County Welfare Department Liability for Handling Reports of Child Abuse

A child may die from severe abuse between the time a county welfare department receives a report of suspected abuse and the time they investigate the report. If the social worker who receives the report reasonably determines that the situation was non-urgent, the county welfare department should not be held liable. This Comment analyzes the four contexts in which a special relationship with a county welfare department may arise and concludes that a duty of care should not be imposed upon county welfare departments. Even if a duty of care is imposed, a county welfare department, as a governmental agency, should be immune from liability.

I. INTRODUCTION

Child abuse can result in death even after social workers receive and investigate reports of abuse.[1] As a result of the agency's involvement, a negligence claim may be brought against a county welfare department.[2] California recently faced this issue in *Ebarb v. County*

1. *See* Mark A. Uhlig, *Preventing Child Abuse: When Early Hints Are Not Enough*, N.Y. TIMES, Nov. 9, 1987, at B1 (study indicated that 25% to 50% of child fatalities involved child abuse in families that had already been identified as high-risk cases by child protective agencies); Douglas J. Besharov, *Protecting Children from Abuse: Should It Be a Legal Duty?*, 11 U. DAYTON L. REV. 509, 510 (1986) (explaining that 25% of child fatalities involved child abuse that had already been reported to a child protective agency).

2. *See* cases cited *infra* notes 42, 51. State tort law is likely to be the basis for an abused child's claim against a county welfare department. In Deshaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989), the Court held that the state had no constitutional duty to protect a child from his father after receiving reports of possible abuse. In *Deshaney*, the father beat his four-year-old child into a coma. *Id.* at 193. The child's mother brought a claim under 42 U.S.C. § 1983 against the agency and its social workers, alleging that they deprived the child of his liberty in violation of the Fourteenth Amendment's due process clause. *Id.* The Supreme Court determined that nothing in the due process clause requires the state to protect the life, liberty, and property of its citizens against invasion by private actors. *Id.* at 195. The Court noted in dicta that the state tort law may provide a remedy: "It may well be that, by voluntarily undertaking to protect [the child] against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger." *Id.* at 201-02. *See also* Laura H. Martin, Comment, *Caseworker Liability for the Negligent Handling of Child Abuse Reports*, 60 U. CIN. L. REV. 191 (1991) (discussing state tort law doctrines that determine a social worker's potential liability).

of Stanislaus, which involved the death of a three-year-old child after the welfare department had been alerted to the potential harm.[3] However, the *Ebarb* decision was ordered not to be published.[4] Because of the pervasiveness of child abuse,[5] California will likely again confront the unresolved issue of the extent of the state's responsibility to protect children from abuse.

County welfare department liability depends on two related issues: whether the county welfare department owes a duty of due care and, if so, whether the county welfare department should be immune from liability.[6] The issues are difficult to resolve when the alleged negligence involves a failure to act rather than the commission of a harmful act. Because courts are traditionally reluctant to impose liability for nonfeasance rather than for misfeasance,[7] courts impose an affirmative duty to act only in certain circumstances, such as where a special relationship exists between the parties.[8]

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3. 246 Cal. Rptr. 845 (1988) (ordered not to be officially published, 254 Cal. Rptr. 508, 765 P.2d 940 (1988)). In *Ebarb*, the plaintiff called the county welfare department and reported that his three-year-old girl was in imminent danger. *Id.* at 846. The plaintiff could not intervene because he was under a court order not to have contact with the child. *Id.* The county welfare department did not take any action and the child died from severe abuse. *Id.*

4. 254 Cal. Rptr. 508, 765 P.2d 940 (1988).

5. In San Diego, 86,758 cases of child abuse and neglect were reported in 1990, a 206% increase from 1985. Jonathan Gaw, *Study on Children Paints a Bleak Picture*, L.A. TIMES, Aug. 14, 1991, at B1. In Orange County, 34,259 reports of child abuse or neglect were reported in 1991, reflecting a 20% increase from 1990. Lynn Smith, *When Tough Times Hit Homes — Hard*, L.A. TIMES, Feb. 23, 1992, at B1. In San Francisco, reports of child abuse have increased by 400% in the past five years. Elaine Herscher, *'Kids' Amendment on the Ballot in SF: Prop. J Sets Aside Portion of City Budget*, S.F. CHRON., Sept. 30, 1991, at A17.

6. The elements of negligence are the existence of a duty, a breach of that duty which is the proximate cause of an injury, and an injury that is compensable with damages. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984). Duty is recognized as the "threshold" element in a cause of action for negligence. Davidson v. City of Westminster, 32 Cal. 3d 197, 202, 649 P.2d 894, 896, 185 Cal. Rptr. 252, 254 (1982). If the issue of duty is resolved against the plaintiff, the case is disposed of without reaching the issue of governmental immunity. *Id.* at 203, 649 P.2d at 897, 185 Cal. Rptr. at 255.

7. The distinction between nonfeasance and misfeasance has deep roots in the common law and may have been based on early courts' concern with aggressive misconduct rather than failures to aid, however egregious the failure. *See* Francis H. Bohlen, *The Moral Duty to Aid Others As a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908). The distinction may owe its survival to the difficulty of setting manageable standards for an expanded duty to protect. *See* James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982).

