

SUPREME COURT
OF THE STATE OF WASHINGTON

BREAN BEGGS as Personal Representative for the estate of TYLER DELEON and as Limited Guardian Ad Litem for DENAE DELEON, BREANNA DELEON, LAKAYLA DELEON, ANTHONY BARCELLOS and BRENDEN BURNETT, minor children; FRANCES CUDMORE as Limited Guardian Ad Litem for BECKETT CUDMORE, a minor child, and; AMBER DANIELS, a single individual,

Plaintiffs,

v.

STATE OF WASHINGTON; the DEPARTMENT OF SOCIAL AND HEALTH SERVICES; LORETTA MEE, ROBERT TADLOCK and DWAYNE THURMAN individually and in their official capacity as agents and employees of the State of Washington; DAVID FREGEAU, MD; the ROCKWOOD CLINIC a Washington State corporation; SANDRA BREMNER-DEXTER MD and; JOHN and/or JANE DOES 1-10,

Defendants.

84098-9

No. 272702-2-III

PLAINTIFFS/APPELLANTS
SUBMISSION OF ADDITIONAL
AUTHORITIES

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Comes now the Plaintiffs/Appellants, pursuant to RAP 10.8 and submits the following foreign authorities showing additional states that allow a private cause of action against health care providers who are mandatory reporters. Copies of the opinions are attached.

Landeros v. Flood 17 Cal.3rd 399 R31 Cal Cal.rptr. 69 551 p2d 389 (1976)

Han v. Hospital of Morristown 917 F.Supp. 531 (ed. 10 1995)

DATED this 1st day of November, 2010.

Respectfully submitted,

RESSLER & TESH PLLC

/s/ Allen M. Ressler
Allen M. Ressler, WSBA #5330
Attorney for Plaintiffs

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551 P.2d 389

17 Cal.3d 399, 551 P.2d 389, 131 Cal.Rptr. 69, 97 A.L.R.3d 324

(Cite as: 17 Cal.3d 399)



GITA LANDEROS, a Minor, etc., Plaintiff and Appellant,

v.

A. J. FLOOD et al., Defendants and Respondents.

S.F. No. 23359.

Supreme Court of California

June 30, 1976.

SUMMARY

The trial court sustained demurrers of a doctor and a hospital to the malpractice complaint of a minor and judgment of dismissal was thereafter entered. The complaint alleged that plaintiff, an 11-month-old girl, was taken by her mother to defendants for diagnosis and treatment of a leg fracture which gave the appearance of having been caused by a twisting force. The mother had no explanation for the injury. It was further alleged that plaintiff was suffering from other injuries at the time, all of which gave the appearance of having been intentionally inflicted by other persons, and that after her release by defendants she suffered permanent injury due to subsequent beatings at the hands of her mother and the mother's common law husband. The first cause of action alleged negligence in failure to diagnose and treat plaintiff's "battered child syndrome," which treatment would have included reporting her injuries to local law enforcement authorities or the juvenile probation department. The second and third "causes of action" were predicated on defendants' failure to comply with Pen. Code, §§ 11160, 11161, 11161.5, requiring doctors and hospitals to report certain injuries to the authorities. (Superior Court of Santa Clara County, No. 260674, Albert F. DeMarco, Judge.)

The Supreme Court reversed, holding that the complaint stated a cause of action. The court quoted from medical literature concerning recognition and treatment of the "battered child syndrome" and it held that the trial court could not properly rule as a matter of law that defendants' standard of care did not include a requirement that the physician know how to diagnose and

treat that condition, and that plaintiff was entitled to the opportunity to prove by way of expert testimony that in the circumstances of the case a reasonably prudent physician would have followed the diagnostic and treatment procedures outlined in the complaint. The court further held that it could not be concluded as a matter of law that defendants' alleged negligence was not the proximate cause of the injuries inflicted on plaintiff after she was released from the hospital. In view of professional literature concerning the likelihood of continued abuse of the victim in such cases, the court held that plaintiff was entitled to the opportunity to prove by expert testimony that defendants should reasonably have foreseen that her caretakers were likely to resume their physical abuse and inflict further injuries on her if she were returned directly to their custody. The "causes of action" based on failure to comply with the reporting statutes, the court held, actually set forth an alternative legal theory in support of plaintiff's cause of action for personal injuries and it treated them as alternative counts setting forth plaintiff's theory of statutory liability. It was held that plaintiff could rely on the statutes and that she was entitled to the opportunity to prove their violation and the other elements necessary to raise the presumption of lack of due care set forth in Evid. Code, § 669, subd. (a). In conclusion, the court held that in order to rely on violation of the reporting statutes, it would be necessary for plaintiff to prove that the doctor actually observed her injuries and formed the opinion that they were intentionally inflicted on her. It noted, however, that the requisite state of mind could be evidenced by circumstantial evidence and the inferences that could be drawn therefrom by the trier of fact. (Opinion by Mosk, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 128--Review--Scope and Extent--Rulings on Demurrers.

In considering an appeal from a judgment of dismissal following the sustaining of a general demurrer to a complaint, the reviewing court is governed by the rules that a general demurrer admits the truth of all material factual allegations in the complaint, that it is not concerned with the question of the plaintiff's ability to prove those allegations, or the possible difficulty in making such proof, and that the plaintiff need only plead facts showing that he may be entitled to some relief.

(2) Healing Arts and Institutions § 46--Physicians, Surgeons and Other Medical Practitioners--Duties and Liabilities--Pleading--Negligence.

In malpractice cases, as in other types of negligence cases, negligence may be pleaded in general terms.

(3) Healing Arts and Institutions § 37--Physicians, Surgeons and Other Medical Practitioners--Duties and Liabilities--Standard of Care.

A physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances.

(4a, 4b) Healing Arts and Institutions § 39--Physicians, Surgeons and Other Medical Practitioners--Duties and Liabilities--Standard of Care-- Application of Standard--Child Abuse Cases.

In a malpractice action by a minor plaintiff who alleged that defendants, a physician and a hospital, were negligent in failing to recognize and properly treat her "battered child syndrome" when she was brought to the hospital by her mother with a comminuted spiral fracture of the right tibia and fibula and other injuries, all of which gave the appearance of having been intentionally inflicted by other persons, the trial court, in ruling on defendants' demurrer, could not properly conclude as a matter of law that defendants' standard of care did not include a requirement that the physician know how to diagnose and treat

the battered child syndrome. Since the conduct required by the circumstances alleged was not within the common knowledge of the layman, plaintiff was entitled to the opportunity to prove by way of expert testimony that in the circumstances of the case a reasonably prudent physician would have followed the diagnostic and treatment procedures outlined in the complaint.

[See Cal. Jur. 2d, Physicians, Dentists and Other Healers of the Sick, §§ 59, 78; Am. Jur. 2d, Physicians and Surgeons, §§ 114, 115, 121.]

(5) Healing Arts and Institutions § 50--Physicians, Surgeons and Other Medical Practitioners--Duties and Liabilities--Evidence--Expert Testimony and Opinions--Standard of Care.

The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman.

(6a, 6b) Healing Arts and Institutions § 46--Physicians, Surgeons and Other Medical Practitioners--Duties and Liabilities--Pleading--Proximate Cause.

In a malpractice action by a minor plaintiff who alleged that the negligence of defendants, a doctor and a hospital, in failing to diagnose and treat her "battered child syndrome" when she was brought to the hospital by her mother with injuries giving the appearance of having been intentionally inflicted by other persons, the trial court, in ruling on defendants' demurrer, could not properly conclude as a matter of law that such alleged negligence was not the proximate cause of injuries inflicted on plaintiff by her mother and her mother's common law husband after she was released from the hospital and returned to their custody. In view of professional literature concerning the likelihood of continued abuse of the victim in such cases, plaintiff was entitled to the opportunity to prove by expert testimony that defendants should reasonably have foreseen that her caretakers were likely to resume their physical abuse and inflict further injuries on her if she were returned directly to their custody.

(7) Negligence § 17--Elements of Actionable Negligence--Proximate Cause-- Intervening Causes--Foresight of Intervening Cause.

An intervening act does not amount to a superseding cause relieving a negligent defendant of liability if it was reasonably foreseeable. An actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct, and foreseeability may arise directly from the risk created by the original act of negligence.

(8) Negligence § 94--Trial and Judgment--Questions of Law and Fact-- Foreseeability of Harm.

When the issue in a negligence action is whether the intervening act of a third person was foreseeable and therefore did not constitute a superseding cause, the foreseeability of the risk generally frames a question for the trier of fact.

(9a, 9b) Healing Arts and Institutions § 37--Physicians, Surgeons and Other Medical Practitioners--Duties and Liabilities--Standard of Care-- Reporting Child Abuse Cases to Authorities.

