v. Flood, 17 Cal. 3d 399, 411, 551 P.2d 389, 395, 131 Cal. Rptr. 69, 75 (1976).

[90] *See* note 29 *supra.*

[91] CAL. PENAL CODE § 11161.5 (West Cum. Supp. 1979). When California became the first state to enact a reporting statute in 1963, the new law gave physicians discretion to withhold a report if, in their opinion, reporting jeopardized the health, care, or treatment of the minor. The statute, however, did not provide immunity from civil liability for a false report. In 1965 the legislature amended the statute to extend immunity for reporting in good-faith, but replaced the discretionary reporting scheme for physicians with a mandatory reporting obligation. *See* Comment, *Observation on the Establishment of a Child Protective Services System in California*, 21 STAN. L. REV. 1104 (1969).

[92] Because Landeros v. Flood, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976), revolved around a physician, it is unclear to what extent the negligence per se theory imposes liability on non-medical reporters. For example, the guardian ad litem may have limited success using this theory in an action against a social worker or probation officer for failing to report suspected child maltreatment to the police. Social workers argue that the law requires referral to police only when a social worker determines referral is "necessary to protect the child and correct the situation". CAL. WELF. & INST. CODE § 16501 (West Cum. Supp. 1979). Police contend that CAL. WELF. & INST. CODE § 16506 (West Cum. Supp. 1979) requires social workers to report to the police. ASSEMBLY HEARINGS, *supra* note 28, at 13-15 (Nov. 22, 1977) (Testimony of Michael Gates, Deputy Attorney General, California Dep't of Justice). The law appears to require the welfare department to report to the police only if a child abuse case comes to the attention of a director of a county welfare department. CAL. PENAL CODE § 11161.5 (West Cum. Supp. 1979). The probation officer's duty is unclear

cause the violation of a criminal statute which does not provide for a civil remedy creates a presumption of negligence.[93] The violation must proximately cause the kind of harm the legislature intended the statute to guard against and it must occur to a person within the class the statute protects.[94] Thus, in *Landeros* the court held that a physician who fails to report suspected child maltreatment is liable under the negligence per se theory.[95] A physician's violation of the mandatory reporting statute establishes a presumption of negligence because the maltreatment which occurs is the kind of harm the statute proscribes and it occurs to a child, a person within the class which the statute protects.

In approving the negligence per se theory, the court adopted a subjective standard of liability with respect to the required mental state of the physician.[96] This subjective standard requires that the guardian ad litem prove the physician actually observed the injuries and formed the opinion that they were intentionally inflicted on the child.[97] Because it is hard to prove the mental state of the reporter, the guardian ad litem may find it difficult to secure liability using the negligence per se theory.

While the court did adopt a subjective standard of liability for the negligence per se theory, it also approved use of the negligence or malpractice theory.[98] By approving the negligence theory, along with the negligence per se theory, the court effectively established an objective standard of liability in child maltreatment cases. If the reporter suspected or should have suspected child maltreatment, the negligence theory imposes liability regardless

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because probation officers are included in both the mandatory and permissive reporting statutes. CAL. PENAL CODE §§ 11161.5, 11161.6 (West Cum. Supp. 1979). *See* ASSEMBLY HEARINGS, *supra* note 28, at 101 (Testimony of Captain Andrew Kristensen, San Francisco Police Dep't).

[93] CAL. EVID. CODE § 669 (West Cum. Supp. 1979) codifies the common law statute.

[94] CAL. EVID. CODE § 669 (West Cum. Supp. 1979).

[95] Landeros v. Flood, 17 Cal. 3d 399, 415, 551 P.2d 389, 397, 131 Cal. Rptr. 69, 77 (1976).

[96] The court noted that CAL. PENAL CODE § 11161.5 (West Cum. Supp. 1979) is ambiguous on the required state of mind of a physician. The court analogized the civil suit to a criminal prosecution. In a criminal prosecution the prosecutor must prove that it actually appeared to the physician that someone inflicted the injuries on the child. The court adopted that construction for the civil suit because it resolves the statute's ambiguity in the offender's favor. Landeros v. Flood, 17 Cal. 3d 399, 416, 551 P.2d 389, 397, 131 Cal. Rptr. 69, 77 (1976).