8. Generally, a person does not have an affirmative duty to assist or protect another who is in danger. Williams v. State, 34 Cal. 3d 18, 23, 664 P.2d 137, 139, 192 Cal. Rptr. 233, 235 (1983). One exception to the no-duty rule is the special relationship doctrine. RESTATEMENT (SECOND) OF TORTS § 315-320 (1965) [hereinafter RESTATEMENT]; *Davidson*, 32 Cal. 3d at 203, 649 P.2d at 897, 185 Cal. Rptr. at 255 (citing RESTATEMENT, *supra*, § 315; Thompson v. County of Alameda, 27 Cal. 3d 741, 751-52, 614 P.2d 728, 733-34, 167 Cal. Rptr. 70, 75-76 (1980); Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 435, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976)). There are other

This Comment examines both the duty issue and the immunity issue and concludes against county welfare department liability when a social worker receives a complaint of child abuse and determines that the situation is non-urgent. Part II analyzes the four basic contexts in which a special relationship may arise in a county welfare department setting. This part proposes that a duty of care should not arise based on the special relationship doctrine. Part III focuses upon the potential for immunity for social workers and county welfare departments under California's Tort Claims Act. This part suggests that even if a duty is imposed, the county welfare department should be immune from liability.

II. THE SPECIAL RELATIONSHIP EXCEPTION TO THE NO-DUTY-TO-RESCUE RULE

To maintain a negligence action against a county welfare department, the plaintiff must show that the county welfare department had a duty to protect the child.[9] If there is no express statutory duty to protect abused children, then common law tort principles may be applied to determine whether the county welfare department owes a duty of care.[10] A general rule under the common law is that a person has no legal duty to protect another.[11] This rule derives from the

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exceptions to the general no-duty rule. A person is liable for failing to act if he or she created the harm. *Williams*, 34 Cal. 3d at 23, 664 P.2d at 139, 192 Cal. Rptr. at 235. This exception is not applicable here because a county welfare department receiving a report of suspected child abuse probably did not create the harm. A person is liable for failing to act if he or she volunteers to come to the aid of another and his or her failure to exercise care increases the risk of harm or the harm is suffered because of the other's reliance upon the undertaking. *Id.*, (citing RESTATEMENT, *supra*, § 323). This exception, which is referred to as the "good Samaritan" doctrine, applies when a person has no initial duty to act. *Id.* The question here is whether a county welfare department has an initial duty to act. However, cases applying the special relationship doctrine in this context analyze the plaintiff's reliance. *See infra* part II.C.

9. *See supra* note 6.

10. *See Williams*, 34 Cal. 3d at 23, 664 P.2d at 139, 192 Cal. Rptr. at 235; *Davidson*, 32 Cal. 3d at 203, 649 P.2d at 897, 185 Cal. Rptr. at 255; *Thompson*, 27 Cal. 3d at 751, 614 P.2d at 733, 167 Cal. Rptr. at 75.

11. RESTATEMENT, *supra* note 8, § 314, which states: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." A famous case for this principle is Buch v. Amory Mfg. Co., 69 N.H. 257, 44 A. 809 (1898). In *Buch*, the owner of a mill was found to have no duty to a trespassing eight-year-old child who caught his hand in machinery and was severely injured. The court clearly stated the no-duty-to-rescue rule:

> Suppose A., standing close by a railroad, sees a two year old babe on the track, and a car approaching. He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he

common law's distinction between misfeasance and nonfeasance.[12] If a court characterizes the defendant's behavior as nonfeasance, absent an exception imposing a duty, the defendant ordinarily will owe no duty to the plaintiff. The no-duty-to-rescue rule has been supported[13] as well as criticized.[14]

There are exceptions to the general no-duty-to-rescue rule. In such cases, liability may be imposed even where the defendant's passive behavior would not have been otherwise actionable. A duty may arise where a special relationship exists,[15] where a person created the

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> may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under statute for its death.

Id. at 260, 44 A. at 810. Other severe cases demonstrating this principle are Handiboe v. McCarthy, 114 Ga. App. 541, 151 S.E.2d 905 (1966) (no liability for the failure of defendant's servant to rescue a four-year-old child from a swimming pool filled with three feet of water); Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959) (no liability when defendant urged business invitee to jump into drainage ditch and failed to rescue the invitee from drowning).

12. Misfeasance is active misconduct causing actual injury to others for which one may be liable. Nonfeasance is a failure to take steps to protect others from harm, *i.e.*, the nonperformance of some act, for which tort law has been more reluctant to recognize liability. KEETON ET AL., *supra* note 6, § 56, at 373. The distinction between misfeasance and nonfeasance has two fundamental problems: "(1) in many cases it is impossible to distinguish the two; and, (2) in cases where intuitively there is a clear distinction, that distinction does not always coincide with generally accepted notions about whether liability should attach." John M. Adler, *Relying upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 878 (1991).

13. Courts have supported the no-duty-to-rescue rule by refusing to impose liability for failure to act even when the failure is egregious. *See* cases cited *supra* note 11. For commentators' support of the no-duty-to rescue rule, see Martin B. Rosenberg, *The Alternative of Reward and Praise: The Case Against a Duty to Rescue*, 19 COLUM. J.L. & SOC. PROBS. 1 (1985) (opposing the expansion of a duty to affirmatively aid or protect as an inappropriate use of legal sanctions to enforce moral obligations); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 200-01 (1973) (arguing that to impose a duty to aid or protect on an "innocent" bystander would be unfair and would violate fundamental notions of individual liberty); 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 18.6, at 1049 (1956) (the no-duty-to-rescue rule promotes the abstract aim of protecting individualistic values by refusing to legally require unselfishness).