In a malpractice action by a minor who alleged that negligence of defendants, a doctor and a hospital, in failing to diagnose and treat her "battered child syndrome" resulted in further injuries being inflicted on her by her mother and the mother's common law husband, plaintiff was entitled to an opportunity to prove her further allegations that defendants violated Pen. Code, §§ 11160, 11161, 11161.5, by failing to report her injuries to the authorities, that such violations proximately caused her further injuries, that such injuries resulted from an occurrence which the statutes were designed to prevent, and that she was one of the class of persons for whose protection the statutes were adopted, in order to raise the presumption, codified in Evid. Code, § 669, that defendants failed to exercise due care.

(10) Healing Arts and Institutions § 46--Physicians, Surgeons and Other Medical Practitioners--Duties and Liabilities--Pleading--Violation of Statutes.

Although plaintiff's complaint in a malpractice action based on the alleged failure of defendants, a doctor and a hospital, to properly handle her "battered child syndrome," with the result that she received further injuries at the hands of her mother and the mother's common law husband; purported to state as separate causes of action, defendants' failure to properly diagnose and treat her and their violation of statutes requiring doctors and hospitals to report certain injuries to the authorities, plaintiff actually had but one cause of action for invasion of her right to be free from bodily harm and the charged statutory violations constituted merely an alternative theory in support thereof. Under the requirement of Code Civ. Proc., § 452, that pleadings be liberally construed with a view to achieving substantial justice, however, the "causes of action" alleging statutory violations could properly be treated as alternative counts setting forth the theory of statutory liability.

(11) Healing Arts and Institutions § 30--Physicians, Surgeons and Other Medical Practitioners--Duties and Liabilities--Statutory Duties.

In a malpractice action by a minor who alleged that the negligent failure of defendants, a doctor and a hospital, to deal properly with her "battered child syndrome" caused her to receive further injuries at the hands of her mother and the mother's common law husband, plaintiff could properly rely on alleged violations of Pen. Code, § 11160, requiring hospitals to report injuries inflicted in violation of law to the authorities, and Pen. Code, § 11161, imposing the identical duty on physicians, as well as Pen. Code, § 11161.5, which specifically requires physicians to report child abuse. Pen. Code, §§ 11160, 11161, are complimentary rather than inconsistent in that they are directed to different classes of persons and, while §§ 11161, 11161.5, are partially duplicative, they do not present an irreconcilable conflict since the same penalty is provided by Pen. Code, § 11162, for a violation of each section.

(12) Healing Arts and Institutions § 48--Physicians, Surgeons and Other Medical Practitioners--Duties and Liabilities--Evidence--Proof of Violation of Statute Requiring Reporting of Child Abuse Cases.

In order to prove a violation of Pen. Code, § 11161.5, requiring physicians to report to the authorities any case in which "it appears to the physician" from observation that a minor under his care or brought to him for diagnosis, examination or treatment has any physical injuries "which appear to have been inflicted upon him by other than accidental means by any person," for purposes of raising the presumption of lack of due care in a malpractice case, the plaintiff must establish that the physician actually observed the minor's injuries and formed the opinion that they were intentionally inflicted. The required state of mind, however, may be evidenced by circumstantial evidence and the inferences that may be drawn therefrom by the trier of fact.

COUNSEL

Caputo & Liccardo, Caputo, Liccardo & Rossi, Richard P. Caputo and Richard J. Kohlman for Plaintiff and Appellant.

Rankin, Oneal, Center, Luckhardt, Marlais, Lund & Hinshaw, G. David Landsness, Campbell, Warburton, Britton, Fitzsimmons & Smith and Alfred B. Britton, Jr., for Defendants and Respondents. *405

MOSK, J.

In this medical malpractice action plaintiff Gita Landeros, a minor, appeals from a judgment of dismissal entered upon an order sustaining general demurrers to her amended complaint. As will appear, we have concluded that the complaint states a cause of action and hence that the judgment must be reversed.

Plaintiff brought the action by her guardian ad litem against A. J. Flood, a physician, and The San Jose Hospitals & Health Center, Inc. (hereinafter called the San Jose Hospital). The amended complaint purports to allege four "causes of action." As we shall explain, the first three of these are actually alternative theories of recovery alleged in support of a single cause of action for compensatory damages for personal injuries caused by defendants' negligence in failing to properly diagnose and treat the condition from which plaintiff was suffering; the fourth "cause of action" merely adds a claim for punitive damages on allegations that defendants' conduct in this respect was wilful and wanton. Defendants filed general demurrers. The court sustained the demurrers as to the first and second "causes of action" with leave to amend, and as to the third and fourth "causes of action" without leave to amend. Plaintiff elected to stand on her complaint as previously amended, and a judgment dismissing the entire action was therefore entered.^{FN1}

FN1 On this appeal plaintiff has expressly abandoned her claim of punitive damages.

The material factual allegations of the amended complaint are as follows. Plaintiff was born on May 14, 1970. On repeated occasions during the first year of her life she was severely beaten by her mother and the latter's common law husband, one Reyes. On April 26, 1971, when plaintiff was 11 months old, her mother took her to the San Jose Hospital for examination, diagnosis, and treatment. The attending physician was defendant Flood, acting on his own behalf and as agent of defendant San Jose Hospital. At the time plaintiff was suffering from a comminuted spiral fracture of the right tibia and fibula, which gave the appearance of having been caused by a twisting force.^{FN2} Plaintiff's mother had no explanation for this injury. Plaintiff also had bruises over her entire back, together with superficial abrasions on other parts of her body. In addition, she had a nondepressed linear fracture of the skull, *406 which was then in the process of healing.^{FN3} Plaintiff demonstrated fear and apprehension when approached. Inasmuch as all plaintiff's injuries gave the appearance of having been intentionally inflicted by other persons, she exhibited the medical condition known as the battered child syndrome.

FN2 A comminuted fracture is "a fracture in which the bone is splintered or crushed into numerous pieces." (Webster's New Internat. Dict. (3d ed. 1961) p. 457.)

FN3 A nondepressed linear skull fracture is ordinarily detectable only by X-ray examination.

It is alleged that proper diagnosis of plaintiff's condition would have included taking X-rays of her entire skeletal structure, and that such procedure would have revealed the fracture of her skull. Defendants negligently failed to take such X-rays, and thereby negligently failed to diagnose her true condition. It is further alleged that proper medical treatment of plaintiff's battered child syndrome would have included reporting her injuries to local law enforcement authorities or juvenile probation department. Such a report would have resulted in an investigation by the concerned agencies, followed by a placement of plaintiff in protective custody until her safety was assured. Defendants negligently failed to make such report.

The complaint avers that as a proximate result of the foregoing negligence plaintiff was released from the San Jose Hospital without proper diagnosis and treatment of her battered child syndrome, and was returned to the custody of her mother and Reyes who resumed physically abusing her until she sustained traumatic blows to her right eye and back, puncture wounds over her left lower leg and across her back, severe bites on her face, and second and third degree burns on her left hand.

On July 1, 1971, plaintiff was again brought in for medical care, but to a different doctor and hospital. Her battered child

syndrome was immediately diagnosed and reported to local police and juvenile probation authorities, and she was taken into protective custody. Following hospitalization and surgery she was placed with foster parents, and the latter subsequently undertook proceedings to adopt her. Plaintiff's mother and Reyes fled the state, but were apprehended, returned for trial, and convicted of the crime of child abuse. (Pen. Code, § 273a.)

With respect to damages the complaint alleges that as a proximate result of defendants' negligence plaintiff suffered painful permanent *407 physical injuries and great mental distress, including the probable loss of use or amputation of her left hand.

The second and third "causes of action" are predicated on defendants' failure to comply with three related sections of the Penal Code, Section 11160 provides in relevant part that every hospital to which any person is brought who is suffering from any injuries inflicted "in violation of any penal law of this State" ^{FN4} must report that fact immediately, by telephone and in writing, to the local law enforcement authorities. Section 11161 imposes the identical duty on every physician who has under his care any person suffering from any such injuries. Section 11161.5 deals specifically with child abuse, and declares in pertinent part that in any case in which a minor is under a physician's care or is brought to him for diagnosis, examination or treatment, and "it appears to the physician" from observation of the minor that the latter has any physical injuries "which appear to have been inflicted upon him by other than accidental means by any person," he must report that fact by telephone and in writing to the local law enforcement authorities and the juvenile probation department. ^{FN5} All three sections require the report to state the name of the victim, if known, together with his whereabouts and the character and extent of his injuries; and a violation of any of the sections is a misdemeanor (§ 11162).

FN4 Among such laws, of course, are the statutes penalizing child abuse. (Pen. Code, §§ 273a, 273d.)

