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## Immunity Under the California Child Abuse and Neglect Reporting Act: Is Absolute Immunity the Answer?

L. Lee Dowding

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## COMMENTS

### Immunity Under the California Child Abuse and Neglect Reporting Act: Is Absolute Immunity the Answer?

#### INTRODUCTION

Violence has become an integral part of life for a large percentage of the families throughout the world. It erodes the very foundations upon which they are built and creeps into the next generation, unnoticed until its effects have undermined these young families as well.<sup>1</sup>

This statement refers to the widespread abuse of children. In the United States, a minimum of 4,000 children die each year from physical abuse.<sup>2</sup> Of the patients under five years of age seen by emergency room physicians, approximately ten percent are treated for inflicted trauma injuries.<sup>3</sup> In addition to traumatic injuries due to beating, shaking, pinching and biting, child abuse is frequently the cause of burns. Of the children hospitalized for any type of burn injury, studies have shown that four to nine percent are victims of abuse,<sup>4</sup> as are twenty-eight percent of children hospitalized for tap-water burns.<sup>5</sup>

In the 1960s, awareness of the causes, proportion and effects of child abuse increased.<sup>6</sup> Major reforms in the child protection system ensued, including nationwide enactment of child abuse reporting statutes.<sup>7</sup> These laws were enacted primarily to protect children and help families.<sup>8</sup> If the abuse is not reported, the child and family will not be helped; the child could die or suffer permanent physical and/or mental impairment.

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1. THE BATTERED CHILD 2 (R. Helfer & R. Kempe, eds., 4th ed. 1987).

2. Schmitt, *The Child with Nonaccidental Trauma*, in THE BATTERED CHILD, *supra* note 1, at 178.

3. *Id.*

4. Feldman, *Child Abuse by Burning*, in THE BATTERED CHILD, *supra* note 1, at 197.

5. *Id.*

6. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 FAM. L. Q. 141, 142 (1986) [hereinafter Meriwether].

7. Every state currently has a child abuse statute. Meriwether, *supra* note 6.

8. *Id.*

Statutes typically contain definitions of abuse,<sup>9</sup> mandate reporting of suspected cases of abuse by professionals,<sup>10</sup> provide liability for failure to report, abrogate certain legally recognized privileges<sup>11</sup> and provide immunity from liability for reports made by mandated reporters.<sup>12</sup> The immunity provided may be either qualified<sup>13</sup> or absolute.<sup>14</sup>

Two California courts have interpreted the California Child Abuse and Neglect Reporting Act as providing an absolute immunity from criminal or civil liability for reports made pursuant to the Act.<sup>15</sup> Absolute immunity precludes a successful suit against a reporter for negligent or knowingly false reporting under the Act.

This Comment focuses on the rationale for requiring professionals to report suspected cases of abuse. In addition, reasons for including some type of immunity provision for professionals are included. The Comment explores the history of California's immunity provision and the appellate courts' interpretations of the provision. Finally, this Comment suggests a possible solution to the problem of the parent's lack of a remedy for a false report.

## I. THE PROBLEM

Teachers, physicians, psychotherapists, social workers and other professionals see children every day in the course of their professional duties. Many of them work with children because they care and want to help. Most medical personnel are required to take an oath to help patients in any circumstances. Unfortunately, some of these professionals are not as honest and caring as the public expects.

For example, one case involved a twelve-year-old comatose child

9. For example: "As used in this article, 'child abuse' means a physical injury which is inflicted by other than accidental means on a child by another person. 'Child abuse' also means the sexual assault of a child or any act or omission proscribed by Section 273a of the California Penal Code (willful cruelty or unjustifiable punishment of a child) or 273d (corporal punishment or injury). 'Child abuse' also means the neglect of a child or abuse in out-of-home care, as defined in this article. Child abuse does not mean a mutual affray between minors." CAL. PENAL CODE § 11165.6 (Deering 1985).

10. The California statute currently covers teachers, teachers' aides, foster parents, many types of health care practitioners (including physicians, psychologists, chiropractors, dentists, and others licensed under Division 2 of the Business and Professions Code), and commercial film and photographic print processors. CAL. PENAL CODE §§ 11165.7-11165.10 (Deering 1985).

11. Like the California statute, most states abrogate the physician-patient and psychotherapist-patient privileges. CAL. PENAL CODE § 11171(b) (Deering Supp. 1988).

12. Meriwether, *supra* note 6, at 143.

13. A privilege is "qualified" when it does not cover all situations; it is not "absolute."

14. A privilege is "absolute" if it covers all situations.

15. *Storch v. Silverman*, 186 Cal. App. 3d 679, 231 Cal. Rptr. 27 (2d Dist. 1986); *Krikorian v. Barry*, 196 Cal. App. 3d 1211, 242 Cal. Rptr. 312 (2d Dist. 1987).

who was sexually abused in her hospital room by someone using a sharp object. The authorities arrested the nurse's aide who was on duty at the time of the incident and charged him with child abuse.<sup>16</sup> Similarly, news reports reveal that day care centers for preschool children are being investigated for alleged sexual abuse of the children.<sup>17</sup> Under California's Child Abuse and Neglect Reporting Act, both health care practitioners and child care custodians are required by law to report suspected instances of child abuse.<sup>18</sup> But what if the professionals are the ones doing the abusing?<sup>19</sup> The Act does not speak to such circumstances.

In the situation of a day care center,<sup>20</sup> the abusers would be unlikely to report themselves, as child abuse is a criminal offense. But perhaps a manager of the day care center discovers the abuse. The manager might be afraid of potential liability. The manager could report a suspicion that the child has been abused by *someone else*, such as the child's parent, guardian or sibling.<sup>21</sup> Physical evidence of the abuse may not indicate the identity of the abuser.<sup>22</sup> The child may be threatened not to reveal the actual perpetrator. The child may be too young to understand the situation. An investigation into the child's family may exonerate the parent,<sup>23</sup> or reveal nothing.

Once a parent is charged with child abuse, based on the accuser's report and a further investigation, several things may happen. Parents may be subjected to adverse publicity, emotional upheaval, the potential loss of custody of their child, and great expense in defending themselves. Before the trial, a judge could decide there is not enough evidence to convict. At trial, the jury could decide the parent is innocent, and the parent is acquitted. What rights, if any, does the parent have against the day care manager who submitted a false report, knowing it was false?

The parent has no remedy under the California Child Abuse and Neglect Reporting Act. The immunity provision, as interpreted by the second district court, provides *absolute* immunity

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16. San Diego Union, Jan. 6, 1989, B1.

17. Los Angeles Times, Jan. 17, 1986, § 1, p. 1, col. 5.

18. CAL. PENAL CODE § 11166 (Deering Supp. 1988).

19. See *infra* notes 27 and 29 for situations of possible abuse by professionals.

20. Workers in a day care center would be in the category of "child care custodians"; they would therefore be required to report under CAL. PENAL CODE § 11165.7 (Deering 1985).