14. Courts have not directly rejected the common law rule, but have expanded the special relationship doctrine to find exceptions to the rule. *See infra* note 18 and accompanying text. For commentators' criticism of the no-duty-to rescue rule, see Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 258-68 (1980) (provides a detailed analysis of the limits of nonfeasance justifications and defends the consideration of moral values in decision-making); James B. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 111-13 (1908) (proposes that liability be imposed upon one who causes the death or serious injury of another by failing to undertake a rescue, but only where rescue was "with little or no inconvenience" to the rescuer); Aleksander W. Rudzinski, *The Duty to Rescue: A Comparative Analysis*, *in* THE GOOD SAMARITAN AND THE LAW 91 (James M. Ratcliff ed., 1981) (discussing that the duty to rescue has been imposed in European countries).

15. *See infra* notes 18-20 and accompanying text.

risk initially (even if non-negligently),[16] or where a person has become involved by virtue of taking initial, gratuitous steps to help.[17]

In an increasing number of cases, courts have relied upon the special relationship doctrine to find exceptions to the no-duty-to-rescue rule.[18] The special relationship doctrine provides that a duty arises if: "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection."[19] Thus, there are two types of affirmative duties under the special relationship doctrine: a duty to "control" and a duty to "protect."[20]

16. RESTATEMENT, *supra* note 8, §§ 321, 322. The law recognizes that even if there is no other relationship between the parties, a risk-creator has a duty to provide reasonable aid or protection to one put in danger. *See id.* Courts sometimes analyze this situation as one creating a relationship. *See, e.g.*, Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). See *infra* text accompanying notes 91-94 for a discussion of the *Johnson* decision.

17. RESTATEMENT, *supra* note 8, § 324. Even where a defendant has done nothing to create a risk and has no special relationship with either the victim or the assailant, a duty may be found where the defendant has taken steps to assist the person in need. *Id.*

18. Of the nearly 200 reported state appellate decisions between 1945 and 1991 citing RESTATEMENT OF THE LAW OF TORTS § 314 (1934) and RESTATEMENT, *supra* note 8, § 314, only 3 were decided before 1962. Roughly 20 cases each year have made reference to the section between the mid-1980s and 1991. Adler, *supra* note 12, at 877 n.41.

19. RESTATEMENT, *supra* note 8, § 315; Lopez v. Southern Cal. Rapid Transit Dist., 40 Cal. 3d 780, 788 n.5, 710 P.2d 907, 911 n.5, 221 Cal. Rptr. 840, 844 n.5 (1985) (quoting Davidson v. City of Westminster, 32 Cal. 3d 197, 203, 649 P.2d 894, 898, 185 Cal. Rptr. 252, 255 (1982)). Under the first theory, the question is whether a special relation exists between the county welfare department and the assailant. *See Davidson*, 32 Cal. 3d at 205, 649 P.2d at 898, 185 Cal. Rptr. at 256. Under the second theory, the question is whether a special relation exists between the county welfare department and the child. *See id.* at 206, 649 P.2d at 898, 185 Cal. Rptr. at 256. This Comment does not address the issue of whether the parent who contacted the county welfare department could be considered a "victim." In Turner v. District of Columbia, 532 A.2d 662 (D.C. 1987), a child who was in his father's custody died of starvation and malnutrition after the mother reported the abuse to the child protective agency. The court noted that it could be argued that the mother was the "victim." *Id.* at 667 n.5.

20. RESTATEMENT, *supra* note 8, § 315 states that, in essence, the duty is identical in either case: "to control the conduct of a third person as to prevent him from causing physical harm to another." However, what is deemed a special relationship for the imposition of the duty to control is not necessarily a special relationship with respect to a duty to protect. For example, a common carrier has a duty to protect its passengers but there is no corresponding duty to exercise control over their actions. *Lopez*, 40 Cal. 3d at 791, 710 P.2d at 914, 221 Cal. Rptr. at 847. This dichotomy of duties to protect and to control may be a consequence of the particular defendant's prior position as a protector or a controller. *See* James P. Murphy, *Evolution of the Duty of Care: Some Thoughts*, 30 DE PAUL L. REV. 147, 169-72 (1980). Or the dichotomy may be used as necessary to reach decisions grounded in traditional tort law theory. *See generally* Adler, *supra* note

The special relationship doctrine is not new. Initially, courts simply held that the duty to control or to protect was present in certain relationships, such as the relationship of parents to their children, employers to their employees, and innkeepers to their guests.[21] Some courts have expanded the types of relationships that would give rise to a duty.[22] For example, psychotherapists have been held responsible for failing to exercise reasonable care to protect others from dangerous patients.[23] Expansion of the types of relationships that would give rise to a duty often "involve public institutions, businesses, or professionals who have failed to protect an injured individual from the person who most 'directly' caused the harm."[24] Despite such expansions, some courts have declined to impose a duty even where a special relationship existed.[25]

The question then is when does a special relationship arise and when is such a relationship sufficient to impose liability. The general definition of a special relationship does not provide guidance as to when a special relationship arises.[26] Examining the attributes which special relationships have in common indicates four contexts in which a special relationship may arise. First, a special relationship may arise by statute.[27] Second, a special relationship may arise when the defendant has some special knowledge or responsibility.[28] Third,

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12 (arguing that courts distort the no-duty-to-rescue rules in order to impose upon defendants an obligation to act reasonably under the circumstances—the same duty prescribed in any negligence action).