[97] *Id.*

[98] *See* text accompanying notes 53-91 *supra*.

of the reporter's actual mental state.[99] This objective standard is easier to meet since it involves a lower burden of proof, as contrasted to the subjective theory which requires proof of the reporter's actual mental state.[100] Notwithstanding the easier objective standard available with the malpractice theory, the guardian ad litem should also plead the negligence per se theory. If the guardian ad litem can prove actual knowledge, use of the negligence per se theory avoids the duty issue involved with the negligence theory.[101]

While violation of the statute establishes a presumption of negligence, the guardian ad litem still must prove that the physician's failure to report proximately caused the child's injury.[102] Since the courts narrowly construe the provisions of the law which justify or excuse non-compliance with the statute, a reporter probably cannot escape liability by arguing lack of causation. The law permits deviation from a statute only in response to an emergency or for conduct which a reasonable person would have taken in an effort to comply with the statute.[103] Neither exception supports a failure to comply with the mandatory reporting statute. Even in an emergency the reporter should have time to report within the thirty-six hours allowed by law.[104] As for the excuse exception, a reporter who fails to report suspected maltreatment does not exhibit conduct which a reasonable person would have taken in an effort to comply with the statute.

The *Landeros* court also held that a hospital which fails to report suspected child maltreatment faces liability under the negligence per se theory.[105] By failing to report the maltreatment the hospital violates Penal Code § 11160 which requires a hospital or pharmacy to report immediately to the police a case in which someone has injured another person by use of a deadly weapon or in violation of any state penal law.[106] The hospital's failure to

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[99] *See* text accompanying note 54 *supra.*

[100] *See* note 96 *supra.*

[101] *See* text accompanying notes 66-75 *supra.*

[102] CAL. EVID. CODE § 669 (West Cum. Supp. 1979). *See* note 56 *supra.*

[103] CAL. EVID. CODE § 669 (West Cum. Supp. 1979).

[104] CAL. PENAL CODE § 11161.5 (West Cum. Supp. 1979) mandates the reporter to report suspected child maltreatment to the proper authorities within 36 hours of the incident. A court might excuse non-compliance if extenuating circumstances prohibited reporting within 36 hours, but the person had demonstrated good faith by reporting the abuse as soon as it was possible.

[105] Landeros v. Flood, 17 Cal. 3d 399, 416, 551 P.2d 389, 397, 131 Cal. Rptr. 69, 77 (1976).

[106] Authorities use penal code sections relating to murder, assault and battery,

report creates a presumption of negligence because the parent or guardian may injure a child with a deadly weapon or in violation of a state penal law.[107]

In summary, the guardian ad litem has several theories upon which to base a civil action against a person enumerated in the mandatory reporting statute. The negligence or malpractice theory may impose liability against a reporter who fails to diagnose the battered child syndrome or report suspected child maltreatment.[108] The negligence theory may also impose liability against a reporter who breaches an affirmative duty to warn or protect a child they have not seen from further maltreatment.[109] The negligence per se or statutory theory imposes liability against both reporters[110] and hospitals[111] which fail to report suspected maltreatment.

III. Liability Against the Parent or Guardian for Child Maltreatment

In addition to an action against an enumerated reporter,[112] the guardian ad litem also should consider a tort action against the

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excessive corporeal punishment, neglect, sexual exploitation, lewd and lascivious conduct, and other crimes in prosecuting child maltreatment cases. Cal. Penal Code §§ 261.5, 273a, 273d, 273g, 288 (West 1970 & West Cum. Supp. 1979). *See e.g.*, People v. Peabody, 46 Cal. App. 3d 43, 119 Cal. Rptr. 780 (5th Dist. 1975); People v. Atkins, 53 Cal. App. 3d 348, 125 Cal. Rptr. 855 (3d Dist. 1975); People v. Rodriguez, 186 Cal. App. 2d 433, 8 Cal. Rptr. 863 (2d Dist. 1960). *See generally* McKenna, *A Case Study of Child Abuse: A Former Prosecutor's View*, 12 Am. Crim. L. Rev. 165 (1974).

[107] Some hospitals establish child abuse committees to determine whether someone has abused a child. If the committee does not suspect child maltreatment, the hospital is probably not liable for failing to report, even if it turns out someone actually maltreated the child. The courts would probably impose a subjective standard for Cal. Penal Code § 11160 (West Cum. Supp. 1979) since a hospital can only report injuries inflicted by a deadly weapon or in violation of the Penal Code when it has actual knowledge that such circumstances exist. For a discussion of the subjective standard as applied to Cal. Penal Code § 11161.5 (West Cum. Supp. 1979) *see* text accompanying notes 98-102 *supra*.

Notwithstanding a committee determination, a committee member who actually suspects child maltreatment risks liability on a negligence per se theory for failing to report. The law does not immunize a reporter with actual knowledge but who defers to a committee determination. Cal. Penal Code § 11161.5 (West Cum. Supp. 1979).