21. Conceivably, any number of family members could be accused in a given situation. To avoid confusion, the term "parent" will be used in this article to include any family member accused of abuse, since parents are most often accused.

22. In some situations of sexual abuse, traces of blood or semen are used to identify the perpetrator.

23. By studying the family and home environment of the child, the investigating agency may decide the abuse was not performed by a member of the family.

from liability for any reports of child abuse made pursuant to the statute.<sup>24</sup> The third district has held the Act provides no immunity for activities relating to the report, and absolute immunity for the report and for injuries flowing from the report.<sup>25</sup>

Day care employees are not the only reporters who might file false reports. Several cases in San Diego County have been filed against physicians who reported child abuse.<sup>26</sup> The plaintiffs in these cases are alleging that the physicians' reports are either negligent, malicious or knowingly false.<sup>27</sup> One would think a thorough investigation by the authorities would not result in criminal charges against the parent for abuse if the parent were indeed innocent.<sup>28</sup> However, a physician's reassurances to investigating authorities that he or she has sufficient evidence to prove guilt could in themselves lead to prosecution.<sup>29</sup>

The problem created under an absolute immunity interpretation of the Act is that the innocent parent cannot successfully sue the physician/reporter. Even if a reporter submits a knowingly false or malicious report, or is in fact the party guilty of child abuse, he

24. *Storch v. Silverman*, 186 Cal. App. 3d 679, 231 Cal. Rptr. 27 (2d Dist. 1986); *Krikorian v. Barry*, 196 Cal. App. 3d 1211, 242 Cal. Rptr. 312 (2d Dist. 1987).

25. *Loeblich v. City of Davis*, 213 Cal. App. 3d 1272, 262 Cal. Rptr. 397 (1989).

26. *Phinney v. County of San Diego, et. al.*, No. N30481, Affidavit in support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment pp. 17-20 (filed April 25, 1988). *Phinney* cites 3 other cases, all against the hospital and a group of its employees who are the defendants in the *Phinney* case.

27. *Id.* In *Phinney*, the plaintiff, mother of a two-year-old boy, alleged that the child's physician had reported her as a child abuser to cover his own medical malpractice. The boy fell in a bathtub; the mother brought him to the hospital, and the doctor examined the child. The child died, apparently from a head injury. The mother was charged with criminal abuse in the death of her son, but was exonerated of all charges. The mother alleges the head injury was caused by the doctor's negligent treatment of the child. Since the child died from a head injury not caused by the mother's abuse or (allegedly) by the fall in the bathtub, the plaintiff claimed the doctor injured the child while performing tests on him. Since the doctor reported child abuse, the lower court held that he was absolutely immune from civil and criminal liability for making the report. Even if the doctor's act of malpractice or abuse underlying the report were the real cause of the child's death, the trial court felt that absolute immunity was required by the holdings in *Storch v. Silverman*, 186 Cal. App. 3d 679, 231 Cal. Rptr. 27 (2d Dist. 1986) and *Krikorian v. Barry*, 196 Cal. App. 3d 1211, 242 Cal. Rptr. 312 (2d Dist. 1987). The case was dismissed on a summary judgment motion by the defense. *Id.* at 1-21.

28. Indeed, the judge who heard the criminal case against Ms. Phinney felt that she was a victim "of too many people who wanted, frankly, to cover their own hides." The judge felt that, even though child abuse is a serious problem, it is "no excuse for people not exercising their discretion in a more appropriate way. . . . I find it disgraceful that a woman has to be subjected to a case like this because of speculation on the part of too many people . . . who are looking after their own jobs and their own economic interests. I think this is a case which cries out for a civil action and for one, I hope you bring one." *Id.* at 5.

29. "Whether a report is unfounded or unsubstantiated depends on the quality of investigation. If a physician writes on the final line of his report that he is willing to go to court and testify that a case has 'clear and convincing evidence' that it is a case of neglect and/or abuse, it is more likely that the case would be opened." tenBensel, *Reporting Child Abuse*, 35 JUV. & FAM. COURT J. 41, 42 (1984).

or she is protected from liability for that report.<sup>30</sup>

### A. *The Rationale for Mandatory Reporting*

The child abuse reporting requirement is intended to protect the abused child by bringing the abuse to the attention of social and protective service agencies.<sup>31</sup> These agencies can then treat the child and the family to prevent further harm.<sup>32</sup> Since the home is a private place, these agencies do not normally have access to what goes on within it. Child abuse that is likely to cause great bodily harm is a felony;<sup>33</sup> parents who abuse their children are unlikely to seek help openly, for fear of criminal prosecution.

The opportunity to ferret out instances of abuse falls on those outside the home who are likely to come in contact with the abused child. Teachers, medical personnel, social workers and counselors have the opportunity to observe children and their parents. Medical personnel frequently see injured children, and they are presumed most qualified to diagnose<sup>34</sup> symptoms<sup>35</sup> of abuse

30. Another possible scenario is one that occurred in *Marlene F. v. Affiliated Psychiatric Medical Clinic*, 48 Cal. 3d 583, 770 P. 2d 278, 257 Cal. Rptr. 98 (1989). In that case, a child was being treated by a psychotherapist for emotional problems. The child's mother later discovered that the therapist had been sexually abusing the child. The mother sued under a theory of negligent infliction of emotional distress and won. One must wonder, however, if the psychotherapist would have been immune from liability had he only made an official report stating that someone else was abusing the child, the situation that allegedly occurred in *Phinney*.

A New Jersey court held that a mother, who had reported child abuse under the New Jersey equivalent to the California Act, was not immune from liability; she, herself, was the perpetrator of the abuse. *State v. Hill*, 232 N.J. Super. 353, 556 A.2d 1325 (1989). Under this case, the doctor in *Phinney* would not be immune for his report. See *infra* notes 26-28.

31. Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 FAM. L. Q. 245, 310 (1974).

32. The child may be removed either temporarily or permanently from the home to prevent further abuse. The parents may receive psychiatric counseling as a condition to keeping or seeing the child. See generally Fraser, *A Glance at the Past, A Glance at the Present, a Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI-KENT L. REV. 641 (1978).

33. CAL. PENAL CODE § 273a(1) (Deering Supp. 1989). "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that . . . its person or health is endangered, is punishable by imprisonment in the county jail. . . ." Subsection (2) provides that harm under conditions unlikely to produce great bodily harm or death is a misdemeanor.

34. Although child abuse is not a disease, the terms "diagnose" and "symptom" are used throughout the literature to refer to the detection and the signs of abuse.