21. RESTATEMENT, *supra* note 8, §§ 316-319. The *Restatement* also lists other relationships, such as a master to his servant, a custodian to a dangerous charge, and a carrier to a passenger which were also subject to a duty.

22. Some courts have at times found a legal duty in situations where there would have been no duty found under the early common law. Adler, *supra* note 12, at 877 (citing Farwell v. Keaton, 396 Mich. 281, 240 N.W.2d 217 (1976) as an example). In *Farwell*, the Michigan Supreme Court found that a teenager had a duty to aid a friend who had been beaten while the boys were on a social venture. 396 Mich. at 287, 240 N.W.2d at 222.

23. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). See *infra* notes 95-99 and accompanying text for a discussion of the *Tarasoff* decision.

24. Adler, *supra* note 12, at 868. These cases appear to be concerned not only with issues of safety, but with loss distribution as well. *Id.* at 868 n.7. Litigation provides an avenue for an injured party to recover through the tort system when the most obvious defendant is not a likely source of recovery. *Id.* Additionally, assailants are not always capable of paying a judgment, even when they can be apprehended. *Id.*

25. *See, e.g.*, Thompson v. Alameda County, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980). See *infra* note 94 for a discussion of the *Thompson* decision.

26. In essence, a special relationship is defined as a relationship giving rise to a duty of due care. Williams v. State, 34 Cal. 3d 18, 23, 664 P.2d 137, 139, 192 Cal. Rptr. 233, 235 (1983). This definition is, of course, circular.

27. *See* Lopez v. Southern Cal. Rapid Transit Dist., 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985) (special relationship exists between carriers and passengers based on a statute which provides that common carriers must do everything necessary for their passengers safe carriage).

28. *See Tarasoff*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (special

a special relationship may arise when the defendant causes another to justifiably rely on him or her to the other's detriment.[29] Fourth, a special relationship may arise when there is a relationship of dependency between the parties.[30] Although this model has limitations,[31] it provides a useful framework for analysis.

To apply these principles to a county welfare department it must first be determined whether the county welfare department's conduct can be characterized as misfeasance or nonfeasance. Because the county welfare department confers a benefit, the conduct will probably be considered nonfeasance.[32] As such, a plaintiff's case will fail unless it can be shown that an exception to the no-duty-to-rescue rule should apply. Applying the special relationship exception[33] leads

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relationship based on a psychiatrist's knowledge existed when psychiatrist failed to warn a woman of danger posed by patient); Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968) (special relationship based on state's responsibility existed when state failed to warn foster parents of the dangerous tendencies of a youth placed in their home).

29. *See* Morgan v. County of Yuba, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964) (special relationship based on reliance existed when sheriff promised to warn threatened woman of the release of a particular prisoner).

30. *See* Mann v. State, 70 Cal. App. 3d 773, 139 Cal. Rptr. 82 (1977) (special relationship based on dependence existed when police officer stopped to investigate stranded motorist on freeway who was subsequently injured). The dependence context as applied by *Mann* is uncertain. *See infra* part II.D.

31. The biggest limitation is that courts are guided by unarticulated policy concerns. *See* Adler, *supra* note 12, at 897 (discussing that, in affirmative duty decisions, courts actually impose upon defendants an obligation to act reasonably under the circumstances); Shlomo Twerski, Note, *Affirmative Duty After Tarasoff*, 11 HOFSTRA L. REV. 1013 (discussing that careful policy analysis is notably absent in the affirmative duty decisions). Policy considerations play a vital role in the judicial recognition of legal duties. " '[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." Dillon v. Legg, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968) (quoting WILLIAM L. PROSSER, THE LAW OF TORTS 332-33 (3d ed. 1964)). The ultimate question is whether a duty *should* be imposed as a matter of policy. 3 HARPER ET AL., *supra* note 13, § 18.6. "[L]egal duties are not discoverable facts of nature but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976).

Another limitation is that these contexts are not discrete and separate. In a situation where two or more contexts are present, a court is more likely to impose a duty. *See, e.g.*, Lopez v. Southern Cal. Rapid Transit Dist., 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985) (the court relied on both a statute and a relation of dependence and control in holding that common carriers have a special relationship with passengers which imposes a duty on the carriers to protect passengers from assaults). See *infra* notes 72-81 and accompanying text for a discussion of the *Lopez* decision.

32. *See supra* notes 11-12 and accompanying text.

33. See *supra* note 8 for an explanation of the inapplicability of the other exceptions to the no-duty-to-rescue rule.

to the question of whether a special relationship existed between the county welfare department and the assailant or between the county welfare department and the abused child. This question will be analyzed in the four contexts in which a special relationship may arise.