[108] *See* text accompanying notes 53-75 *supra*.

[109] *See* text accompanying notes 76-91 *supra*.

[110] *See* text accompanying notes 92-104 *supra*.

[111] *See* text accompanying notes 105-107 *supra*.

[112] *See* text accompanying notes 46-111 *supra*.

child abuser. Before bringing such an action, however, the guardian ad litem first must consider whether the action is in the child's best interests. If a civil action is appropriate, the guardian ad litem should determine whether the abuser committed the intentional torts of battery[113] or false imprisonment[114] since these torts seem especially likely to occur in child maltreatment cases.

In determining the appropriateness of a tort action, the guardian ad litem must balance the policy reasons which commend the suit against the reasons for foregoing it. The primary reason for seeking civil redress is to compensate the child for injuries caused by the maltreatment.[115] When preserving the family seems impossible, the guardian ad litem may find a civil action on the child's behalf particularly appropriate.

The potential disruption and harm to the family, however, militates against a civil action.[116] The child's legal proceedings further alienates members of the family,[117] and may jeopardize efforts to preserve the family through crises counselling[118] or other

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[113] *See* text accompanying notes 122-127 *infra.*

[114] *See* text accompanying notes 128-142 *infra.*

[115] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 56 (4th ed. 1971). *See also* Comment, *Children Take Their Lumps - The Sorry State of Children's Tort Recovery*, this issue.

[116] It is generally premature to initiate a civil action against the abusing parent or guardian during the juvenile court proceedings because the court may again reunite the family. This disposition is likely since the first obligation of the court is to preserve the family if it is in the child's best interest to do so. CAL. WELF. & INST. CODE § 366 (West Cum. Supp. 1979).

[117] Straining the family relationship is not productive under any circumstances, but especially when the court may reunite the family. When the court removes a child from the parents, it must review the case within a year to assess whether it should reunite the family. CAL. WELF. & INST. CODE § 366 (West Cum. Supp. 1979). The guardian ad litem may have to file the action amidst the prospect of family reunification in order to preserve the claim, however, since the statute of limitations for an intentional tort is one year. CAL. CIV. PROC. CODE § 340 (West Cum. Supp. 1979).

[118] The California Child Protective Services Act emphasizes rehabilitation and family counselling in part so that the courts will find it less necessary to remove children from their families. CAL. WELF. & INST. CODE § 16502.5 (West Cum. Supp. 1979). *See* Comment, *Observations on the Establishment of a Child Protective Service System in California, supra* note 91. Studies show that the type of intensive, coordinated, and multi-disciplinary casework which a CPS unit can provide often rehabilitates the battering parent or guardian. *See* Steele & Pollock, *A Psychiatric Study of Parents Who Abuse Infants and Small Children* 103-145, in the BATTERED CHILD, *supra* note 53. *See also* Comment, *Incest and the Legal System: Inadequacies and Alternatives*, this issue.

professional social service assistance.[119] The guardian ad litem also should be sensitive to the psychological impact on the child of a civil action against the parent or guardian. The punitive aspects of such an action also militate against filing suit.[120] Such actions may have punitive effects in that they force the parent or guardian into litigation and payment of monetary damages, adding emotional and financial strain to the punishment which the criminal law already provides.[121]

Assuming that the guardian ad litem believes that a civil action against the parent or guardian is warranted, authority exists for seeking civil redress for the maltreatment. In the only intentional tort case involving child maltreatment to reach the California appellate courts,[122] the court in *Gillett v. Gillett*[123] held a guardian civilly liable for the willful and excessive punishment of the child under a battery theory.[124] The rejection of the intra-family tort immunity doctrine[125] and the mandatory appointment of a guard-

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[119] Successful therapeutic approaches include the establishment of "Parents Anonymous" groups, the use of crisis nursuries, and the use of lay therapists. Lay therapists are non-professionals who become "good-friends" to parents who have injured or fear they may injure their children. *See generally* Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse,* 12 AM. CRIM. L. REV. 103 (1974).

[120] The philosophical conflict in California regarding the nature and purpose of its child abuse laws is typical of the debate which divides the socio-medical-legal literature. *See generally* V. FONTANA & D. BESHAROV, *supra* note 24.

[121] Some commentators suggest that a punitive philosophy pervades the California child maltreatment laws because of the historically prominent role of law enforcement agencies and probation departments in implementing those laws. *See* Comment, *Observations on the Establishment of a Child Protective Service System in California, supra* note 91.