FN5 The statute imposes the same duty on certain other health care professionals, school officials and teachers, child care supervisors, and social workers.

By means of allegations phrased largely in the statutory language plaintiff undertakes to charge defendants with a duty to comply with section 11161.5 (second "cause of action") and sections 11160 and 11161 (third "cause of action"), and avers that they failed to make the reports thus required by law. Her allegations of proximate cause and damages on these counts are essentially identical to those of the first count.

We have found no case directly in point, but the issues may be decided by reference to well settled principles. (1) Succinctly stated, the rules governing our consideration of this appeal are "that a general demurrer admits the truth of all material factual allegations in the complaint [citation]; that the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court [citations]; and that plaintiff need only plead facts showing that he may be entitled to some relief [citation]." (*408 Alcorn v. Ambro Engineering, Inc. (1970) 2 Cal.3d 493, 496 [86 Cal.Rptr. 88, 468 P.2d 216]; accord, Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 123 [109 Cal.Rptr. 799, 514 P.2d 111]; Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 572 [108 Cal.Rptr. 480, 510 P.2d 1032].) (2) On the latter point it is clear that "In this state negligence may be pleaded in general terms, and that is as true of malpractice cases as it is of other types of negligence cases." (Stafford v. Shultz (1954) 42 Cal.2d 767, 774 [270 P.2d 1], quoting from Greninger v. Fischer (1947) 81 Cal.App.2d 549, 552 [184 P.2d 694]; accord, Rannard v. Lockheed Aircraft Corp. (1945) 26 Cal.2d 149, 154-157 [157 P.2d 1]; Guilliams v. Hollywood Hospital (1941) 18 Cal.2d 97, 99-103 [114 P.2d 1]; Weinstock v. Eisler (1964) 224 Cal.App.2d 212, 236 [36 Cal.Rptr. 537].)

(3) The standard of care in malpractice cases is also well known. With unimportant variations in phrasing, we have consistently held that a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances. (Brown v. Colm (1974) 11 Cal.3d 639, 642-643 [114 Cal.Rptr. 128, 522 P.2d 688]; Bardessono v. Michels (1970) 3 Cal.3d 780, 788 [91 Cal.Rptr. 760, 478 P.2d 480, 45 A.L.R.3d 717]; Lawless v. Calaway (1944) 24 Cal.2d 81, 86 [147 P.2d 604]; Hesler v. California Hospital Co. (1918) 178 Cal. 764, 766-767 [174 P. 654].)

(4a) The first question presented, accordingly, is whether the foregoing standard of care includes a requirement that the physician know how to diagnose and treat the battered child syndrome.

It appears from the literature that the battered child syndrome was first tentatively identified and reported to the medical profession in the early 1950s. Further surveys and analyses of the syndrome followed, culminating in a landmark article published in 1962 in the Journal of the American Medical Association. (Kempe et al., *The Battered-Child Syndrome* (1962) 181 A.M.A.J. 17.) Since that date numerous additional studies of the condition have been undertaken, and their results and recommendations publicized in the medical journals. ^{FN6} *409

FN6 A typical article in the field recites case histories of child abuse, points out the distinguishing signs and symptoms of the battered child syndrome, and advises the practicing physician how to detect and treat the condition. For a detailed survey of the medical literature on the topic from its beginning until 1965, see McCoid, *The Battered Child and Other Assaults Upon the Family: Part One* (1965) 50 Minn.L.Rev. 1, 3-19. A selection of the later articles is cited in Grumet, *The Plaintive Plaintiffs: Victims of the Battered Child Syndrome* (1970) 4 Family L.Q. 296, *passim*.

California courts have not been oblivious to this development. In a prosecution for child abuse reviewed in 1971 - the same year as the events here in issue - the Court of Appeal held admissible the testimony of a physician identifying the typical elements of the battered child syndrome. (People v. Jackson (1971) 18 Cal.App.3d 504, 506 [95 Cal.Rptr. 919].) The court explained that a physician's diagnosis of battered child syndrome essentially means that the victim's injuries were not inflicted by accidental means, and "This conclusion is based upon an extensive study of the subject by medical science." (Id., at p. 507.) Citing portions of the literature referred to hereinabove, the court concluded (*ibid.*) that "the diagnosis of the 'battered child syndrome' has become *an accepted medical diagnosis*." (Italics added.) Indeed, the Court of Appeal added that "Trial courts have long recognized the 'battered child syndrome' and it has been accepted as a legally qualified diagnosis on the trial court level for some time" (Id., at pp. 507-508; accord, People v. Henson (1973) 33 N.Y.2d 63 [349 N.Y.S.2d 657, 304 N.E.2d 358, 363-364]; State v. Loss (1973) 295 Minn. 271 [204 N.W.2d 404, 408-409].)

While helpful, the foregoing general history of the battered child syndrome is not conclusive on the precise question in the case at bar. The question is whether a reasonably prudent physician examining this plaintiff in 1971 would have been led to suspect she was a victim of the battered child syndrome from the particular injuries and circumstances presented to him, would have confirmed that diagnosis by ordering X-rays of her entire skeleton, and would have promptly reported his findings to appropriate authorities to prevent a recurrence of the injuries. There are numerous recommendations to follow each of these diagnostic and treatment procedures in the medical literature cited above. ^{FN7} *410

FN7 For example, the leading article by Kempe et al., *op. cit.*, *supra*, 181 A.M.A.J. 17, states that "A physician needs to have a high initial level of suspicion of the diagnosis of the battered-child syndrome in instances of subdural

hematoma, multiple unexplained fractures at different stages of healing, failure to thrive, when soft tissue swelling or skin bruising are present, or in any other situation where the degree and type of injury is at variance with the history given regarding its occurrence” (*Id.*, at p. 20.) Of the different types of fractures exhibited, an arm or leg fracture caused by a twisting force is particularly significant because “The extremities are the ‘handles’ for rough handling” of the child by adults. (*Id.*, at p. 22.) The article also contains numerous recommendations to conduct a “radiologic examination of the entire skeleton” for the purpose of confirming the diagnosis, explaining that “To the informed physician, the bones tell a story the child is too young or too frightened to tell,” (*Id.*, at p. 18.) Finally, on the subject of management of the case it is repeatedly emphasized that the physician “should report possible willful trauma to the police department or any special children’s protective service that operates in his community” (*id.*, at p. 23) in order to forestall further injury to the child: “All too often, despite the apparent cooperativeness of the parents and their apparent desire to have the child with them, the child returns to his home only to be assaulted again and suffer permanent brain damage or death.” (*Id.*, at p. 24.)

Despite these published admonitions to the profession, however, neither this nor any other court possesses the specialized knowledge necessary to resolve the issue as a matter of law. We simply do not know whether the views espoused in the literature had been generally adopted in the medical profession by the year 1971, and whether the ordinarily prudent physician was conducting his practice in accordance therewith. (5) The question remains one of fact, to be decided on the basis of expert testimony: “The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations], unless the conduct required by the particular circumstances is within the common knowledge of the layman.” (*Sinz v. Owens* (1949) 33 Cal.2d 749, 753 [205 P.2d 3, 8 A.L.R.2d 757]; accord, *Brown v. Colm* (1974) *supra*, 11 Cal.3d 639, 643; *Cobbs v. Grant* (1972) 8 Cal.3d 229, 236-237 [104 Cal.Rptr. 505, 502 P.2d 1]; *Huffman v. Lindquist* (1951) 37 Cal.2d 465, 473 [234 P.2d 34, 29 A.L.R.2d 485].)

(4b) Inasmuch as the “common knowledge” exception to the foregoing rule does not apply on the facts here alleged, the trial court could not properly conclude as a matter of law that defendants’ standard of professional care did not include the diagnostic and treatment procedures outlined in the complaint. Plaintiff is therefore entitled to the opportunity to prove by way of expert testimony that in the circumstances of this case a reasonably prudent physician would have followed those procedures. FN8 *411

FN8 Whether the physician would have followed the procedure of reporting plaintiff’s injuries to the authorities, however, is not solely a question of good medical practice. The above-cited reporting statutes (Pen. Code, §§ 11160-11161.5) were in force in 1971. They evidence a determination by the Legislature that in the event a physician does diagnose a battered child syndrome, due care includes a duty to report that fact to the authorities. In other words, since the enactment of these statutes a physician who diagnoses a battered child syndrome will not be heard to say that other members of his profession would not have made such a report. The same is true of each of the persons and entities covered by this legislation. Accordingly, although expert testimony on the issue of a duty to report is admissible, it is not mandatory.

The statute also lays to rest defendant Flood’s concern that if he were required to report his findings to the authorities he might be held liable for violation of the physician-patient privilege. (Evid. Code, § 992.) Section 11161.5 specifically exempts the physician from any civil or criminal liability for making a report pursuant to its terms.