A. Special Relationship Based on a Child Abuse Statute

A statute may provide a source of duty either expressly or by creating a special relationship.[34] However, a generalized duty to the public cannot be the basis of a negligence claim in the absence of a special relationship between a public entity and a specific individual.[35] Thus, the relevant question is whether the child abuse statute creates a special relationship between the county welfare department and the abused child.

The California Legislature responded to the problem of child abuse by enacting statutes that delegate the responsibility of receiving child abuse reports to county welfare departments.[36] Child abuse statutes have two main clauses: the purpose clause and the procedural clause. The purpose clause of the child abuse statute reveals the legislative intent and can be used as persuasive authority to contend that the statute created a duty for the county welfare department to protect abused children.[37] The procedural clause of the child

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34. Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 490 U.S. 1007 (1989); Lopez v. Southern Cal. Rapid Transit Dist., 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985).

35. This doctrine is called the public duty doctrine. *See generally* CHARLES S. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 32.9 (1980) (explaining the distinction between a special and private duty). An illustration of the public duty doctrine follows. A police officer owes a duty to the general public as a whole to protect the citizenry. Von Batsch v. American Dist. Tel. Co., 175 Cal. App. 3d 1111, 1121, 222 Cal. Rptr. 239, 244 (1985).

> A person does not, by becoming a police officer, insulate himself from any of the basic duties which everyone owes to other people, *but neither does he assume any greater obligation to others individually. The only additional duty undertaken by accepting employment as a police officer is the duty owed to the public at large.*

Williams v. State, 34 Cal. 3d 18, 24 n.3, 664 P.2d 137, 140 n.3, 192 Cal. Rptr. 233, 236 n.3 (quoting Warren v. District of Columbia, 444 A.2d 1, 8 (D.C. App. 1981)). Absent a special relationship creating a special duty, a claim based solely on the public duty will fail. *See, e.g.*, Davidson v. City of Westminster, 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982); *Von Batsch*, 175 Cal. App. 3d at 1122, 222 Cal. Rptr. at 245; Hartzler v. City of San Jose, 46 Cal. App. 3d 6, 120 Cal. Rptr. 5 (1975).

36. CAL. WELF. & INST. CODE §§ 16000-16515 (West 1991 & Supp. 1992).

37. *E.g.*, Department of Health & Rehabilitative Servs. v. Yamuni, 529 So. 2d 258, 261, 13 Fla. L. Weekly 354, 357 (Fla. 1988). In *Yamuni*, the court found that the Florida child protection agency's duty to protect abused children was reinforced by the statement of legislative intent that child abuse reports prevent further harm to the child. *Id.* The purpose clause of the Florida child abuse statute states that the prevention of child abuse shall be a priority of the state because of the increasing problem of child abuse and its impact on children and their families. FLA. STAT. ANN. § 827.07(1) (West 1986 & Supp. 1990).

abuse statute contains the procedures that the country welfare department must follow.[38] A social worker must make an "immediate in-person response . . . in emergency situations . . . . However, an in-person response is not required when the county welfare department, based upon an evaluation of risk, determines that an in-person response is not appropriate."[39]

Because the California courts have yet to address whether the child abuse statute creates a special relationship,[40] arguments from other states may be persuasive.[41] Some state courts have held that the state child abuse statute did not create a duty to protect a specifically identified abused child.[42] For example, in *M.H. v. State*,[43] the

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The California child abuse statute states that the purposes of county welfare services are:

> (a) protecting and promoting the welfare of all children including handicapped, homeless, dependent, or neglected children; (b) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children; (c) preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible; (d) restoring to their families children who have been removed, by the provision of services to the child and the families; (e) identifying children to be placed in suitable adoptive homes, in cases where restoration to the biological family is not possible or appropriate; and (f) assuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot be placed for adoption.

CAL. WELF. & INST. CODE § 16501 (West 1991 & Supp. 1992).

38. California Welfare and Institutions Code § 16504 provides:

> Any child reported to the county welfare department to be endangered by abuse, neglect, or exploitation shall be eligible for initial intake and evaluation of risk services. Each county welfare department shall maintain and operate a 24-hour response system. An immediate in-person response shall be made by a county welfare department social worker in emergency situations in accordance with regulations of the department. The person making any initial response to a request for child welfare services shall consider providing appropriate social services to maintain the child safely in his or her own home. However, an in-person response is not required when the county welfare department, based upon an evaluation of risk, determines that an in-person response is not appropriate. An evaluation of risk includes collateral contacts, a review of previous referrals, and other relevant information, as indicated.

CAL. WELF. & INST. CODE § 16504 (West 1991 & Supp. 1992).

39. *Id.*

40. This was the issue in Ebarb v. County of Stanislaus, 246 Cal. Rptr. 845 (1988) (ordered not to be officially published, 254 Cal. Rptr. 508, 765 P.2d 940 (1988)).