[122] The only other case to consider Gillett v. Gillett, 168 Cal. App. 2d 102, 335 P.2d 736 (2d Dist. 1959), was a criminal case in which the court accepted the *Gillett* holding with little comment. People v. Stewart, 188 Cal. App. 2d 88, 355 P.2d 736 (2d Dist. 1959).

[123] 168 Cal. App. 2d 102, 335 P.2d 70 (2d Dist. 1959).

[124] Gillett v. Gillett, 168 Cal. App. 2d 102, 105, 335 P.2d 736, 739 (2d Dist. 1959).

[125] In Hewlette v. George, 68 Miss. 703, 9 So. 885, 13 L.R.A. 682 (1891), the Mississippi Supreme Court established a precedent which courts adhered to for the better part of a century. Although *Hewlette* was a negligence action, many courts failed to distinguish the case when confronted with an intentional tort claim. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664, 64 L.R.A. 991 (1903). Roller v. Roller, 37 Wash. 242, 79 P. 788, 68 L.R.A. 83 (1905) exposed the doctrine at its lowest level by rejecting an action against a father who raped his daughter. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055 (1930), repudiated the absolute rule of *Hewlette,* although most jurisdictions embraced the doctrine for many more years. *See* McCurdy, *Torts Between Persons in*

ian ad litem in cases of child maltreatment[126] should lead to more such actions brought on the child's behalf.[127]

Although the California appellate courts have not decided the liability of a parent or guardian for false imprisonment of a child,[128] the guardian ad litem also should consider this theory as a basis for liability. The tort may arise, for example, if the parent or guardian unreasonably confines the child in a closet or otherwise unreasonably restricts the child's freedom of movement.[129] The common law tort of false imprisonment protects this interest in freedom of movement.[130] The prima facie case requires a total restraint of movement from which there are no safe exits open to plaintiff,[131] with some jurisdictions also requiring that plaintiff be aware of the confinement.[132] Because the abused child's youth may prevent such awareness, this issue may pose a problem in litigation.[133]

Even if the child is unaware of the confinement, California

Domestic Relations, 43 HARV. L. REV. 1030 (1930).

In California the state Supreme Court rejected the intra-family tort immunity doctrine for intentional torts in Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955), and finally rejected it for negligence actions in Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971). *See* Whitten, *Gibson v. Gibson: A Further Limitation on California's Parent-Child Immunity Rule*, 23 HASTINGS L. J. 588 (1972); Comment, *Parent and Child: Parental Immunity in Tort Abolished*, 11 SANTA CLARA L. REV. 478 (1971); Comment, *The Vestiges of Child-Parent Tort Immunity*, 6 U.C. DAVIS L. REV. 195 (1973).

[126] The mandatory appointment of guardian ad litems has only existed since 1976. CAL. WELF. & INST. CODE § 326 (West Cum. Supp. 1979). For a discussion of the appointment of guardian ad litems *see* note 12 *supra*.

[127] Other jurisdictions have also sanctioned actions by a child against a parent or guardian for what is essentially child abuse. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951) (intentional mental cruelty); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930) (assault and battery); Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913) (assault and battery).

[128] In the only appellate case where a child has raised the false imprisonment claim against a parent, the court rejected the action on the basis of the intra-family tort immunity doctrine. Hewlette v. George, 68 Miss. 703, 9 So. 885, 13 L.R.A. 682 (1891). *Hewlette* is no longer good authority in California. *See* note 125 *supra*.

[129] Prosser gives an excellent example of a situation involving such a young child. "Suppose a baby one month old is locked in a bank vault for three days, and suffers serious illness or even dies, as a result. Is there no tort merely because the child is unaware of the confinement? And if there is a tort, what else but false imprisonment?" W. PROSSER, *supra* note 115, at 43 n.47.

[130] W. PROSSER, *supra* note 115, at 42.