Defendants complain that the first “cause of action” is nevertheless fatally defective because it assertedly fails to

allege certain specific facts, i.e., that Dr. Flood negligently treated plaintiff's leg fracture, that proper treatment of that fracture or the bruises on plaintiff's back included taking an X-ray of her skull, and that Dr. Flood negligently failed to ask plaintiff's mother for an explanation of the cause of the fracture. None of these allegations is necessary, however, because they are irrelevant to the gist of the complaint. Plaintiff's theory is that in the circumstances of this case the fracture, the bruises, and the lack of an explanation offered by her mother are themselves indicia of the underlying battered child syndrome of which plaintiff was the victim, and it was that condition which defendants negligently failed to diagnose and treat. For the reasons stated, the complaint adequately alleges the facts necessary to support such a theory.

(6a) The second principal question in the case is proximate cause. Under the allegations of the complaint it is evident that the continued beating inflicted on plaintiff by her mother and Reyes after she was released from the San Jose Hospital and returned to their custody constituted an "intervening act" that was the immediate cause in fact of the injuries for which she seeks to recover. (Rest.2d Torts, § 441.) (7) It is well settled in this state, however, that an intervening act does not amount to a "superseding cause" relieving the negligent defendant of liability (*id.*, § 440) if it was reasonably foreseeable: "[A]n actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct." (*Vesely v. Sager* (1971) 5 Cal.3d 153, 163 [95 Cal.Rptr. 623, 486 P.2d 151], and cases cited.) Moreover, under section 449 of the Restatement Second of Torts that foreseeability may arise directly from the risk created by the original act of negligence: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." (Italics added.) (See *Vesely v. Sager, supra*, at p. 164 of 5 Cal.3d, and cases cited.)

As we recently observed with respect to a determination of duty, however, "foreseeability is a question of fact for the jury." (*Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 46 [123 Cal.Rptr. 468, 539 P.2d 36].) (8) The same rule applies when the issue is whether the intervening act of a third person was foreseeable and therefore did not constitute a superseding cause: in such circumstances "The foreseeability of the risk generally frames a question for the trier of fact" (*Weaver v. Bank of America* (1963) 59 Cal.2d 428, 434 [30 Cal.Rptr. 4, 380 P.2d 644]; accord, Rest.2d Torts, § 453, com. b). *412

(6b) We cannot say categorically that an ordinarily prudent physician who had correctly diagnosed that plaintiff was a victim of the battered child syndrome would not have foreseen the likelihood of further serious injuries to her if she were returned directly to the custody of her caretakers. On the contrary, it appears from the professional literature that one of the distinguishing characteristics of the battered child syndrome is that the assault on the victim is not an isolated, atypical event but part of an environmental mosaic of repeated beatings and abuse that will not only continue but will become more severe unless there is appropriate medicolegal intervention.^{FN9} If the risk of a resumption of physical abuse is thus a principal reason why a doctor's failure to diagnose and treat the battered child syndrome constitutes negligence, under section 449 of the Restatement the fact that the risk eventuates does not relieve him of responsibility.

FN9 See, e.g., Kempe et al., *The Battered-Child Syndrome* (1962) 181 A.M.A.J. 17, 24, quoted in footnote 7, *ante*; Boardman, *A Project to Rescue Children from Inflicted Injuries* (1962) 7 Soc. Work 43, 49 ("Experiences with the repetitive nature of injuries indicate that an adult who has once injured a child is likely to repeat. ... [T]he child must be considered to be in grave danger unless his environment can be proved to be safe"); Fontana et al., *The "Maltreatment Syndrome" in Children* (1963) 269 New England J. Med. 1389, 1393 ("over 50 per cent of these children are liable to secondary injuries or death if appropriate steps are not taken to remove them from their environment"); Friedman, *The Need for Intensive Follow-Up of Abused Children*, in *Helping the Battered Child and his Family* (Kempe & Helfer eds. 1972) chapter 6, page 79 ("it would appear from our investigations that the severe

permanent damage associated with the 'battered child syndrome' usually does not occur with the initial incident. [Fns. omitted.] Identification of abuse at this time thus offers an opportunity for intervention with the goal of preventing subsequent trauma and irreversible injury to the child”).

Accordingly, the trial court in the case at bar could not properly rule as a matter of law that the defendants' negligence was not the proximate cause of plaintiff's injuries. Plaintiff is entitled to prove by expert testimony that defendants should reasonably have foreseen that her caretakers were likely to resume their physical abuse and inflict further injuries on her if she were returned directly to their custody. ^{FN10} *413

FN10 Again defendant Flood presses only a technical point of pleading, claiming the allegation of proximate cause is fatally defective because the foreseeability of the intervening conduct of plaintiff's mother and Reyes is not specifically set forth. It is asserted that under the case law such an allegation is mandatory if the foreseeability of the intervening act does not clearly appear from the pleaded facts of negligence and injury. (See, e.g., Frace v. Long Beach etc. Sch. Dist. (1943) 58 Cal.App.2d 566 [137 P.2d 60].) As shown above, however, here the occurrence of the intervening act is the precise hazard to which defendants' conduct is alleged to have negligently exposed plaintiff, and the injuries pleaded are those which a reasonably prudent physician would have foreseen as likely to ensue from that negligence. In these circumstances “The allegations of the complaint are sufficient to present the issue” of proximate cause. (Custodio v. Bauer (1967) 251 Cal.App.2d 303, 316-317 [59 Cal.Rptr. 463, 27 A.L.R.3d 884].)

(9a) There remain for consideration plaintiff's allegations that defendants violated Penal Code sections 11160, 11161, and 11161.5, summarized hereinabove, requiring doctors and hospitals to report certain injuries to the authorities. (10) As noted at the outset, the complaint separately sets forth these violations as the second and third “causes of action.” In fact, plaintiff has only one cause of action because only one of her primary rights has been invaded - her right to be free from bodily harm: “There was one injury and one cause of action. A single tort can be the foundation for but one claim for damages. [Citations.]” (Panos v. Great Western Packing Co. (1943) 21 Cal.2d 636, 638-639 [134 P.2d 242].) The charged statutory violations constitute simply an alternative legal theory in support of plaintiff's cause of action for personal injuries. Alternative theories of common law negligence and statutory liability may be pleaded in a single count (Coleman v. City of Oakland (1930) 110 Cal.App. 715, 721 [295 P. 591]) or in separate counts (3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 296, p. 1969); or the statutory basis of liability need not be pleaded at all, as the trial court is required to take judicial notice of acts of the Legislature (Evid. Code, § 451, subd. (a)).

Pursuant to our duty to liberally construe pleadings with a view to achieving substantial justice (Code Civ. Proc., § 452), we therefore treat the second and third “causes of action” as alternative counts setting forth plaintiff's theory of statutory liability.

(9b) The purpose of that theory is manifestly to raise a presumption that by omitting to report plaintiff's injuries to the authorities as required by law, defendants failed to exercise due care - a presumption now codified in Evidence Code section

669. ^{FN11} Defendant Flood correctly concedes that the complaint alleges facts showing compliance with the first, third and fourth of the conditions specified in subdivision (a) of section 669; he reiterates his *414 contention that the allegations of proximate cause are defective, but for the reasons stated above the point is not well taken. It follows that plaintiff is entitled to prove compliance with each of the four statutory conditions for invoking the presumption of lack of due care, shifting to defendants the burden of rebutting that presumption. ^{FN12}

FN11 Insofar as relevant here, section 669 provides:

“(a) The failure of a person to exercise due care is presumed if:

“(1) He violated a statute, ordinance, or regulation of a public entity;

“(2) The violation proximately caused death or injury to person or property;

“(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

“(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

“(b) This presumption may be rebutted by proof that:

“(1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; ...”

FN12 A number of recent commentators support this theory of liability. (See, e.g., Isaacson, *Child Abuse Reporting Statutes: The Case for Holding Physicians Civilly Liable for Failing to Report* (1975) 12 San Diego L.Rev. 743, 756-762; Ramsey & Lawler, *The Battered Child Syndrome* (1974) 1 Pepperdine L.Rev. 372; Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse* (1974) 12 Am.Crim.L.Rev. 103, 115 & fn. 51; Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation* (1967) 67 Colum.L.Rev. 1, 34-36; for a published recommendation to the same effect by one of plaintiff's counsel in the case at bar, see Kohlman, *Malpractice Liability for Failing to Report Child Abuse* (1974) 49 State Bar J. 118.)