35. Some symptoms of abuse are: repeated injuries; injuries that are inconsistent with the parents' explanation of the injury as an accident; delay of the parents in seeking medical care for the child; bruises leaving definite hand or finger imprints. A trained physician can distinguish bruising of this kind from accidental bruising. For further information,

and neglect.<sup>36</sup> As a result, many early reporting statutes singled out physicians over other professionals, and required only physicians to report.<sup>37</sup>

Physicians and other professionals may not want to report child abuse.<sup>38</sup> They are often reluctant to report when they can be compelled to testify in court.<sup>39</sup> Time spent in court and away from patients could have an adverse economic impact on reporters.<sup>40</sup>

Reporters also fear liability for their reports. The strongest fear in the early days of mandatory reporting was liability for breach of the physician-patient confidential relationship.<sup>41</sup> In response to this fear, most states abrogate the physician-patient privilege for reports.<sup>42</sup> Professionals also fear the alleged abusers will sue, should the report prove unfounded,<sup>43</sup> under causes of action including defamation, false light invasion of privacy, malicious prosecution, medical malpractice, and intentional or negligent infliction

see Schmitt, *supra* note 2.

36. Besharov, *Child Abuse and Neglect*, 23 VILL. L. REV. 458, 467 (1978).

37. Foster & Freed, *Battered Child Legislation and Professional Immunity*, 52 A.B.A. J. 1071 (1966); Fraser, *supra* note 32, at 656; Besharov, *supra* note 36, at 467.

38. Besharov, *supra* note 36, at 465, cites George Wyman's (then Commissioner of the New York State Department of Social Services) explanation of the reasons for under-reporting in New York. Besharov states these reasons are applicable to all states:

Although many persons will casually accept the possibility that some children may be subjected to abuse, it appears that only the tragedy of death or severe maiming of a child in one's own community with its ensuing publicity and notoriety provides the stimulus for reporting the suspected abuse of other children. Other factors would seem to be: . . . the tendency to report abuse only when injury is severe; diagnostic capabilities not sufficiently well-developed, particularly in areas where medical centers are not involved; reluctance to become involved due to fear of criminal prosecution of parents or automatic removal of children, more personal relationship with one's neighbors in rural communities mitigates against being willing to speak out even though this will protect a child; frustration that reports have not in fact resulted in the desired goals, i.e., rehabilitation treatment for the child and family, or successful adjudication in Family Court; lack of organized, vigorous program of casefinding and interpretation.

39. Study, *The Iowa Child Abuse Reporting Statute: One State's Success*, 65 IOWA L. REV. 1273, 1336 (1980).

40. *Id.*

41. McCoid, *The Battered Child and Other Assaults Upon the Family*, 50 MINN. L. REV. 1, 38 (1965). McCoid, writing in 1965, before reporting statutes had been used for long, recognized the fear, but claimed it was exaggerated: "Yet every American case in which a physician has made disclosures concerning patients for the protection of third parties has resulted in recognition of a privilege on the part of the physician and a denial of liability. There seems little doubt that where the physician or hospital makes disclosures which are beneficial to the child patient or which may prevent future abuse of this child or others, the courts will recognize at least a qualified privilege which can be overcome only by a showing of malice or lack of good faith in the facts reported." (citations omitted.) See also, Sussman, *supra* note 31, at 293; Besharov, *supra* note 36, at 477-78; Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 33 (1967).

42. Meriwether, *supra* note 6, at 147.

43. Fraser, *supra* note 32, at 663.

tion of emotional distress.<sup>44</sup> These fears led to the widespread adoption of provisions granting immunity from liability for required reports made in good faith.<sup>45</sup> A more detailed discussion of immunity provisions follows in section C.

Provisions for immunity and abrogation of privileged communications were added in most states.<sup>46</sup> Also included in reporting acts are provisions for civil and/or criminal liability for failure to report.<sup>47</sup> These provisions apply only to mandated reports, and are designed to encourage reporting and to provide a means of enforcement.<sup>48</sup> If the law provides no means of enforcement, the concept of mandatory reporting has little "encouragement" value.<sup>49</sup>

In summary, mandatory reporting laws both require and encourage reporting of abuse cases. It is interesting to note that California's early Reporting Act called for discretion on the part of the reporting physician.<sup>50</sup> As amended in 1967,<sup>51</sup> the discretion was deleted in an attempt to strengthen the mandatory character of the statute.<sup>52</sup>

### B. Types of Immunity

As discussed above, immunity provisions were designed to encourage mandated reporters, and to allay their fears of liability should they be mistaken. To better understand the need for these provisions, this Comment explores the legal claims and probable results under each of three situations: (1) if no immunity were provided by statute; (2) if a qualified immunity were provided; and (3) if absolute immunity were provided.

Without statutory immunity, several causes of action could be brought against medical and professional reporters. Parents could bring an action based on malicious prosecution. Intentional infliction

44. Sussman, *supra* note 31, at 293. In *Storch v. Silverman*, 186 Cal. App. 3d 673 at 674, 231 Cal. Rptr. 27 at 28, the plaintiffs alleged malpractice and negligent infliction of emotional distress.

45. Foster & Freed, *supra* note 37, at 1071; Meriwether, *supra* note 6, at 147; Fraser, *supra* note 32, at 663.

46. Meriwether, *supra* note 6, at 146-47.

47. Fraser, *supra* note 32, at 665; Meriwether, *supra* note 6, at 146-7; Sussman, *supra* note 31, at 295-96; Besharov, *supra* note 36, at 480.

48. Fraser, *supra* note 32, at 665.

49. Sussman, *supra* note 31, at 295.

50. Comment, *The California Legislative Approach to Problems of Willful Child Abuse*, 54 CALIF. L. REV. 1805, 1821 (1966).

51. Former CAL. PENAL CODE § 11161.5 (Deering 1980) stated the reporter would "not be required to report as provided herein if in his opinion it would not be consistent with the health, care or treatment of the minor."

52. Comment, *supra* note 50, at 1821.



tion of emotional distress,<sup>53</sup> defamation,<sup>54</sup> false light invasion of privacy, and negligence<sup>55</sup> are other causes of action parents could file.

In a claim based on malicious prosecution, the plaintiff must prove the defendant instigated criminal proceedings against the plaintiff maliciously.<sup>56</sup> If the professional reported with a good faith belief in the truth of the report, the plaintiff would be unable to prove malice and would lose.<sup>57</sup> Most states provide a qualified immunity to individuals who report a suspected crime in good faith.<sup>58</sup> That immunity would protect the reporter of child abuse from any of these claims, as well as from claims of negligence and intentional or negligent infliction of emotional distress. In a defamation case, in some states the plaintiff would again need to prove malice.<sup>59</sup> California, however, provides an absolute privilege for communications in the course of a judicial proceeding,<sup>60</sup> and a

53. See *Storch v. Silverman*, 186 Cal. App. 3d 673, 674, 231 Cal. Rptr. 27, 28 (2d Dist. 1986); *Krikorian v. Barry*, 196 Cal. App. 3d 1211, 1214, 242 Cal. Rptr. 312, 313 (2d Dist. 1987); *Montoya by Montoya v. Bebensee*, 761 P.2d 285, 286 (Colo. App. 1988).