41. It should be noted that some state opinions refer to "special duty" instead of "special relationship."

42. M.H. v. State, 385 N.W.2d 533, 537 (Iowa 1986); Nelson v. Freeman, 537 F. Supp. 602, 611 (W.D. Mo. 1982), *aff'd sub nom.* Nelson v. Missouri Div. of Family Servs., 706 F.2d 276 (8th Cir. 1983). In some cases the existence of a special relationship depended on whether the claim was against the social worker or the agency. *See* Jensen

Iowa Supreme Court held that the Iowa child abuse statute did not create such a duty.[44] The court acknowledged the conflicting obligations that caseworkers undertake and the potential negative impact the imposition of a duty could create.[45] The Iowa statute, like California's child abuse statute,[46] facilitates removing children from abusive environments and returning children to their home as soon as practicable.[47] The Iowa court determined that exposure to liability would place social workers in precarious situations and inhibit vigorous decision-making.[48]

In *Nelson v. Freeman*, a federal district court similarly held that the Missouri child abuse statute did not create a special duty.[49] The court stated that a social worker had a public duty to investigate once a child abuse report was received; however, a claim based only on a generalized duty to the public does not create a special relationship.[50]

Other state courts have held that a child abuse statute does create a duty of care.[51] In *Brodie v. Summit County Children Services*

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v. South Carolina Dep't of Social Servs., 297 S.C. 323, 328, 377 S.E.2d 102, 106-07 (S.C. Ct. App. 1988) (holding that no special relationship existed between the state employees and the abused child but the child abuse statute created a special duty upon social worker to conduct a thorough investigation of child abuse reports); Coleman v. Cooper, 89 N.C. App. 188, 191, 366 S.E.2d 2, 5 (1988) (holding that city did not owe abused child special duty, but because abused children were within class that was intended to be protected by child abuse statute, violation of statute could give rise to negligence claim against social worker); MidAmerica Trust Co. v. Moffat, 158 Ill. App. 3d 372, 379, 511 N.E.2d 964, 970 (1987) (court dismissed complaint against social worker but indicated that the agency would be a more appropriate defendant).

43. 385 N.W.2d 533 (Iowa 1986).

44. *Id.* at 537.

45. *Id.*

46. CAL. WELF. & INST. CODE § 16501 (West 1991 & Supp. 1992).

47. IOWA CODE ANN. § 232.67 (West 1985).

48. 385 N.W.2d at 537-38. The court reasoned that by enacting the child abuse statute, the legislature did not intend to create a tort cause of action against the state or its employees for the negligent performance of their duties. *Id.* The Iowa court analogized a social worker's duties to that of a police officer's. "Their judgment will not always be right; but to assure continued vigorous police work, those charged with that duty should not be liable for mere negligence." *Id.* (citing Smith v. State, 324 N.W.2d 299, 301 (Iowa 1982)).

49. Nelson v. Freeman, 537 F. Supp. 602, 611 (W.D. Mo. 1982), *aff'd sub nom.* Nelson v. Missouri Div. of Family Servs., 706 F.2d 276 (8th Cir. 1983).

50. Under Missouri law, the public duty doctrine prevents the translation of a public duty into a special duty. *Id.* See *supra* note 35 for an explanation of the public duty doctrine.

51. *See, e.g.*, Brodie v. Summit County Children Servs. Bd., 51 Ohio St. 3d 112, 119, 554 N.E.2d 1301, 1308 (1990) (holding that state child abuse statute created a special relationship giving rise to a duty to protect a specific child after a report was received); Turner v. District of Columbia, 532 A.2d 662, 667 (D.C. 1987); Department of Health & Rehabilitative Servs. v. Yamuni, 529 So. 2d 258, 261, 13 Fla. L. Weekly 354 (Fla. 1988) (holding that, under Florida statute, state child protection agency had special duty to prevent future harm to abused children); Mammo v. State, 138 Ariz. 528, 531, 675 P.2d 1347, 1350 (Ariz. Ct. App. 1983) (holding that state agency had duty to protect specific child under Arizona child abuse statute when it received child abuse

Board,[52] the court held that the Ohio child abuse statute created a duty to protect a specific child after a report was received. In reaching this conclusion, the court applied a four-part test to determine whether the special relationship existed: (1) the municipality must have assumed an affirmative duty to act on behalf of the abused child, (2) knowledge must have existed on the part of the municipalitiy's agents that inaction could lead to harm, (3) the abused child must have justifiably relied on the municipality's undertaking, (4) direct contact must have existed between the caseworker and the abused child.[53] To meet the first element, the court reasoned that the statute required caseworkers to investigate child abuse reports and report their findings.[54]

Brodie should be unpersuasive in California for two reasons. First, Ohio's four-part test requires all four elements to be met before a special relationship is imposed. In contrast, California has four separate contexts in which a special relationship may arise.[55] Second, Ohio's child abuse statute requires social workers to investigate all reports of known or suspected child abuse within twenty-four hours.[56] In contrast, California's child abuse statute allows the social worker to decide whether to investigate a report.[57]

In *Turner v. District of Columbia*,[58] a child died of starvation and

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reports); Florida First Nat'l Bank v. City of Jacksonville, 310 So. 2d 19, 26 (Fla. Dist. Ct. App. 1975) (holding that police regulations gave rise to a special duty once the victims were clearly and specifically identified); Owens v. Garfield, 784 P.2d 1187, 1192 (Utah 1989) (dicta) (holding that Utah child abuse statute created duty to protect children who were identified as child abuse victims).

52. 51 Ohio St. 3d 112, 554 N.E.2d 1301 (1990).

53. *Id.* at 118-119, 554 N.E.2d at 1308.

54. *Id.*

55. *See supra* notes 27-30 and accompanying text. A special relationship in California can be imposed based only on the statute; there is no need for the county welfare department to know that harm will follow, no need for a child's justifiable reliance, and no need for direct contact with the county welfare department and child.