(11) Finally, defendants raise two questions of statutory interpretation. They contend that even if plaintiff may rely on Penal Code section 11161.5 in this case, she cannot invoke sections 11160 and 11161 because the latter are “general” statutes which have assertedly been superseded by the former as a “special” statute on the same topic. But such supersession occurs only when the provisions are “inconsistent” (Code Civ. Proc., § 1859), which is not here the case. Sections 11160 and 11161.5 are directed to different classes of persons, and hence are not inconsistent but complementary. Sections 11161 and 11161.5, on the other hand, are duplicative of each other to the extent that the former deals with physical injuries unlawfully inflicted on minors and the latter deals with the observation of such injuries by a physician. (See generally Note, *The California Legislative Approach to Problems of Willful Child Abuse* (1966) 54 Cal.L.Rev. 1805, 1814-1815.) But inasmuch as the same penalty is provided for a violation of each section (Pen. Code, § 11162), they do not present an irreconcilable conflict requiring one to give way to the other. (Compare *People v. Gilbert* (1969) 1 Cal.3d 475, 479-480 [82 Cal.Rptr. 724, 462 P.2d 580], and cases cited.) There is nothing to prevent the Legislature from imposing a reporting requirement on physicians in two separate statutes, even if their coverage apparently overlaps.

(12) Defendants next contend that plaintiff can rely on section 11161.5 only if she can prove that Dr. Flood *in fact* observed her various injuries and *in fact* formed the opinion they were caused by other than accidental means and by another person - in other words, that his failure to comply with the reporting requirement of the statute was intentional rather than negligent. We first note that the complaint in effect so alleges, *415 thereby mooted the issue at this pleading stage. For the guidance of the

court at the trial, however, we briefly address the point of proof.

The provision of section 11161.5 is ambiguous with respect to the required state of mind of the physician. It has been suggested that for the purposes of a criminal prosecution "the more reasonable interpretation of the statutory language is that no physician can be convicted unless it is shown that it *actually* appeared to him that the injuries were inflicted upon the child." (Italics added.) (Note, *The California Legislative Approach to Problems of Willful Child Abuse* (1966) 54 Cal.L.Rev. 1805, 1814.) We adopt that construction, as it resolves the ambiguity in favor of the offender. (*People v. Ralph* (1944) 24 Cal.2d 575, 581 [150 P.2d 401].) It is also applicable in the present civil action, because the presumption of lack of due care is predicated inter alia upon proof that the defendant "violated a statute" (Evid. Code, § 669, subd. (a)(1)), here section 11161.5. If plaintiff wishes to satisfy that requirement, it will therefore be necessary for her to persuade the trier of fact that defendant Flood actually observed her injuries and formed the opinion they were intentionally inflicted on her. ^{FN13}

FN13 By parity of reasoning, the same rule will apply if plaintiff elects to rely at trial on sections 11160 and 11161 as well.

This does not mean, of course, that plaintiff can meet her burden only by extracting damaging admissions from defendant Flood. "The knowledge a person may have when material to an issue in a judicial proceeding is a fact to be proven as any other fact. It differs from physical objects and phenomena in that it is a state of mind like belief or consciousness and cannot be seen, heard or otherwise directly observed by other persons. It may be evidenced by the affirmative statement or admission of the possessor of it. If he is silent or says he did not have such knowledge, it may be evidenced in other ways," i.e., by circumstantial evidence and the inferences which the trier of fact may draw therefrom. (*Oil Workers Intl. Union v. Superior Court* (1951) 103 Cal.App.2d 512, 532-533 [230 P.2d 71].) Plaintiff will therefore be entitled to introduce proof of facts alleged in her complaint as circumstantial evidence that defendant Flood possessed the requisite state of mind, and any conflict between such evidence and direct testimony of defendant Flood will be for the trier of fact to resolve.

The judgment is reversed.

Wright, C. J., McComb, J., Tobriner, J., Sullivan, J., Clark, J., and Richardson, J., concurred. *416

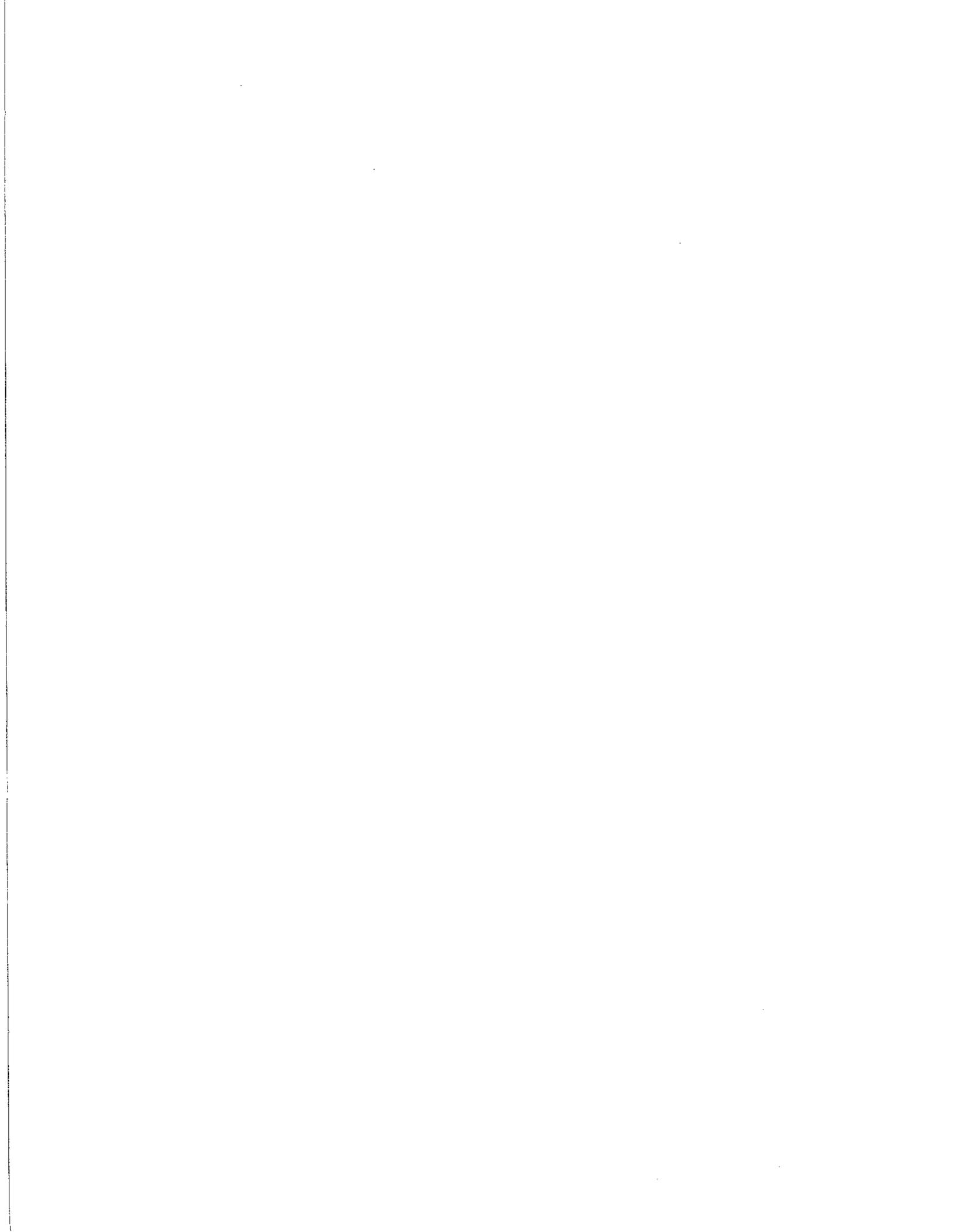
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Landeros v. Flood

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United States District Court,
E.D. Tennessee,
Northern Division.

Desiree Levon HAM, a minor, b/n/f Daisy Nadine Ham, et al., Plaintiffs
v.
HOSPITAL OF MORRISTOWN, INC., d/b/a Lakeway Regional Hospital, et al., Defendants.
No. 3:94-cv-172.

July 21, 1995.

Grandmother brought action on behalf of child who was victim of child abuse against physicians and other hospital personnel, alleging that they were negligent in failing to recognize and report symptoms of child abuse to proper agencies, and physicians and hospital personnel moved to dismiss or for summary judgment. The District Court, Jarvis, Chief Judge, held that: (1) child abuse reporting statute created private cause of action for breach of duty to recognize and report symptoms of child abuse, and (2) fact issue as to whether physicians' conclusion that child's injuries did not create reasonable notice of child abuse precluded summary judgment.

Motion denied.

West Headnotes

[1] Federal Courts 170B ↪ 409.1

170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(C) Application to Particular Matters

170Bk409 Conflict of Laws

170Bk409.1 k. In General. Most Cited Cases

Federal court in diversity case applies law of state in which it sits, including that state's choice of law provisions.