54. See *Lehman v. Stephens*, 148 Ill. App. 3d 538, 543, 499 N.E.2d 103, 107, (1986).

55. See generally *Sussman*, *supra* note 31, at 245.

56. *Daly*, *Willful Child Abuse and State Reporting Statutes*, 23 U. MIAMI L. REV. 283, 328 (1969); Comment, *supra* note 50, at 1820. "Malicious" does not have a precise definition in case law. Prosser says that malice in a malicious prosecution case is usually "malice in fact," and may mean hatred, spite, or ill will. It may also be found when the primary purpose in bringing the action is *other* than bringing an offender to justice. Prosser, *The Law of Torts*, § 119 at 883 (West, 5th ed. 1984).

57. *Sussman*, *supra* note 31, at 294. "The fact is that in almost every conceivable case . . . a successful defense could be made by the mere showing of good faith or lack of malice on the part of the reporter."

58. *Id.* "A legally recognized privilege pertains to those who report a crime or those who report to the proper authorities any incident intended to protect innocent parties. In such cases the reporter is normally protected even though he may be in error, assuming he acted in good faith."

California provides no such privilege statutorily, although the common law may. Instead, CAL. PENAL CODE § 148.5 provides that a person who reports a crime knowing the report is false is guilty of a misdemeanor. 148.5(d) expressly exempts those making a report under the California Child Abuse and Neglect Reporting Statute from liability under this section (Deering Supp. 1989). Thus, one who is required to report child abuse and makes a report knowing it to be false is protected from criminal liability for the false report under section 148.5 as well as under the Act.

59. *Daly*, *supra* note 56, at 328; Comment, *supra* note 50, at 1820-21. In defamation cases, "malice" is defined by CAL. CIV. CODE § 48a(4)(d) (Deering Supp. 1989): "'Actual malice' is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice."

In California, the plaintiff probably does not have to prove malice in a defamation case.

60. CAL. CIV. CODE 47(1),(2) (West Supp. 1988). ("A privileged publication or broadcast is one made . . . 1. In the proper discharge of an official duty. 2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law. . . .")

qualified privilege for communications between "interested parties."<sup>61</sup> These privileges would protect the reporter from a defamation suit.<sup>62</sup>

Some statutes provide protection from liability by including a provision based on the state of mind or level of knowledge required to report. A state of mind provision functions independently of an immunity provision. It is in effect whether or not an immunity provision exists. The statute uses either a subjective or an objective standard. The California statute uses an objective standard and requires the reporter to have "reasonable suspicion" that child abuse has occurred.<sup>63</sup> If the reporter can show it was reasonable to suspect child abuse, he or she cannot be held liable. Therefore, liability should present no threat "to the honest physician."<sup>64</sup>

States providing a qualified immunity to mandated reporters usually restrict that immunity to good faith actions.<sup>65</sup> In an action against a mandated reporter under this provision, the same result is found as where there is no immunity provision; the plaintiff must prove bad faith. The good faith requirement may have an added punch in an action for negligence that the common law does not provide. A reporter could be acting in good faith and still be negligent,<sup>66</sup> and therefore immune. The good faith requirement would protect negligent reporters, but not malicious ones.

Absolute immunity provides the most protection. This type of

61. CAL. CIV. CODE 47(3) (West Supp. 1988). ("A privileged publication or broadcast is one made . . . 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.")

62. The reporting and investigation of child abuse would be "an official proceeding authorized by law." See *Loeblich v. City of Davis*, 213 Cal. App. 3d 1272, 1282, 262 Cal. Rptr. 397, 404 (3d Dist. 1989) for an application of section 47(3) to a child abuse reporting case.

63. CAL. PENAL CODE § 11166(a), (West Supp. 1988).

[A]ny child care custodian, health practitioner, or employee of a child protective agency who has knowledge of or observes a child . . . who he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency immediately. . . . For the purposes of this article, "reasonable suspicion" means that it is objectively reasonable for a person to entertain such a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect child abuse.

*Id.*

64. Paulsen, *supra* note 41, at 34.

65. *Id.*; Meriwether, *supra* note 6, at 147.

66. This is especially true since child abuse can be difficult to diagnose; if a reporter made a report based on little or no evidence, but honestly believed the report was true, he or she would be protected even though negligent in making the report.

provision precludes all claims, even when the defendant is maliciously motivated.<sup>67</sup> The plaintiff can still file a suit, but it will be halted at the demurrer or summary judgment stage.

The goal of immunity provisions is to encourage reports of suspected child abuse. The threat or mere possibility of legal entanglement inhibits reporting.<sup>68</sup> The main reason for immunity provisions is to calm nervous fears.<sup>69</sup> Still, they serve a very important purpose. The simple fact that they can be publicized to potential reporters makes them of value.<sup>70</sup>

### C. California's Immunity Provision, 1963 to Present

The California child abuse reporting statute was enacted in 1963 and listed various types of physicians who were required to report.<sup>71</sup> The statute gave these reporters immunity from "any civil or criminal liability as a result of making any report authorized by this section."<sup>72</sup> The language of the provision does not require good faith by the reporter. It could be interpreted to provide absolute immunity. (The first reported case interpreting the immunity provision was not decided until 1986,<sup>73</sup> after the statute had been changed.) The periodical literature of the period suggests some possible interpretations.

A literal interpretation would treat a report as "authorized" only if the report is one required by the section.<sup>74</sup> Under this in-

67. Paulsen, *supra* note 41, at 34.

68. Sussman, *supra* note 31, at 293.

69. "It is ironic that legal immunity, a factor so important in the discussions about the need for child abuse reporting legislation, is probably unnecessary. No liability, in fact, does exist for good faith reporting of the sort which the reporting laws now mandate or permit." Paulsen, *supra* note 41, at 31. "This fear [of being sued] exists even though applying existing legal doctrines leads to the conclusion that anyone making a legally mandated or authorized report would be free from liability so long as the report was made in good faith." Besharov, *supra* note 26, at 475. "[T]here is no American case that even suggests that there may be liability for a good-faith report of the kind required by battered child statutes. In effect, the statutory immunity conferred by such statutes is a placebo for medical 'nervous Nellies.'" Foster & Freed, *supra* note 37, at 1072. "[T]he ultimate success of a defense of privilege may well be assured. . ." McCoid, *The Battered Child and Other Assaults Upon the Family*, 50 MINN. L. REV. 1, 39 (1965).

However, liability is not the only fear of reporters. "Legal entanglements" include time in court, attorney's fees, publicity and anything else resulting from a lawsuit, even though the reporter is not actually held liable. Even insurance cannot compensate the physician or other reporter for time spent away from his or her business.

70. Paulsen, *supra* note 41, at 34.

71. As amended in 1966, the immunity provision was CAL. PENAL § CODE 11161.5 (Deering 1980).

72. Former CAL. PENAL CODE § 11161.5 (Deering 1980).

73. The author's research reveals no appellate court cases interpreting any of the amendments to the immunity provision until *Storch v. Silverman*, 186 Cal. App. 3d 679, 231 Cal. Rptr. 27 (Second Dist. 1986).