[131] *Id.*

[132] *Id.*

[133] *Id.*

courts should permit a false imprisonment action.[134] California law defines false imprisonment as the unlawful violation of another person's liberty,[135] thereby establishing the infant's protected interest in personal liberty free from unreasonable parental constraint.[136] False imprisonment of the child violates the infant's protected interest regardless of whether the infant is conscious of the confinement. The child especially deserves compensation when the violation of the protected interest physically injures the child.[137]

The injury a child suffers from false imprisonment is analogous to a child's mental pain and suffering. In *Capelouto v. Kaiser Foundation Hospital,*[138] the California Supreme Court held that a child may recover for mental pain and suffering despite any inability to determine the child's mental state.[139] In a case involving pain and suffering, the child may be unconscious, asleep, or too young to articulate the nature of the injury, but the child suffers injury nonetheless.[140]

Similarly, a child suffers injury from false imprisonment, re-

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[134] For a flavor of the debate over this issue *see generally* Cohen, *False Imprisonment: A Reexamination of the Necessity for Awareness of Confinement,* 43 TENN. L. REV. 109 (1975); Nahmod, *Awareness of Confinement of False Imprisonment,* 15 DUQUESNE L. REV. 31 (1976); Prosser, *False Imprisonment: Consciousness of Confinement,* 55 COLUM. L. REV. 847 (1955).

[135] CAL. PENAL CODE § 236 (West 1975). No cases interpreting § 236 consider whether plaintiff must be consciouus of the confinement.

[136] The intra-family tort immunity doctrine protects a parent or guardian who imposes reasonable restraints on a child's freedom of movement. Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971). *See* note 125 *supra.*

[137] The RESTATEMENT (SECOND) OF TORTS (1979) exemplifies the trend away from an awareness requirement. The RESTATEMENT OF TORTS § 42 (1934) espoused the traditional rule requiring that the plaintiff be conscious of the confinement. The reporter for the Restatement, Professor Prosser, thought that position wrong for cases where plaintiff suffered injury as a consequence of the confinement. *See* Prosser, *False Imprisonment: Consciousness of the Confinement, supra* note 134. As reporter for the RESTATEMENT (SECOND) OF TORTS (1979), Prosser supported an amendment which eliminated the awareness requirement in cases where plaintiff suffered physical injuries. RESTATEMENT (SECOND) OF TORTS § 42 (1979).

[138] 7 Cal. 3d 889, 500 P.2d 880, 103 Cal. Rptr. 856 (1972).

[139] *Id.* at 895, 500 P.2d at 884, 103 Cal. Rptr. at 860.

[140] The infant's inability to explain the cause of pain or to describe the extent of it does not affect the sting of it. Indeed, the infant's cry of hurt is as poignant as the most detailed exposition. The moan of the injured child, who may even be unconscious, needs no elaboration in descriptive language.

Id.

gardless of any ability to be aware of the confinement.[141] As a consequence of the confinement, the child may suffer physical injury or injury only to its protected interest in freedom of movement.[142] Because of these injuries, the law should permit a guardian ad litem to bring a false imprisonment action, even if the child is unaware of the confinement.

CONCLUSION

California law provides for the appointment of a guardian ad litem to protect the child's best interests in a child maltreatment case. The guardian ad litem must discharge that responsiblity despite the law's failure to guarantee certain authority to the guardian ad litem and the potential for conflict of interest between the guardian ad litem and the child. In protecting the child's best interests, the guardian ad litem must consider the appropriateness of bringing civil actions on the child's behalf. The negligence or professional malpractice theory imposes civil liability on people enumerated in the mandatory reporting statute who fail to diagnose the battered child syndrome or report suspected child maltreatment. The negligence per se or statutory theory also imposes liability on these reporters, as well as on hospitals which fail to report maltreatment. Finally, parents or guardians who abuse children are vulnerable to a civil action. If the guardian ad litem decides that a civil action is in the child's best interests, then sound authority and policy reasons support bringing such an action.

Lawrence W. Miles Jr.

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[141] RESTATEMENT (SECOND) OF TORTS § 42, Comment a, reads in part, "False imprisonment resembles battery rather than assault, in that it is possible for a confinement to occur without the plaintiff being aware of it at the time." Comment b has particular application to child maltreatment cases:

> b. There may, however, be situations in which actual harm may result from a confinement of which the plaintiff is unaware of at the time. In such a case more than the mere dignitary interest, and more than nominal damages are involved, and the invasion becomes sufficiently important for the law to afford redress.

[142] Some commentators argue that the violation of the protected interest involved is worthy of protection by the law regardless of whether there is actual physical injury. *See* Nahmod, *Awareness of Confinement of False Imprisonment, supra* note 134; Cohen, *False Imprisonment: A Reexamination of the Necessity for Awareness of Confinement, supra* note 134. The few jurisdictions which have decided the issue decline to extend liability that far. Broughton v. State, 37 N.Y.2d 451, 335 N.E.2d 310, 373 N.Y.S.2d 87 (1975); Baulie v. Miami Valley Hospital, 8 Ohio Misc. 193, 221 N.E.2d 217, 37 Ohio Op. 2d 259 (1966).