56. The relevant portion of the Ohio child abuse statute provides:

> The county department of human services or children services board shall investigate, within twenty-four hours, each report of known or suspected child abuse or child neglect and of a known or suspected threat of child abuse or child neglect that is referred to it under this section to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible.

OHIO REV. CODE ANN. § 2151.421(F)(1) (Baldwin 1992).

57. CAL. WELF. & INST. CODE § 16504 (West 1991 & Supp. 1992); *see supra* notes 38-39 and accompanying text.

58. 532 A.2d 662 (D.C. 1987).

malnutrition after the child protective service agency received numerous reports of child abuse.[59] The court held that a special duty may be created either by statute or by direct contact and justifiable reliance.[60] The court determined that the District of Columbia Child Abuse Prevention Act created such a duty.[61]

The *Turner* court relied on an Arizona decision, *Mammo v State*,[62] and a Florida decision, *Florida First National Bank v. City of Jacksonville*.[63] In both *Mammo* and *Florida First National*, the court held that a special duty was created by statute. The Turner court found *Mammo* and *Florida First National* persuasive. In each case, the governmental agency had been notified of the situation several times, the information received had the same level of reliability, the agency was required by law to take prompt action, and the Arizona and Florida statutes were very similar to the District of Columbia's act.[64]

The *Turner* court, however, declined to follow the contrary decision of *Nelson v. Freeman*.[65] The *Turner* court distinguished *Nelson* on its facts, noting that in *Nelson*, the government agency had the opportunity to evaluate the abused children. The California child abuse statute, like the Missouri child abuse statute, gives the social worker the discretion to decide whether an investigation is warranted.[66] Thus, the California child abuse statute should not be construed to create a special relationship between county welfare departments and abused children.

In *Ebarb v. County of Stanislaus*,[67] which was ordered not to be

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59. *Id.*

60. *Id.* at 667. A statute or regulation could describe a special duty if its language sets forth mandatory acts aimed at a particular class of persons rather than the public at large. *Id.* The children did not have direct or continuing contact with the county welfare department. *Id.* Thus, appellants argued that once a specific report of abuse or neglect is filed, a special relationship exists between the county welfare department and the identified child because the statute requires that certain actions be taken. *Id.*

61. *Id.* The court found the duty to be narrow and specific, created by statute to benefit a precisely defined class of persons, neglected and abused children. *Id.* at 673.

62. 138 Ariz. 528, 675 P.2d 1347 (Ariz. Ct. App. 1983). In *Mammo*, a wrongful death action was brought against the State of Arizona and its Department of Economic Security for failing to act promptly on a complaint that children were being abused. The court held that a special duty arose between the victims and the agency when the agency received information concerning the threatened child. *Id.* at 531, 675 P.2d at 1350. It emphasized that Arizona's child protection statute established specific duties on the part of the protection services workers which were clearly for the benefit of a particular group. *Id.* at 532, 675 P.2d at 1351.

63. 310 So. 2d 19 (Fla. Dist. Ct. App. 1975). In *Florida First Nat'l*, the court held that police regulations gave rise to a special duty once the victims were clearly and specifically identifed. *Id.* at 26.

64. *Turner*, 532 A.2d at 670.

65. 537 F. Supp. 602 (W.D. Mo. 1982); *see supra* notes 49-50 and accompanying text.

66. CAL. WELF. & INST. CODE § 16501 (West 1991 & Supp. 1992).

67. 246 Cal. Rptr. 845 (1988) (ordered not to be officially published, 254 Cal.

published, the court held that California Welfare and Institutions Code sections 16501.1 and 16504 created a special relationship between county welfare departments and abused children.[68] At the time of the events in *Ebarb*, section 16501.1 required social workers to make an "immediate in-person response, 24 hours a day, seven days a week to reports of abuse, neglect, or exploitation."[69] In 1987, after the *Ebarb* events occurred, section 16501.1 was amended.[70] The word "immediate" was deleted and portions were added stating that an "in-person response is not required when the county welfare department, based upon an assessment, determines that an in-person response is not appropriate."[71]

At the time of the events in *Ebarb*, the California child abuse statute was similar to the Ohio, Arizona, Florida, and District of Columbia child abuse statutes which all required immediate investigation of all reports. However, the amended California child abuse statute does not require immediate investigation and gives the social worker the discretion to decide whether an investigation is warranted.

In California, there are recognized special relationships created by statute that establish an affirmative duty to act. In *Lopez v. Southern California Rapid Transit District*,[72] the court held that a statute created a special relationship between a common carrier and a passenger which gave rise to a duty to protect passengers from injury by fellow passengers.[73] The plaintiffs were fare-paying passengers on board a bus when a "violent argument" ensued.[74] The bus driver was notified of the "altercation" but continued to operate the bus without

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Rptr. 508, 765 P.2d 940 (1988)); see *supra* note 3 for a discussion of *Ebarb's* facts.

68. *Id.* at 849.