74. Comment, *supra* note 50, at 1818.

terpretation, a report would not be authorized<sup>75</sup> if the reporter did not have the proper state of mind.<sup>76</sup> Therefore, a malicious or intentionally false report would not be granted immunity because it would not be authorized.<sup>77</sup> A report based on negligent diagnosis would probably be authorized, if the reporter had reasonable cause to believe the child was abused.<sup>78</sup>

Another way to interpret the provision is to look at its purpose.<sup>79</sup> The purpose of the reporting statute and its immunity provision is helping abused children and encouraging reports.<sup>80</sup> Using this approach, a physician's report of child abuse, while the physician neither believed nor had reasonable cause for believing abuse existed, would be making an unauthorized report.<sup>81</sup> Without a reasonable belief in the existence of abuse, the report would not further the statute's purpose.<sup>82</sup>

In 1975, the immunity provision of the statute was amended.<sup>83</sup> The amendment provided immunity "unless it can be proven that a false report was made with malice."<sup>84</sup> In 1976, the provision was again amended. "With malice" was replaced by the language "and the person knew or should have known that the report was false."<sup>85</sup> The "knew or should have known" language denotes an objective standard. The reporter is held to the standard of the reasonably prudent person in a similar position.<sup>86</sup> Thus if a "reasonable" physician would have known the report was false, our physician/reporter should also have known and can be held liable. In contrast, a subjective standard would focus on what that physician actually believed, not what he should have believed.<sup>87</sup>

The objective standard could have opened the door to claims by parents that the physician should have known the report in their

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75. *Id.*

76. The state of mind under the statute at this time was that "the minor has physical injury or injuries which appear to have been inflicted on him by other than accidental means . . ." Former CAL. PENAL CODE § 11161.5 (Deering 1980).

77. Comment, *supra* note 50, at 1818.

78. In many cases it is difficult for a physician to determine whether abuse has actually occurred. Krugman, "The Assessment Process of a Child Protection Team," *THE BATTERED CHILD*, p. 132 (4th ed. 1987). In such a case, the physician should report reasonable suspicions so that a child protection team can help in the diagnosis.

79. Comment, *supra* note 50, at 1818. This method of interpretation relies on the policy reasons for the statute.

80. Sussman, *supra* note 27, at 310.

81. Comment, *supra* note 50, at 1818.

82. *Id.*

83. Former CAL. PENAL CODE § 11161.5 (Deering 1980).

84. *Id.*

85. *Id.*

86. Sussman, *supra* note 27, at 277.

87. *Id.*

particular case was false.<sup>88</sup> The objective standard could inhibit reporting.<sup>89</sup> If the physician or other reporter, under the pressure of making an immediate decision on whether a child had been abused, had been mistaken or negligent, the reporter could be held liable for a false report. This might be so even if the reporter honestly believed the child was abused.

With the objective standard, the physician/reporter is stuck between a rock and a hard place. If he reports what he suspects is child abuse and he is wrong, he could be held liable. By not reporting child abuse, the physician could be held criminally and civilly liable for *failure* to report.<sup>90</sup> Even though the case law and statutes already protect this physician,<sup>91</sup> reading the statute does not make the protection clear to a potential reporter. The reporter would probably choose not to report at all, hoping to escape liability for failure to report. Failure to report makes him less visible.<sup>92</sup>

In 1980, the immunity provision was repealed and the Child Abuse and Neglect Reporting Act was enacted.<sup>93</sup> The new Act presented a new immunity provision.<sup>94</sup> The new provision has the same language granting immunity to professionals as the original version enacted in 1963. An additional portion provides immunity to voluntary reporters.<sup>95</sup>

The use of identical language in the 1980 and 1963 versions is significant. Either a literal or purpose-oriented approach could be used in its interpretation, as discussed earlier in this section. It is unclear how the legislature would have interpreted the original version. They might have re-enacted it in its original form purposefully. The available legislative history does not reveal whether the legislature was even aware the language was the same.<sup>96</sup>

The differences in language between the grant of immunity to

88. *Id.*

89. *Id.*

90. Besharov, *supra* note 36, at 480-81.

91. Sussman, *supra* note 27, at 294.

92. The first California case imposing liability for failure to report is *Landeros v. Flood*, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

93. Deering Supp. 1988.

94. "No child care custodian, health practitioner, employee of a child protective agency, or commercial film and photographic print processor who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article." CAL. PENAL CODE § 11172(a) (Deering Supp. 1988).

95. "Any other person reporting a known or suspected instance of child abuse shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report, and any such person who makes [such a report] is liable for any damages caused." CAL. PENAL CODE § 11172(a) (Deering Supp. 1988).

96. For a review of the legislative history of section 11172(a), see *Krikorian v. Barry*, 196 Cal. App. 3d 1211, 242 Cal. Rptr. 312 (2d Dist. 1987).

mandatory and to voluntary reporters is also significant. Voluntary reporters have immunity unless they intentionally file a false report.<sup>97</sup> No such limitation on immunity is included in the grant to mandatory reporters.<sup>98</sup> If the legislature intended to include a limitation, they could have done so easily by saying "all persons" have immunity, whether mandatory or voluntary reporters. The language used in the two provisions strongly implies an absolute immunity for mandated reporters.

Another change made to the statute in 1980 was to the standard for the level of knowledge required to report. The standard was subjective under the old statute. The reporter must have actually believed the child was abused before the duty to report was triggered. The legislature, in changing to an objective standard, was attempting to overcome the California Supreme Court's interpretation of the former statute.<sup>99</sup> The objective standard protects the "honest" reporter, while the subjective standard protected only dishonest<sup>100</sup> reporters.<sup>101</sup> If the abuse is reported, the reporter obviously cannot be held liable for failure to report. If it is at all reasonable for the reporter to suspect child abuse, he is not liable for a false report even if the report actually is false. The objective standard should encourage reporters who are not absolutely positive a child has been abused to report anyway, if it would be reasonable to suspect abuse.

#### D. Interpretation of the Immunity Provision by California Courts

In two recent cases,<sup>102</sup> issues involving the interpretation of the immunity provision were before the California Second District

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97. CAL. PENAL CODE § 11172(a) (Deering Supp. 1988). See notes 89 and 90 for text.

98. *Id.*

99. See *Landeros v. Flood*, 17 Cal. App. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976), where the California Supreme Court held that the reporter must have a *subjective* belief abuse existed before a report was required.

The objective standard for the level of knowledge required to report discussed here must be distinguished from the objective standard of immunity under the old statute (former CAL. PENAL CODE § 11161.5, Deering 1980) discussed at pp. 17-18.