[2] Torts 379 ↪ 103

379 Torts

379I In General

379k103 k. What Law Governs. Most Cited Cases

(Formerly 379k2)

Under Tennessee law, law of place where tort occurred controls tort action, absent contrary public policy.

[3] Federal Courts 170B ↪ 431

170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(C) Application to Particular Matters

170Bk431 k. Torts in General; Indemnity and Contribution. Most Cited Cases

(Formerly 211k13)

Under Tennessee choice of law, law of Tennessee would control standard to be applied to negligence action based on diversity of citizenship, that arose from alleged negligence of physicians in Tennessee, in failing to recognize and report suspected child abuse. West's Tenn.Code, § 37-1-403.

[4] Negligence 272 ↪ 210

272 Negligence

272II Necessity and Existence of Duty

272k210 k. In General. Most Cited Cases

(Formerly 272k2)

Negligence 272 ↪ 1692

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1692 k. Duty as Question of Fact or Law Generally. Most Cited Cases

(Formerly 272k136(14))

Under Tennessee law, in cause of action for negligence, there must be duty of care owed by defendant to plaintiff; whether there is duty owed by one person to another is question of law to be decided by court.

[5] Negligence 272 ↪210

272 Negligence

272II Necessity and Existence of Duty

272k210 k. In General. Most Cited Cases

(Formerly 272k2)

Negligence 272 ↪233

272 Negligence

272III Standard of Care

272k233 k. Reasonable Care. Most Cited Cases

(Formerly 272k4)

Under Tennessee law, although all persons have duty to use reasonable care not to engage in conduct that will foreseeably cause injury to others, they do not ordinarily have duty to act affirmatively to protect others from conduct other than their own.

[6] Negligence 272 ↪220

272 Negligence

272II Necessity and Existence of Duty

272k220 k. Protection Against Acts of Third Persons. Most Cited Cases

(Formerly 272k2)

Under Tennessee law, persons do not have duty to control conduct of other persons to prevent them from causing physical harm to others.

[7] Infants 211 ↪13

211 Infants

211III Protection

211k13 k. Protection of Health and Morals. Most Cited Cases

Infants 211 ↪13.5(1)

211 Infants

211III Protection

211k13.5 Duty to Report Child Abuse

211k13.5(1) k. In General. Most Cited Cases

Under common law of Tennessee, physician does not have duty to either report suspected child abuse or to prevent any such

child abuse.

[8] Infants 211 ↪ 13.5(1)

211 Infants

211II Protection

211k13.5 Duty to Report Child Abuse

211k13.5(1) k. In General. Most Cited Cases

(Formerly 211k13)

Under Tennessee law, statute requiring medical personnel to report suspected brutality, neglect, or physical or sexual abuse of children to law enforcement official creates legal obligation to report, such that failure to report can give rise to civil liability. West's Tenn.Code, § 37-1-403.

[9] Federal Civil Procedure 170A ↪ 2515

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort Cases in General. Most Cited Cases

Fact issue as to whether conclusion by physicians that blisters on hands of child did not create suspicion of child abuse was reasonable precluded summary judgment in negligence action against physicians for failure to recognize and report symptoms of child abuse to proper agencies. West's Tenn.Code, § 37-1-403.

*532 J.D. Lee, Knoxville, TN, for Plaintiffs.

James W. Harrison, Taylor, Reams, Tilson & Harrison, Morristown, TN, G.P. Gaby, Milligan & Coleman, Greeneville, TN, and Douglas L. Dutton, Hodges, Doughty & Carson, Knoxville, TN, for Defendants.

MEMORANDUM OPINION

JARVIS, Chief Judge.

This diversity action is based upon several negligence theories, all of which have their genesis in Tennessee Code Annotated § 37-1-401, et seq., entitled "Mandatory Child Abuse Reports". More specifically, plaintiffs allege that this statutory scheme establishes certain duties by physicians and other hospital personnel which defendants breached by: (1) negligently failing to recognize the minor plaintiff's clear symptoms of child abuse; (2) negligently failing to report the minor plaintiff's suspected child abuse to the proper agencies; and (3) negligently failing to take the minor plaintiff into protective custody. Jurisdiction is predicated upon diversity of citizenship and an amount in controversy exceeding \$50,000, and is not in dispute.^{FN1} See 28 U.S.C. § 1332(a)(1). This matter is presently before the court on the defendants' motions to dismiss or for summary judgment [see Docs. 24, 27, and 34]. The issues raised have been fully briefed by the parties [see Docs. 25, 26, 28, 30, 33, 35, and 40]. Oral argument was heard on June 5, 1995. For the reasons that follow, defendants' motions will be denied and this matter will

be scheduled for trial.^{FN2}

^{FN1}. Plaintiffs are citizens and residents of the State of Connecticut, and the individual defendants are citizens and residents of the State of Tennessee. Furthermore, the corporate defendants are incorporated under the laws of the State of Tennessee, with their principal place of business in Tennessee, or a state other than Connecticut.

^{FN2}. The court notes for the record, however, that, during argument, plaintiffs agreed with one prong of defendants' motions: the claims by Daisy Nadine Ham and Michael D. Ham for mental anguish, as set forth in ¶ 21 of the second amended complaint [Doc. 22], must be dismissed because Tennessee law does not permit recovery for emotional distress due to the injury or endangerment of another, even if the person injured or endangered is a family member or loved one of the plaintiff. *See, e.g., Shelton v. Russell Pipe and Foundry Co.*, 570 S.W.2d 861 (Tenn.1978). These claims, therefore, will be dismissed.

I.

Defendants first contend that this case must be dismissed because the statutory *533 scheme entitled "Mandatory Child Abuse Reports" and, specifically, § 37-1-403 ("Reporting of brutality, abuse, neglect or child sexual abuse."), does not create a private cause of action. In order to evaluate this prong of defendants' motions, the factual allegations in the complaint must be regarded as true. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir.1983), *cert. denied*, 469 U.S. 826, 105 S.Ct. 105, 83 L.Ed.2d 50 (1984). Plaintiffs allege that on March 21, 1993, the minor plaintiff, Desiree Levon Ham, who was then 16 months old, was brought to the emergency room of defendant Lakeway Regional Hospital in Morristown, Tennessee, by her mother Claudine D. Griffin. Ms. Griffin informed the hospital personnel that Desiree had been experiencing nausea and vomiting over the two to three preceding days. Desiree was then admitted to the hospital under the primary care of defendant Dan E. Hale, O.D. On March 22, Desiree was seen in consultation by defendant David V. Willbanks, M.D., a pediatrician, and by defendant Everett G. Lynch, M.D., a family practice physician.^{FN3} Plaintiffs further allege that, during the course of Desiree's hospitalization, the defendants or their representatives all observed the child and noted that she had blisters on the palms and fingers of both hands. She also had an abrasion on her forehead. Desiree's mother was at a loss to explain these injuries, except to say that there was a mouse in the house and to speculate that Desiree might have been bitten by that mouse. At any rate, Desiree was treated for acute gastroenteritis for the next few days, improved, and was discharged on March 26 to her mother.

^{FN3}. Dr. Lynch passed away on June 7, 1994, and the administratrix of his estate, Doris Lynch, has now been substituted as a party defendant [see Doc. 21].

Two days later, on March 28, Ms. Griffin brought Desiree to the emergency room of the Morristown-Hamblen Hospital in an "unresponsive state and suffering seizures." [See Doc. 22, p. 4]. Desiree was subsequently transferred to the East Tennessee Children's Hospital in Knoxville, Tennessee, where she was evaluated and placed in intensive care, apparently the victim of extreme child abuse. Desiree is presently afflicted with severe, irreversible brain damage as a result of this abuse. The complaint alleges that these injuries were sustained by Desiree after she was released from Lakeway Regional Hospital into the custody of her mother on March 26.

Ms. Griffin was subsequently charged with child abuse, although those charges have now been dismissed. The Hamblen

County grand jury has since returned an indictment against Charles Ryan Dixon for aggravated child abuse involving Desiree. ^{FN4} Desiree has now been placed in the physical and legal custody of her paternal grandmother, Daisy Nadine Ham, who has brought this action on Desiree's behalf.

^{FN4}. During argument, plaintiffs' counsel advised the court that Mr. Dixon was either living with or dating Ms. Griffin during the time of the events complained of. It makes no difference, however, for purposes of the pending motions as to whether Ms. Griffin or Mr. Dixon, or both, were guilty of abusing Desiree.

II.

