

5-15-1974

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Recommended Citation

Jerry A. Ramsey and Byron J. Lawler *The Battered Child Syndrome*, 1 Pepp. L. Rev. Iss. 3 (1974)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol1/iss3/3>

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The Battered Child Syndrome

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and

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Battered children have long been deprived of the protection of the law. During the first few years of a child's life, he is under the care, custody, and control of his parents, and is not in a position to effectively communicate with anyone outside the family, even when he needs protection against the family environment. The unique position of the family in our society excludes outsiders from helping the child and leaves him at the mercy of his parents.

In the early 1960's, a small group of doctors throughout the United States began to discuss the dilemma that society has thrust upon many small children, calling the problem The Battered Child Syndrome. They described the syndrome as follows:

The Battered Child Syndrome, a clinical condition in young children who have received serious physical abuse, is a frequent cause of permanent injury or death. The Syndrome should be considered in any child exhibiting evidence of fracture of any bone, subdural hematoma, failure to thrive, soft tissue swelling or skin

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bruising, in any child who dies suddenly, or where the degree and type of injury is at variance with the history given regarding the occurrence of the trauma. Psychiatric factors are probably of prime importance in the pathogenesis of the disorder, but knowledge of these factors is limited. Physicians have a duty and responsibility to the child to require a full evaluation of the problem and to guarantee that no expected repetition of the trauma will be permitted to occur.¹

The concern of the doctors was justified. Additional investigation revealed that a significant number of children were being abused by their custodians. As doctors learned more about this phenomenon, they began to write articles in medical journals describing the factors and symptoms that a doctor should recognize as part of the Syndrome.² The thrust of many of these articles is of a clinical nature, but virtually all also highlight the need for social remedies to the problem. As stated in *Helping The Battered Child and His Family*, these articles seek:

1. To suggest a child abuse treatment program which, if implemented, should prove helpful in either the large or small community.
2. To demonstrate that many people of a variety of backgrounds and experiences can be helpful both to the abused child and his family.
3. To provide these individuals with a practical "how to" and "what to do" approach to the many problems that arise when one attempts to provide help.³

The California legislature recognized that the problem involved in the syndrome was that children are helpless to protect themselves; their guardians need psychiatric help; and that child abuse continues until such protection and help are provided. To remedy this situation, California enacted a reporting statute. In an attempt to make the statute fulfill its purpose, the statute has been modified five times since the initial act was made law. The present statute⁴ broadens the class of persons required to make reports so as to include physicians, dentists, residents, interns, chiroprac-

1. C. Kempe, M.D., F. Silverman, M.D., B. Steele, M.D., W. Droegemueller, M.D. and H. Silver, M.D., *The Battered Child Syndrome*, 181 J.A.M.A. 105 (1972).

2. *Id.*

3. R. Helfer, M.D., C. Kemper, M.D., *HELPING THE BATTERED CHILD AND HIS FAMILY* (1972).

4. CAL. PENAL CODE § 11161.5 (West Supp. 1973).

ters, religious practitioners, registered nurses, and superintendents and principals of schools. The persons within the reporting class must make an appropriate report to the police authority when they observe a minor who has physical injuries which appear to have been inflicted upon him by other than accidental means.⁵

The problem is that the professionals who are required by law to make reports neglect to follow the law; and the child continues to be battered, beaten, and abused. A letter from the Orange County Grand Jury to the Orange County Board of Supervisors indicates the severity of the situation and the lack of organization within the county to combat the Syndrome:

The Grand Jury is acutely aware of individual cases of child abuse going on at this moment, in this county; of the torment of parents engaged in such behavior; of the frustrations experienced by professionals who repeatedly encounter abuse and who feel there is no meaningful action to be taken and, finally, of the grave social consequences of continuing to ignore the problem.⁶

One possible solution to the widespread failure to report is to impose civil liability upon people who are required by the statute to make the report. In addition to criminal liability, the added civil liability has the advantage of becoming a financial deterrent to noncompliance with the statute while it helps to pay for the injuries sustained by the child.

However, until just 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. This question has been partially resolved by a recent lawsuit brought against several doctors in the County of San Luis Obispo, California.⁷ The facts creating the lawsuit follow.

Thomas Eugene Robison was born on November 2, 1969, in San Luis Obispo, California. He was a normal, healthy baby in all respects. He lived a normal life, as we know it, the first four months of his existence while he resided with his natural father; but early in 1970, his father left and another man began living in the home.