100. A "dishonest" reporter would be one who *says* he or she did not have a subjective belief the child was abused, in order to fit under the statute requiring him or her to report only with a subjective belief of abuse. The reporter can avoid the requirement to report merely by lying about having a subjective belief of child abuse.

101. Despite its flaws, the objective standard provides better protection for the child than a subjective standard. Under the subjective standard, a reporter's poor judgment can be shielded if he says that he really believed in his judgment. *Sussman*, *supra* note 27, at 278.

102. *Storch v. Silverman*, 186 Cal. App. 3d 673, 231 Cal. Rptr. 27 (1986); *Krikorian v. Barry*, 196 Cal. App. 3d 1211, 242 Cal. Rptr. 312 (1987).

Appellate Court.<sup>103</sup> The court interpreted the immunity provision to provide absolute immunity to the mandated reporter.<sup>104</sup> A third case, decided in the third district appellate court, disagreed with the breadth of the second district's interpretation of immunity.<sup>105</sup>

*Storch v. Silverman*<sup>106</sup> involved accusations against parents of a 10-year-old child. They alleged a negligent report of abuse. Their cause of action was based on malpractice and negligent infliction of emotional distress. They alleged that the physician/reporter "knew or should have known [the careless and reckless diagnosis of abuse] would and did cause severe emotional distress"<sup>107</sup> because plaintiffs were subjected to an investigation by police and a protective service agency.<sup>108</sup> Defendant's demurrers were sustained and the action was dismissed at the trial court.<sup>109</sup>

On appeal, plaintiffs promoted a literal interpretation of the statute. They claimed negligent and knowingly false reports are not "required or authorized by the law" since the reporter did not "reasonably suspect" the abuse occurred.<sup>110</sup> They claimed the reporter must have the requisite state of mind for the report to be authorized.<sup>111</sup>

The court rejected plaintiffs' argument because it felt the literal interpretation would render the immunity provision meaningless.<sup>112</sup> The court claimed there is no need for immunity if there can be no liability.<sup>113</sup> In other words, if the only protected reports are true reports, then the protection is unnecessary, because the plaintiff would have no claim if the report were true. The court in *Storch* seems to have missed the point of the immunity provision. The purpose of immunity provisions is not strictly to provide immunity; that is probably provided by other statutes and common law privileges.<sup>114</sup> Instead, the purpose is to encourage reporting by

103. The Second District relied on *Storch* and *Krikorian* in another recent case, *McMartin v. Children's Institute International*, 212 Cal. App. 3d 1393, 261 Cal. Rptr. 437 (1989).

104. *Storch*, supra note 102.

105. *Loeblich v. City of Davis*, 213 Cal. App. 3d 1272, 1282, 262 Cal. Rptr. 397, 404 (3d Dist. 1989).

106. *Storch v. Silverman*, 186 Cal. App. 3d 673, 231 Cal. Rptr. 27 (2d Dist. 1986).

107. *Storch* at 676; 231 Cal. Rptr. 27 at 28.

108. *Id.* An investigation is standard procedure under the California Child Abuse and Neglect Reporting Act, CAL. PENAL CODE §§ 11164-11174 (Deering Supp. 1988).

109. *Id.* at 675, 231 Cal. Rptr. at 29. The trial court held that Penal Code section 11172(a) provides absolute immunity from civil liability for all medical practitioners involved in the reporting of suspected abuse.

110. *Id.* at 678, 231 Cal. Rptr. at 31.

111. *Id.* This issue is discussed in section C of this Comment and in Comment, *supra* note 50, at 1818.

112. *Id.* at 678, 231 Cal. Rptr. at 31.

113. *Id.*

114. *See generally* section C above.

publicizing the fact that reporters are protected<sup>115</sup> and to discourage unfounded litigation. The immunity provision is largely cosmetic,<sup>116</sup> the reporter would not be held liable for a report made in good faith.<sup>117</sup> The court in *Storch* failed to recognize the essential purpose of the provision. It is precisely because reporters were unlikely to be aware of other statutory and common law protections that immunity provisions were originally included in reporting statutes.<sup>118</sup>

In *Krikorian v. Barry*,<sup>119</sup> a child care facility alleged that those individuals reporting abuse by employees of the facility were immune from liability only for the act of reporting the abuse, but not for the investigation leading up to the report.<sup>120</sup> The court held the Act provides absolute immunity not only for reporting but also "for conduct giving rise to the obligation to report, such as the collection of data, or the observation, examination, or treatment of the suspected victim or perpetrator of child abuse, performed in a professional capacity or within the scope of employment. . . ."<sup>121</sup> Thus, if the injury the plaintiff claimed flowed from the act of reporting or for any activities required in relation to making the report, the reporter would be immune under *Krikorian* from suit on that injury.<sup>122</sup> The court was following its own ruling in *Storch* on this issue. The *Storch* court stated, in dicta, that even if a reporter maliciously and knowingly submitted a false report of child abuse with the intent to vex, annoy and harass an innocent party, that reporter would still have absolute immunity from civil or criminal liability.<sup>123</sup>

The Third District Appellate Court, in *Loeblich v. City of Davis*,<sup>124</sup> disagreed with the second district court's broad interpretation of the immunity statute. The plaintiffs in *Loeblich* were a mother, her two daughters, and her husband. The defendants included a school nurse, social workers, a teacher, the school, the

115. Sussman, *supra* note 27, at 310.

116. Fraser, *supra* note 32, at 664.

117. This issue is discussed in section C above and in Comment, *supra* note 50, at 1818. The reporter will have to claim the privilege as a defense in the course of the suit against him.

118. "These probably unnecessary immunity provisions may encourage reporting simply because they exist and can be publicized to physicians." Paulsen, *supra* note 41, at 34.

119. 196 Cal. App. 3d 1211, 242 Cal. Rptr. 312 (2d Dist. 1987).

120. *Id.* at 1222, 242 Cal. Rptr. at 318.

121. *Id.* at 1223, 242 Cal. Rptr. at 319.

122. The court in *Krikorian* discussed more issues than this section implies; discussion of the remaining issues by the court culminated in following the holding in *Storch*, and so does not bear repeating in this Comment.

123. *Storch*, at 681, 231 Cal. Rptr. at 33.

124. 213 Cal. App. 3d 1272, 262 Cal. Rptr. 397 (1989).



City of Davis, and a Davis police officer.

A school bus driver, on hearing a remark of a sexual nature by four-year-old Anastassia Loeblich, reported the event to school authorities, who subsequently reported the matter to the County Department of Social Services (DSS) and the Police Department.<sup>125</sup> A DSS worker telephoned Anastassia's mother, Karen Loeblich, and informed her that her husband had confessed to abusing Anastassia, and that the child "had a bloody vagina, [and] distended anus with no bowel control" as a result of "repeated and continued sexual abuse. . . ."<sup>126</sup> Anastassia was held in DSS custody for eleven hours, even after University of California Medical Center personnel examined her and she was found "not to have any clinical signs of molestation."<sup>127</sup> Upon Karen Loeblich's arrival, her daughter Aleksandra was seized by the social workers and held for over two hours.