[1][2][3] As previously noted, jurisdiction in this case is based on diversity, 28 U.S.C. § 1332. Under the *Erie* doctrine, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), a federal court in a diversity case applies the law of the state in which it sits, including that state's choice of law provisions. *International Harvester Credit Corp. v. Hill*, 496 F.Supp. 329, 332 (M.D.Tenn.1979) (citing *MacPherson v. MacPherson*, 377 F.Supp. 794, 796 (M.D.Tenn.1973), *rev'd on other grounds*, 496 F.2d 258 (6th Cir.1974)). With respect to torts, Tennessee law provides that the law of the place where the tort occurred controls, absent a contrary public policy. *Winters v. Maxey*, 481 S.W.2d 755 (Tenn.1972). Therefore, the law of Tennessee will control the standard to be applied in this negligence action.

III.

A.

[4][5][6][7] Before addressing whether T.C.A. § 37-1-403 creates a private cause of action, *534 the court will turn briefly to defendants' contention that there is no common law duty to report suspected child abuse to anyone. The law is well settled in Tennessee that, in a cause of action for negligence, there must first be a duty of care owed by the defendant to the plaintiff. *See, e.g., Shouse v. Otis*, 224 Tenn. 1, 448 S.W.2d 673, 676 (1969). Thus, where there is no duty, then there can be no negligence. *See, e.g., Chattanooga Warehouse and Cold Storage Co. v. Anderson*, 141 Tenn. 288, 210 S.W. 153 (1918). Whether there is a duty owed by one person to another is a question of law to be decided by the court. *Dooley v. Everett*, 805 S.W.2d 380, 384 (Tenn.Ct.App.1990). In Tennessee, while all persons have a duty to use reasonable care not to engage in conduct that will foreseeably cause injury to others, they do not ordinarily have a duty to act affirmatively to protect others from conduct other than their own. *Nichols v. Atnip*, 844 S.W.2d 655, 661 (Tenn.Ct.App.1992). Thus, as a general rule in Tennessee, persons do not have a duty to control the conduct of other persons to prevent them from causing physical harm to others. *Id.* There are, of course, several exceptions to this general rule. *Id.* It will not be necessary to discuss these exceptions, however, because plaintiffs do not allege that they apply under the circumstances of this case. In short, the common law of Tennessee does not impose a duty on a treating physician to either report suspected child abuse or to prevent any such child abuse.

B.

[8] This void in the common law was filled by the Tennessee legislature when it enacted Part 4 of the chapter in the T.C.A.

dealing with juvenile courts and proceedings. See T.C.A. §§ 37-1-101 through 616. Part 4 of this chapter succinctly summarizes the duty owed by the defendants in this case-and indeed all persons-to the minor plaintiff Desiree: "Mandatory Child Abuse Reports." T.C.A. § 37-1-401 (emphasis added). The specific subsection relied upon by plaintiffs is set forth in T.C.A. § 37-1-403 ("Reporting of brutality, abuse, neglect or child sexual abuse."). This statute provides in pertinent part as follows:

(a) Any person, including, but not limited to, any:

(1) Physician, osteopath,^{FN5} medical examiner, chiropractor, nurse or hospital personnel engaged in the admission, examination, care or treatment of persons;

FN5. This subsection was amended in 1994 to substitute "osteopathic physician" for "osteopath". Because the effective date of this amendment was May 9, 1994, the court is quoting from the previous statute which was in effect at the time of the events complained of in March 1993.

.....

having knowledge of or called upon to render aid to any child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition which is of such a nature as to reasonably indicate that it has been caused by brutality, abuse or neglect or which on the basis of available information reasonably appears to have been caused by brutality, abuse or neglect, shall report such harm immediately, by telephone or otherwise, to the judge having juvenile jurisdiction or to the county office of the department or to the office of the sheriff or the chief law enforcement official of the municipality where the child resides.

.....

There is no question, therefore, that this statute creates a duty on the part of these defendants; however, the issue to be determined by this court with respect to the pending motions is whether this statute creates a private cause of action.

In support of their position, defendants rely on a number of cases from other jurisdictions which clearly hold that similar reporting statutes do not create a private cause of action. See, e.g., *Thelma D. v. Board of Education of City of St. Louis*, 669 F.Supp. 947, 950 (E.D.Mo.1987) (following *Doe "A" v. Special School District of St. Louis County*, 637 F.Supp. 1138 (E.D.Mo.1986)). See also 73 ALR 4th 782, § 11[b]. In fact, only one jurisdiction has held that a mandatory child abuse reporting statute creates a private cause of action under common law. See *Landeras v. Flood*, 17 Cal.3d 399, 131 Cal.Rptr. 69, 551 P.2d 389, 97 ALR 3d 324 (1976). *535 There is also dicta in *Doran v. Priddy*, 534 F.Supp. 30, 33 (D.Kan.1981), which indicates that court's willingness to follow *Landeras* had the issue been raised. Otherwise, there are no other courts outside of Tennessee which have held that a private cause of action is created for a child by a statute requiring a professional to report physical injuries to children which appear to have been inflicted other than by an accident.^{FN6} Thus, if this court were to be persuaded simply by the weight of the authority on one side or the other of this issue from other jurisdictions, then defendants would readily prevail on their motion to dismiss.

FN6. Cases which interpret Michigan's child protection law, Mich.Comp.Laws §§ 722.621, et seq., are easily

distinguishable because that statute specifically provides that the failure to report may result in civil liability. See Mich.Comp.Laws § 722.633. See also Rosacrans v. Kingon, 154 Mich.App. 381, 387-88, 397 N.W.2d 317 (1986).

However, as previously noted, the law of this case is controlled by Tennessee case law which interprets this reporting statute. There is no Tennessee Supreme Court case on point. However, in Doe v. Coffee County Board of Education, 852 S.W.2d 899 (Tenn.Ct.App.1992), the Court of Appeals for the Middle Section appears to have answered the question presently confronting this court. In Coffee County, four students and their parents filed suit against the boys' basketball coach of the Manchester Central High School ("MCHS"), because of the coach's improper sexual activities with the students. Suit was also filed against the school board and four school employees under four theories of negligence. The trial court granted summary judgment dismissing the claims against the school board and its employees based on the discretionary function exception to the Tennessee Governmental Tort Liability Act, found in T.C.A. § 29-20-205(1) (1980). The trial court also dismissed two of the students' claims based on the statute of limitations. On appeal, issues were raised with respect to the trial court's interpretation of the discretionary function exception and the statute of limitations. Although the court of appeals affirmed the dismissal of the claims based on the statute of limitations, it held that the trial court erred by dismissing the following claims based on the discretionary function exception: (1) the negligent hiring claim; (2) the installation of locks claim; and (3) the failure to report claim.^{FN7} This court is, of course, concerned only with the court of appeals' analysis of the failure to report claim.

^{FN7} The court of appeals agreed with the trial court that the adoption and enforcement of an effective sexual abuse policy is a discretionary function. Thus, plaintiffs' claim on that issue was dismissed.

That claim was based on plaintiffs' allegation that one of the MCHS teachers, Marion Brandon, was grossly negligent in failing to take appropriate action after receiving reports from students regarding the basketball coach's sexual misconduct. In discussing this claim, the court of appeals stated as follows:

The Failure to Report Claim.

Teachers and other school officials and personnel have a legal obligation to report suspected child sexual abuse to the Department of Human Services. Tenn.Code Ann. §§ 37-1-403(a)(4),^{FN8} 37-1-605(a)(4) (1991).^{FN9} Thus, teachers like Marion Brandon have a non-discretionary duty to report students' complaints of child sexual abuse. Their failure to do so can give rise to liability under Tenn.Code Ann. § 29-20-205^{FN10} and does not fall within the discretionary act exception in Tenn.Code Ann. § 29-20-205(1).

^{FN8} T.C.A. § 37-1-403(a)(4) specifically imposes the same duty on any "[s]chool teacher or other school official or personnel" as it does on physicians to report "brutality, abuse, neglect, or child sexual abuse."

^{FN9} Section 37-1-605(a)(4) also requires any "[s]chool teacher or other school official or personnel" to report "known or suspected child sexual abuse."

^{FN10} Section 29-20-205 removes immunity for injury caused by the negligent act or omission of governmental employees and also sets forth exceptions thereto.

As with any other negligence claim, civil damage liability for failing to report complaints of child sexual abuse will only arise when it proximately causes injury to another. Under the facts in this record, it is *536 unlikely that Jane Doe A or Jane Doe C will be able to establish a causal connection between their injuries and Mrs. Brandon's alleged failure to report their complaints concerning [the boys' basketball coach] to the Department of Human Services. Taking the plaintiffs' allegations as true even though they are contested by Mrs. Brandon, Mrs. Brandon did not receive the complaints about [the basketball coach's] conduct until after the incidents involving Jane Doe A and Jane Doe C had already occurred.
852 S.W.2d at 909.