On April 28, 1970, Tommy was brought to the Arroyo Grande Hospital in Arroyo Grande with a skull fracture, contusions, blood blisters on his penis, and many old bruises. The admitting doctor suspected child abuse and questioned the mother about the cause of the various injuries. The history given was inconsistent with

5. See CAL. PENAL CODE § 273 (a) (West Supp. 1973).

6. See Appendix A.

7. Robison v. Elvin Wical, M.D. et al., Civil No. 37607 (Cal. Sup. Ct. San Luis Obispo, filed Sept. 4, 1970) (hereinafter cited Robison).

the injuries observed. The mother's explanation of the skull fracture was that the boy had fallen off a bed. The blood blisters were explained as insect bites.

The medical records indicated that the explanation given was not believed by the admitting doctor. No further action was taken, however, to determine how the child received the injuries. No report was made to any governmental agency. The child was released to his mother on May 1, 1970.

On May 8th, Tommy was again brought to Arroyo Grande Community Hospital by his mother. Again, the doctor admitting the child to the hospital suspected the mother of child abuse. Further investigation by the doctors and nurses disclosed that the child's left arm was swollen and discolored between the forearm and fingertips. The fingertips of the left hand were blistered. There was obvious swelling on the back of the child's head, puncture wounds about his neck, and bruises and welt marks along the upper back. There were other bruises on the torso and lower extremities of the child that appeared to be in various stages of healing.

The attending doctor and nurses intended to keep the child out of the dangerous environment of his parent, but the mother and her boyfriend took the child from the hospital against medical advice. They transported Tommy to San Luis Obispo where he was admitted to Sierra Vista Hospital.⁸

The child was released from the hospital in San Luis Obispo on May 11, 1970. The discharge summary indicated that the child's hospitalization had been uneventful and that the child had been retained regarding possible child abuse, but was being discharged "in the hope that that was not so."

No reports were made to the governmental agencies in San Luis Obispo regarding Tommy's admission to the hospital there. A report had been made to the Arroyo Grande police by a doctor from Arroyo Grande Community Hospital. The police began an investigation, but did not make any report to the County Juvenile Probation Department or take any real action with regard to the report.⁹

8. Sierra Vista Hospital, San Luis Obispo, Medical Records No. 70-1885 (Patient Tommy Robison) Admitted 5/9/70—Discharged 5/11/70.

9. The Police Department was named in the original suit, but was dismissed from the suit on settlement.

Tommy remained with his mother until May 27, 1970. On the morning of that date he was taken to a doctor in Arroyo Grande, California. He examined the child and later testified that he did not find any evidence of injury on the child at the time of examination. However, he did take an x-ray of the child's lower extremities which revealed a fracture of the long bone of the leg.

Later that same day, the child was admitted to Arroyo Grande Community Hospital. At the time of this admission, he was not breathing and his pulse was weak and irregular. His head was swollen; the soft spot, or the fontenal, was bulging and hard; there was no pulse in the brain. The child's eyes did not respond to light and he did not react to any pain stimulus. There were extensive bruises over the left side of his head, under his chin, on his torso, legs and back. He appeared to be dead. The child was given emergency care that restored his vital signs, but the injuries sustained resulted in extensive and permanent brain damage.

The doctors who failed to report the Battered Child Syndrome were included as defendants in the suit on the theory of negligence *per se*. They had a duty to the child to report the symptoms of child abuse; failure to make the report was a breach of the duty to exercise due care owed to the minor child; the child was a member of the group which the statute sought to protect; and failure to report was the direct and proximate cause of the damages sustained by the child. These legal problems are discussed in the following paragraphs.

THE DOCTORS HAD A DUTY TO THE CHILD TO REPORT THE SYMPTOMS OF CHILD ABUSE

The basis for creating the duty is found in the Penal Code. In pertinent part, the applicable code section reads:

§ 11161.5 Injuries apparently inflicted upon minor by other than accidental means; report by physician, teacher, social worker, etc.