Six months later, the Loeblich family filed suit, alleging false imprisonment, libel, slander, and intentional infliction of emotional distress.<sup>128</sup> The court sustained the defendants' demurrers on the basis of "the absolute immunity conferred upon defendants under [the Act]."<sup>129</sup>

On appeal, plaintiffs contended that the conduct of the defendants went beyond that protected by the Act. The court declined to follow the holding in *Krikorian* that provided immunity for "conduct giving rise to the obligation to report . . . performed in a professional capacity or within the scope of employment."<sup>130</sup> In construing the phrase, "for any report required or authorized by this article. . . ." <sup>131</sup> the court found that, "by its plain and unambiguous terms, the immunity conferred by the Act is limited to injury caused by the act of reporting suspected child abuse."<sup>132</sup>

125. Appellant's Opening Brief at 2, *Loeblich v. City of Davis*, 213 Cal. App. 3d 1272, 262 Cal. Rptr. 397 (No. 56423).

126. *Id.* at 1277, 262 Cal. Rptr. at 399. All of these allegations were found to be untrue, and the investigation of the family ended about a week later.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Krikorian* at 1223, 242 Cal. Rptr. at 319. The *Loeblich* court pointed out that the defendant preschool owner in *Krikorian*, who cross-complained against the psychologist hired by the parents to investigate the alleged abuse, did not have standing to assert professional negligence on behalf of the children. The only damage to the defendant was the loss of the defendant's child care license, which was a *direct* result of a report from the psychologist. Therefore, the court in *Krikorian* only needed to find immunity for the report in order to sustain the demurrers. Any holding of the court beyond that was dicta. *Loeblich* at 1280, 262 Cal. Rptr. at 401.

131. CAL. PENAL CODE § 11772(a) (Deering Supp. 1988).

132. *Loeblich* at 1281, 262 Cal. Rptr. at 402. It is interesting to note that, under the holding of *Loeblich*, the defendant physician in *Phinney* (*supra* notes 25 & 26) could be held liable for medical malpractice, since his alleged act of fatally injuring the child was

The court then considered provisions in the statute expressly relating to specific types of activity associated with reporting,<sup>133</sup> and determined that these provisions would be rendered superfluous by a broad interpretation of the Act.<sup>134</sup> The court proceeded to hold the city and county defendants immune from liability for libel and slander<sup>135</sup> under a statute granting absolute immunity to public officials for communications made in the course of an official proceeding.<sup>136</sup> The court remanded the matter to the trial court for determination of the liability of the defendants for false imprisonment and intentional infliction of emotional distress.<sup>137</sup>

The *Loeblich* court's holding does not disagree that mandated reporters should be immune from liability for the making of the report. The court looked to other statutory provisions and found that, under certain circumstances, those provisions gave reporters protection for activities outside the actual report. It was therefore unnecessary to extend the Act's reach, as attempted by *Storch* and *Krikorian*.

*Storch* and *Krikorian* held that California's statute granted absolute immunity for activities relating to child abuse reports; *Loeblich* limited the absolute immunity to the reports themselves, not the investigative activities leading to them. This limitation will probably aid only a small number of plaintiffs. Regardless of which specific holding is ultimately followed, absolute immunity is still the regime under which child abuse reporting cases will be

not the result of a report, but was a negligent act performed during activities leading up to the report.

133. Specifically, the court was referring to the provision in Cal Penal Code section 11172(a) providing that "[n]o person required to make a report pursuant to this article, nor any person taking photographs at his or her direction, shall incur any civil or criminal liability for taking photographs of a suspected victim of child abuse, or causing photographs to be taken of a suspected victim of child abuse, without parental consent, or for disseminating the photographs with the reports required by this article." Also, section 11172(b), immunizing any mandated reporter who, "pursuant to a request from a child protective agency, provides the requesting agency with access to the victim of a known or suspected instance of child abuse. . . ."

134. *Loeblich* at 1281-82, 262 Cal. Rptr. at 402. The court stated, "despite strong policy arguments for extending immunity to investigative activity generally, it is clear that beyond the act of reporting, the Legislature chose to protect only the related incidental conduct specifically described in the statute." *Id.*

135. *Id.* at 1285, 262 Cal. Rptr. at 405.

136. CAL. CIV. CODE § 47(2) (West Supp. 1988). The court rejected the City and County defendants' contention that they were also immune under Government Code section 820.2, which provides: "[A] public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." The court held that, even though the decision to investigate the alleged child abuse was discretionary, the tortious conduct performed after having made the discretionary decision to act was ministerial, and therefore not immune. (*McCorkle v. City of Los Angeles*, 70 Cal. 2d 252, 269, 449 P.2d 453, 74 Cal. Rptr. 389 (1969)).

137. *Id.* at 1286, 262 Cal. Rptr. at 405.

decided. Absolute immunity does not preclude the filing of lawsuits against reporters; it simply provides that the plaintiff will lose as a matter of law. Reporters still have problems, such as potential loss of money and time, under the regime of absolute immunity.

First, lawsuits will still be filed, possibly by plaintiffs with legitimate claims of malicious reporting. Other suits may be filed by plaintiffs without legitimate claims, who hope the reporter will settle out of court for a large sum rather than face a court battle.<sup>138</sup> Although the court can order a losing plaintiff to pay attorney's fees, the plaintiff may be penniless. With this in mind, the legislature in 1984 amended the statute to provide for state payment of attorney's fees for reporters who prevail in the litigation.<sup>139</sup>

This provision does not end the concerns of the professional reporter. Loss of money spent on attorney's fees is not the worst part of litigation for some professionals. Lawsuits, even when halted in preliminary stages, take time. The medical practitioner is not attending to patients, and the child care custodian must leave the business in other hands to go to court. This is especially a problem for the small licensed day care center, with a small or single-member staff. The family physician or dentist in sole practice faces the same problem. The notoriety of a lawsuit could cost the professional future business, even if absolved of all claims.<sup>140</sup> Absolute immunity will not deter these results.

On the other side of the coin, the reporter who files a malicious or knowingly false report is completely protected from civil liability under the *Storch* doctrine, even though he may have committed malpractice or criminal child abuse himself.<sup>141</sup> The accused can sue, but will lose at the early stages of litigation because the reporter is immune.

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138. McCoid, *supra* note 41, at 39.

139. CAL. PENAL CODE § 11172(e) (Deering Supp. 1988).

140. For example, if one hears about the charges on television, one may not be watching when the outcome of the trial is announced. Note also the result of the McMartin preschool case, the longest criminal trial in U.S. history, in which the defendants, owners and operators of a child care facility, were found not guilty of most charges, and a mistrial was called on the remaining charges because the jury could not agree. One defendant spent five years in jail, only to be found not guilty at trial.