In response to this language from the court of appeals, defendants first contend that this language is *dicta* and is therefore no authority for the proposition that an alleged violation of the reporting statute gives rise to a private cause of action. In support of this position, defendants, during argument, pointed to the following language in this case:

For our present purposes, the only facts that are material are those relating directly to the running of the statute of limitations and to the application of the discretionary function exception.

Id. at 903. In this court's opinion, however, this language provides no basis to circumvent the court's discussion of the failure to report claim. This failure to report claim relates directly to defendant's contention that it was covered by the discretionary function exception. The court of appeals held that there was no discretion here-teachers and other school officials and personnel *must* report child sexual abuse just as they *must* report brutality, abuse, or neglect. The court of appeals went on to hold that even though plaintiffs had stated a cause of action under Tennessee law, these plaintiffs could not survive the motion for summary judgment because they could not establish, as a matter of law, that the teachers' failure to report was a proximate cause of their injuries. *Id.* at 909. Thus, defendants' argument that this language in *Coffee County* is *dicta* is unavailing.

Defendants next contend that the *Coffee County* case cannot really mean what it says because the court of appeals failed to discuss its decision rendered some 11 years earlier in *Buckner v. Carlton*, 623 S.W.2d 102 (Tenn.Ct.App.1981). In *Buckner*, the Court of Appeals for the Middle Section discussed the circumstances under which the violation of a criminal statute would give rise to a private cause of action as it analyzed the following statute:

If any person, by color of his office, willfully and corruptly oppresses any person, under pretense of acting in his official capacity, he shall be punished by fine not exceeding one thousand dollars (\$1,000), or imprisonment in the county jail not exceeding one (1) year.

T.C.A. § 39-3203 (now § 39-5-404). The *Buckner* court then held as follows:

There is no indication of a legislative intent to create or deny a private right of action for oppression. A private right of action would probably not interfere with the underlying purpose of the oppression statute, although it could be argued the private enforcement of the statute through a civil cause of action with its lesser standard of proof would hamper the activities of government officials to an extent not intended by the Legislature. But the factor weighing most heavily against an implied right of action is that the oppression statute as well as the criminal statutes concerning conspiracy and solicitation are intended for the protection of the general public. When courts have implied a private right of action from a criminal statute, the statute invariably is intended to protect a particular class of people.

623 S.W.2d at 105 (citing *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874 (1916) (Act for the

protection of railroad employees and travelers) and J.I. Case Company v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964) (Protection of Investors)).

Again, defendants rely heavily on the fact that the court in *Coffee County* did not discuss its decision in *Buckner* in arguing that the reporting statute does not create a private right of action. But, in this court's opinion, it was not necessary for the court in *Coffee County* to do so. The reporting statute, unlike the statute in *Buckner*, is not a criminal statute. The failure to report as required by T.C.A. § 37-1-403 has no criminal*537 ramifications unless someone "knowingly" fails to make a report. See T.C.A. § 37-1-402(a). In that event, the person has committed a Class A misdemeanor. *Buckner* is simply inapposite. The statute in *Buckner* is designed to prevent an act, i.e., the willful and corrupt oppression of a person by another person, by color of his office. The reporting statute, on the other hand, creates an affirmative duty-to report cases of suspected child abuse, brutality, neglect or sexual abuse. It is not a criminal statute until someone "knowingly" fails to do so. The court, therefore, is unpersuaded by defendants' attempt to emasculate the language from *Coffee County* on this basis.

Finally, defendants contend that no private right of action can be created by the reporting statute because it is not designed to protect any particular class of people-rather, it is designed to protect the general public. The court disagrees. T.C.A. § 37-1-402(a) sets forth the purpose and the focus of the reporting statute:

The purpose of this part is to protect children whose physical or mental health and welfare are adversely affected by brutality, abuse or neglect by requiring reporting of suspected cases by any person having cause to believe that such case exists. It is intended that, as a result of such reports, the protective services of the state shall be brought to bear on the situation to prevent further abuses, to safeguard and enhance the welfare of children, and to preserve family life. This part shall be administered and interpreted to provide the greatest possible protection as promptly as possible for children.

The reporting statute, therefore, is not intended for the protection of the general public. It is intended to protect children only and, more specifically, those children who are the victims of brutality, neglect, and physical and sexual abuse. The court is mindful that some courts have held that reporting statutes create a duty owed to the general public and not to specific individuals. See, e.g., Nelson v. Freeman, 537 F.Supp. 602, 607-11 (W.D.Mo.1982). This court respectfully disagrees with that legal conclusion. In view of the clearly delineated purpose of this reporting statute, the court will not equate a statute enacted to protect children with one enacted to protect the general public as, for example, the oppression statute discussed in *Buckner*.

In sum, while the court acknowledges that the defendants have raised many forceful arguments in support of their position that the reporting statute does not create a private cause of action, the court concludes that these arguments do not circumvent the clear import of the *Coffee County* case: the reporting statute creates a legal obligation to report suspected brutality, neglect, or physical or sexual abuse of children and the failure to report "can give rise to liability..." Coffee County, 852 S.W.2d at 909. Defendants' motions to dismiss on this basis must therefore be denied.

IV.

Having determined that plaintiffs have alleged a legal cause of action, the court must next turn to whether plaintiffs can survive defendants' pending motions for summary judgment. As enunciated by the *Coffee County* case, the inquiry now becomes whether, as with any other negligence claim, plaintiffs can establish that the failure to report the child abuse has proximately caused the injury to Desiree. See 852 S.W.2d at 909. If there is no proximate causation, then there can be no civil damage

liability. *See id.* The court also notes that this would be true even if the court were to embrace defendants' theory that the reporting statute is penal in nature. *See, e.g., Brookins v. The Round Table, Inc.*, 624 S.W.2d 547, 550 (Tenn.1981) ("In [Tennessee] the violation of a penal statute is negligence *per se*, and will sustain an action for civil wrong, where it affirmatively appears that the violation was the proximate cause of the injury for which recovery is sought.").

[9] In support of their motion for summary judgment, the defendant doctors have filed their affidavits.^{FN11} The doctors admit *538 that they saw blisters on Desiree's hands; however, they further opined that there was nothing about those blisters which indicated that they were caused by trauma. Rather, in the doctors' opinions, they were caused by Desiree's documented internal problems, *i.e.*, viral gastroenteritis. The doctors also admit that Desiree had a bruise or abrasion on the left side of her forehead.

FN11. Dr. Willbanks' affidavit is set forth as an attachment to Doc. 24; Dr. Hale's affidavit is set forth as an attachment to Doc. 27. There is, of course, no affidavit filed by Dr. Lynch because he passed away during the pendency of this litigation.

In response, plaintiffs have filed the affidavits of Carol M. White, a registered nurse, and Dr. Larry E. Wolfe, a family practitioner who has emergency room experience [*see* Docs. 31 and 32, respectively]. In the court's opinion, these affidavits easily raise a genuine issue of material fact as to whether the defendant doctors should have been put on notice that Desiree was the victim of abuse. For example, Dr. Wolfe testifies that, within a reasonable degree of medical certainty, Desiree's "diarrhea could have been caused due to the stress from trauma." [*See* Doc. 32, p. 3]. Dr. Wolfe further testifies as follows:

No lab work was ordered in the Emergency Room, thus there was no monitoring of electrolytes. After admission, the lab work showed an elevated white blood cell count with lymphocytes being significantly elevated, indicative of an inflammatory process. Desiree Ham's hepatic enzymes were elevated which led Dr. Lynch to document "suspect hepatitis." The hepatitis survey showed no antibiotics or viruses detected. Possible liver trauma was not noted. In my professional opinion, within a reasonable degree of medical certainty, liver function studies are not this high in viremia.^{FN12} An elevation in liver function studies, which is as significant as this, is indicative of soft tissue injury.

FN12. Viremia is the "presence of viruses in the blood, usually characterized by malaise, fever, and aching of the back and extremities." *Dorland's Illustrated Medical Dictionary* 1826 (28th ed. 1994).

[*See id.*]. Thus, Dr. Wolfe concludes that Desiree's injuries could have been caused by external trauma. This conclusion therefore creates a genuine issue of material fact as to the reasonableness of the doctors' conclusions that there was no child abuse and, consequently, no duty to report these injuries to one of the authorities enumerated by statute.^{FN13} Thus, defendants' motion for summary judgment must be denied.^{FN14}

FN13. The court also notes that there may be a genuine issue of material fact as to whether one or more of the defendants should have reported possible neglect of Desiree to the proper authorities based upon the presence of a rodent in the child's bed.

FN14. The court finally notes for the record that defense counsel all but conceded this issue, indicating that if they