(a) In any case in which a minor is brought to a physician and surgeon, dentist, resident, intern, podiatrist, chiropractor, or religious practitioner for diagnosis, examination or treatment, or is under his charge or care, or in any case in which a minor is observed by any registered nurse when in the employ of a public health agency, school, or school district and when no physician and surgeon, resident, or intern is present, by any superintendent, any supervisor of child welfare and attendance, or any certificated pupil personnel employee of any public or private school system or any principal of any public or private school, by any teacher of any public or private school, by any licensed day care worker, by an administrator of a public or private summer day camp or child care center, or by any social worker, and it appears to the

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

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

No person shall incur any civil or criminal liability as a result of making any report authorized by this section.¹⁰

Prior to the *Robison* case, there had not been any civil cases in California directly concerning the issue of a duty to report under a particular statute. An early Ohio case dealing with the question of negligence of a physician based on non-compliance with a criminal statute was the case of *Jones v. Stanko*.¹¹ This case involved a doctor who had failed to report smallpox to an appropriate state agency. The servant of the person who was afflicted with smallpox contracted the contagious disease and died. The servant's widow subsequently brought an action against the treating physician, basing her contention of negligence on the fact that the doctor failed to report the contagious disease to the state agency. The trial court refused to instruct the jury on the reporting issue and a verdict was returned in favor of the doctor. The Appellate Court reversed on appeal, holding that the servant's death was a harm which the reporting statute was designed to prevent by giving people warning of the existence of the disease; that the failure to make the report might be a proximate cause of the death.

10. CAL. PENAL CODE § 11161.5 (West Supp. 1973).

11. 118 Ohio 147, 160 N.E. 456 (1928).

The case of *Medlin v. Bloom*,¹² involved a situation where an infant became blind because of an eye disease. The Massachusetts law required the attending physician to immediately report such eye disease cases to the State Board of Health. The statute was designed to insure that newly born infants who showed signs of such disease receive immediate care in order that their sight might be saved, and to prevent their blindness from becoming a burden on the State. An action was brought against the doctor because of his failure to report. The trial court refused to give an instruction on the issue of whether or not the doctor's failure or delay in making the statutorily required report was evidence of negligence. The Massachusetts Appellate Court reversed, indicating that it was for the jury to determine whether the failure of a report was negligence and whether that negligence was a proximate cause of the blindness.¹³

The facts of the *Robison* case are very similar to the facts of the two cases as stated above. In all three cases, the reporting statute was enacted to prevent a particular harm, and the failure to make the report resulted in that particular harm. Both the Ohio and the Massachusetts cases held that the reporting statute in such a situation gave rise to a civil duty to the injured party. Given the California reporting statute, a similar result should be anticipated in a case like *Robison*.

The next problem regarding duty is the time when the duty arises. *People v. Jackson*,¹⁴ deals with criminal liability under the reporting statute, but gives some insight into the Syndrome, discusses the type of duty that the professional is required to discharge, and suggests the time when the duty arises. The court recognized that The Battered Child Syndrome consists of several elements, and listed them as follows:

1. The child is usually under three years of age;
2. There is evidence of bone injury at different times;
3. There are subdural hematomas with or without skull fractures;
4. There is a seriously injured child who does not have a history that fits the injuries;
5. There is evidence of soft-tissue injury; and
6. There is evidence of neglect.¹⁵

These criteria were taken out of medical records and incorporated into the court's decision. Thomas Eugene Robison had injuries

12. 320 Mass. 201, 119 N.E. 773 (1918).

13. *Id.*

14. 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971).

15. *Id.* at 506, 95 Cal. Rptr. at 921.

that fit all the criteria for child abuse as discussed in the *Jackson* opinion.

The *Jackson* case did not end with the listing of criteria, however. The court went on to hold that the doctor was not required to make an accusation of child abuse, but was only required to report the symptoms of the Battered Child Syndrome. The court in *Jackson* emphasized that the symptoms are easily detectable by a professional person and further intimated that the duty arises on discovery of the symptoms of abuse. The Court explained the problem in the following language:

A finding as in this case of the 'battered child syndrome' is not an opinion by the doctor [discovering and/or reporting doctor] as to whether any particular person has done anything, but, as this doctor indicated, 'it would take thousands of children to have the severity and number and degree of injuries that this child had over the span of the time we had' by accidental means. In other words, the 'battered child syndrome' simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means. This conclusion is based upon an extensive study of the subject by medical science. The additional finding that the injuries were probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason. Only someone regularly 'caring' for the child has the continuing opportunity to inflict these types of injuries; an isolated contact with a vicious stranger would not result in this pattern of successive injuries stretching through several months.¹⁶

Thus, it appears that the doctor owes a duty to the minor child to make a report of The Battered Child Syndrome at the time the doctor discovers the symptoms. There is no requirement that the doctor draw the conclusion that the injuries were sustained by child abuse before the duty arises.