141. The *Loeblich* holding could find its real value in this type of situation. Surely this result is the real intent of the legislature: the protection of those reporters acting in good faith, but not those who have committed a crime or an intentional tort.

*E. Possible Solutions*

One avenue the accused but innocent parent might pursue is to report the reporter. If the reporter is a physician, California has a Board of Medical Quality Assurance to investigate complaints of unprofessional conduct.<sup>142</sup> It is unknown at this time whether knowingly false or malicious reports of child abuse are unprofessional conduct.<sup>143</sup> When acts of unprofessional conduct are found by the Board, disciplinary action is taken. The physician may be publicly reprimanded, lose his license, or be placed on suspension or probation.<sup>144</sup> In this situation, the physician is punished. However, any injury caused by the false report is not compensated. Although the falsely accused parent may get some satisfaction from this disciplinary action, the remedy of money damages is not available.

Another solution for the falsely accused parent is for the legislature to change or the courts to re-interpret the immunity provision to give only qualified immunity to reporters, as did the court in *Loeblich*. This change would still allow a parent to sue the reporter. The reporter would probably still win because of the other statutory and common law protections available to the reporter.<sup>145</sup> In certain cases, such as in a defamation suit, common law protections would not cover a knowingly false or malicious report, unless it was made in the course of an official proceeding. In that case, the plaintiff could win, but only by proving the report was malicious or knowingly false. The reporter would still have the same problems as under absolute immunity, including loss of time and business by involvement in the litigation. In addition, the American Medical Association would presumably publicize such a statutory change in the law to keep its members informed. Professional reporters might feel the loss of the privilege would expose them to liability. They would again fear to report. The purpose of encouraging reports would not be served by this type of change. As one

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142. Unprofessional conduct is defined in section 2234 of the Business and Professions Code as including but not limited to the following: a) violating any provision of the Medical Practice Act; b) gross negligence; c) repeated negligent acts; d) incompetence; e) commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon. CAL. BUS. & PROF. CODE section 2234 (Deering 1986). In addition, section 2261 provides that "knowingly making or signing any certificate or other document directly or indirectly related to the practice of medicine or podiatry which falsely represents the existence or nonexistence of a state of facts, constitutes unprofessional conduct."

143. CAL. BUS. & PROF. CODE cites no cases concerning this issue.

144. CAL. BUS. & PROF. CODE § 2227 (Deering 1986). Other chapters of the code refer specifically to dentists (sections 1600-1800), nurses (sections 2700-2896), psychologists (sections 2900-2995), and other healing arts (sections 500-1320).

145. See generally section C above.

authority states:

A statutory rejection of liability [is not] a complete solution to the problem of physicians' reluctance through fear of liability. Clearly no statute will prevent the filing of a groundless claim or avoid some form of litigation vindicating the physician.<sup>146</sup>

The same could probably be said regarding reinterpretation by the courts.

### F. Proposal

Changing the immunity provided to reporters will not solve the litigation problems. A solution that goes outside the realm of litigation would be more useful. A panel or board of review could look at claims against reporters before they reach the litigation stage. This panel would determine if the claims have merit which would speak for instigation of a court trial.

The panel would be a peer review board similar to the Board of Medical Quality Assurance. This panel, unlike the Board, would include members of different professions. For example, in a case against a child care facility, a member of the child care field would be part of the panel; a chiropractor would be on the panel if the case involved a chiropractor. In this way, someone from the reporter's peer group would be able to render an expert opinion on the reasonableness of the report under the circumstances.<sup>147</sup>

The panel would also include members of the legal profession. Their responsibility would be to interpret the evidence and the law for the benefit of the panel.

This panel would review claims against reporters. If the evidence provided by the plaintiffs were sufficient to prove intentionally false or malicious reporting, the claim would then be brought to court and tried before a jury.<sup>148</sup> If the evidence were insufficient, the claim would be dismissed.

The main advantage to the peer review panel is that it takes

146. McCoid, *supra* note 41, at 39. McCoid also questions the extent to which immunity really encourages reporting. For McCoid's discussion of this issue see McCoid, *supra* note 41, at 39 n95.

147. In any peer review situation there is the possibility that peers will not act impartially. However, many professions use peer review, as those not trained in that field are unlikely to understand the particular problems of the professional.

148. A reasonable standard of proof to use in such cases could be "by a preponderance of the evidence." Thus, the Board would decide if the evidence showed it was more likely than not that the report was made maliciously or with knowledge of its falsity. At trial, a higher standard of proof (such as "clear and convincing evidence") could be used. If the same standard of proof were used by the Board as in trial, a jury could assume that since the Board had sent the case to trial, there was definitely enough evidence to find liability. The jury might decide to rely more on the Board's decision than on the evidence presented.

cases out of the court system, yet allows legitimate claims to be heard. The reporter would have representatives on the panel who would understand his needs and duties as a reporting professional. The time and money spent to defend litigation would be reduced. Potentially damaging publicity would be less of a factor. Suits brought only to induce a settlement in avoidance of trial would also be reduced. Only legitimate claims would be allowed to go to trial. In addition, the falsely accused parents would have an opportunity to present their legitimate claims, a right they do not have under the regime of absolute immunity.

The main disadvantage of this system would be the cost. It might be difficult to get professionals willing to take time off from their regular schedules to serve on the panel.<sup>149</sup> However, the solution should not be rejected simply because it may cost money. Perhaps the funds the legislature intended to spend on payment of reporters' attorneys' fees under the current system<sup>150</sup> could be used to fund the new system. Municipal funds might also be used, especially in locations where there is an inordinately high rate of child abuse.

Another possibility is to extend the duties of the Board of Medical Quality Assurance and similar Boards for other professions. These Boards could send cases to trial, in addition to determining the disciplinary actions to be taken. This extension would merely provide a private right of action to a complainant. These Boards already perform similar work, and their extension is the most logical and least costly solution. In any case, this proposal should be given consideration as an attempt to provide an equitable solution to both sides of this controversy.

### CONCLUSION

Since the beginning of mandatory child abuse reporting laws in the late 1950s and 1960s, the need to provide some incentive and protection to reporters was recognized. In California, it seemed that immunity provisions were working. There were no reported cases on the subject until 1986. This Comment has attempted to show that immunity provisions are not working. Children are still being abused; reporters are still deterred from reporting because they are worried about being sued; falsely accused individuals may still have no remedy under the law.<sup>151</sup> A solution to this prob-

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149. There is no way of knowing how many cases could come before the Board. Because the law currently provides absolute immunity for reporters, prospective plaintiffs are halted at the attorney's door, and their suits are never filed.

150. CAL. PENAL CODE § 11172(e) Supp. 1988).

151. Presuming that courts continue to hold reporters absolutely immune.

lem is urgently needed, not because it will stop child abuse, but because it could bring more cases of abuse to light. Only when a reporter makes known a case of abuse can the child and the abuser get help. Only when the reporter feels safe from unfounded litigation will he report.

*L. Lee Dowding*