THE FAILURE TO REPORT THE SYMPTOMS OF THE BATTERED CHILD SYNDROME IS A BREACH OF THE DUTY TO EXERCISE DUE CARE

Negligence requires that there be a breach of the duty of due care. The situation in the *Robison* case is that the doctor omitted, rather than committed, a certain act. Evidence Code Section 669 covers just that type of situation.¹⁷

16. *Id.* at 507, 95 Cal. Rptr. at 921.

17. CAL. EVIDENCE CODE § 669 (West Supp. 1973).

The Code provides that a failure of a person to exercise due care is presumed if (1) he violated a statute of a public entity; (2) the violation proximately caused the death or injury; (3) the death or injury resulted from an occurrence of the nature which the statute was designed to prevent; and (4) the person suffering the injury was one of the class of persons for whose protection the statute was adopted.¹⁸ The *Robison* case factually comports with this statute's requirements in that (1) the doctor violated a penal code section; (2) the failure to report allowed the injuries to exacerbate, finally resulting in serious mental retardation; (3) the recurrence of child abuse was the harm that the statute intended to prevent; and (4) Tommy was a member of the class of persons within statutory protection. It is suggested that in light of Evidence Code Section 669,¹⁹ the failure to report is a breach of the duty of due care.

THE FAILURE TO REPORT THE SYNDROME IS THE PROXIMATE CAUSE OF THE CHILD'S INJURIES

The case of *Whinery v. Southern Pacific Company*²⁰ handled the problem of proximate cause in the following manner. The situation involved a Southern Pacific train which was exceeding the statutory speed limit at the time of the accident. The rule of the case was that, if the defendant violated the statute without excuse, and the violation continued up to the moment of damage, then, that conduct would not only constitute negligence as a matter of law, but would be deemed to be the proximate cause of the accident.

The application of the presumption of proximate cause makes sense in a battered child case because of the repetitive nature of the abuse. The legal issue presented is whether the liability of the person failing to report is superceded by the intentional acts of the custodians of the child when they abuse the child on repeated occasions after the abuse is observed; i.e. does the intervening criminal act cut off the tort liability. California has used the rules set forth in Section 449 of the Restatement of Torts in the case of *Vesely v. Sager*, in this situation.²¹ The section provides in substance that if the likelihood that a third person may act in a particular manner is the hazard which makes the actor negligent, even a criminal act does not prevent the actor from being liable

18. *Id.*

19. *Id.*

20. 6 Cal. App. 3d 126, 85 Cal. Rptr. 649 (1970).

21. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

for the harm caused thereby.²²

Application of these rules to the instant fact situation shows that the likelihood of a third person (the child's custodian) continuing the child abuse is exactly the hazard that the reporting statute is designed to prevent. Thus, under the rules of *Vesely*, the intervening acts of the parents do not break the chain of causation and the doctors should be civilly liable to the minor child.

CONCLUSION

Why should doctors and other persons identified in the statute be required to make reports of battered children? The doctor, the practitioner, and the teacher hold unique positions in our society; they are able to intimately observe the child outside his family environment. They, more easily than anyone else, can identify the clinical indicia of the Battered Child Syndrome.

Society through the legislature has mandated that these children be protected. The parents obviously are not psychologically capable of protecting them, since they themselves are the ones in inflicting the injuries. Thus, the welfare of the child can only be protected by an objective unbiased third party who is outside the familial environment.

Has the reporting statute resulted in the implementation of the legislative mandate? Unfortunately, the criminal sanctions are not of sufficient severity, nor is the incident of prosecution of sufficient frequency to answer in the affirmative.

The number of "Tommys" in our institutions cry out for an effective method to encourage those who fail to report to take a hard look at their dereliction of duty. A civil tort action, based on negligence *per se* and tried before a cross section of society who can impose an effective dollar penalty, will provide such encouragement. With the penalty measured in the tens and hundreds of thousands of dollars, the inconvenience of reporting and becoming involved will shrink into insignificance. It is a language that most professionals understand. Only then will the legislative mandate be effected. Only then will the "Tommys" of our society have the opportunity for a childhood free of physical abuse.

22. *Id.* at 164, 486 P.2d 158, 95 Cal. Rptr. 630.