69. Section 16501.1 was enacted in 1983, amended in 1987, and repealed in 1991. The events in *Ebarb* took place before the 1987 amendment. Before the 1987 amendment, § 16501.1 provided:

> Preplacement Preventive Services are those services which are designed to help children remain with their families by preventing or eliminating the need for removal.
>
> (a) The Emergency Response Program is a component of Preplacement Preventive Services and is a response system which provides immediate in-person response, 24 hours a day, seven days a week to reports of abuse, neglect, or exploitation, for the purpose of providing initial intake services and crisis intervention to maintain the child safely in his or her own home or to protect the safety of the child.

CAL. WELF. & INST. CODE § 16501 (West 1991 & Supp. 1992).

70. *Id.*

71. *Id.*

72. 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985).

73. *Id.* at 789, 710 P.2d at 912, 221 Cal. Rptr. at 845.

74. *Id.* at 784, 710 P.2d at 908, 221 Cal. Rptr. at 841.

taking any precautionary measures.[75] The argument escalated into a violent fight and the plaintiffs were injured.[76]

The *Lopez* court relied on California Civil Code section 2100 which provides that common carriers "must use the utmost care and diligence for their [passengers'] safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."[77] In contrast, Welfare and Institutions Code sections 16504 and 16501 do not impose such stringent requirements on social workers as Civil Code section 2100 imposes on common carriers. County welfare departments are established to serve several goals, including the protection of children.[78] These statutes, however, do not require county welfare departments to do "everything necessary" to protect children. The statute provides county welfare departments with guidelines in determining how to respond to a report of suspected child abuse.

Furthermore, the *Lopez* court relied upon the relation of dependence and control between a carrier and its passengers in order to impose a duty.[79] Passengers must rely on the bus driver for their safety because they are "sealed in a moving steel cocoon."[80] The "means of entering and exiting are limited and under exclusive control of the bus driver."[81] In contrast, county welfare departments do not have such exclusive contact with or control over the environment of a child when they have received a call of suspected child abuse. Unlike the relationship between carriers and their passengers, there is no relation of dependence or control between a child and a county welfare department when a social worker first receives a report of suspected child abuse.

In *Bonds v. California ex rel. California Highway Patrol*,[82] a highway patrolman did not remove a parked, abandoned Ford Mustang from the side of a highway.[83] Later, plaintiff's U-Haul truck collided with a motor home, which had apparently stopped to either repair or remove the Ford Mustang.[84] The force of the collision caused the motor home to collide with the Ford Mustang, causing an

75. *Id.*
76. *Id.*
77. California Civil Code § 2100 provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." CAL. CIV. CODE § 2100 (West 1985).
78. CAL. WELF. & INST. CODE § 16501 (West 1991 & Supp. 1992).
79. 40 Cal. 3d at 789, 710 P.2d at 912, 221 Cal. Rptr. at 845.
80. *Id.*
81. *Id.*
82. 138 Cal. App. 3d 314, 187 Cal. Rptr. 792 (1982).
83. *Id.* at 317, 187 Cal. Rptr. at 793.
84. *Id.* at 316, 187 Cal. Rptr. at 793.

explosion that killed two passengers in the motor home.[85] Relying on California Vehicle Code section 22651, which "permits" rather than "requires" a highway patrolman to remove a vehicle from a highway,[86] the court found that the highway patrolman did not owe a duty of care to the plaintiff.[87]

Like the highway patrol, a county welfare department is subject to statutory rules and duties. Social workers have a duty to make an in-person visit immediately upon the report of child abuse only when they determine that an emergency situation exists.[88] Because an in-person response is not required for each report of child abuse but is predicated on a social worker's decision that an emergency situation exists, a duty of care to protect a child should not arise before any contact with the child.

Both the purpose clause and the procedural clause of the California child abuse statute are similar to other states' child abuse statutes which have not given rise to a special relationship. First, the purpose clause states that the county welfare department's goals are to remove children from abusive environments and return children to their home as soon as practicable. Exposure to liability would place social workers in precarious situations and inhibit vigorous decision-making. Second, the procedural clause does not mandate an immediate response and gives social workers the discretion to decide whether a report must be investigated. Furthermore, the California child abuse statute is more like the discretionary statute in *Bonds* than the mandatory statute in *Lopez*. Consequently, the county welfare department should not have a special relationship with a child based on the child abuse statute.

B. Special Relationship Based on Special Knowledge or Responsibility

Another context where a special relationship may arise is when the defendant has some special knowledge or responsibility toward another.[89] The special relationship may invoke a duty to control another person's conduct or to protect an identifiable and foreseeable

85. *Id.*

86. California Vehicle Code § 22651 states in pertinent part: "Any peace officer . . . may remove a vehicle . . . (b) When any vehicle is left standing upon a highway . . . in a condition so as to create a hazard to other traffic . . . ." CAL. VEH. CODE § 22651 (West Supp. 1992).

87. *Bonds*, 138 Cal. App. 3d at 321, 187 Cal. Rptr. at 796.

88. CAL. WELF. & INST. CODE § 16504 (West 1991 & Supp. 1992).

89. *See supra* note 28 and accompanying text.

third party from harm.[90]

In *Johnson v. State*,[91] a parole agent placed a juvenile parolee with violent tendencies into the Johnson's home without warning them of his potentially dangerous behavior.[92] The juvenile attacked and injured Mrs. Johnson.[93] Because the parole agent knew of the juvenile's violent tendencies, a failure to warn the Johnsons placed them in foreseeable danger and thus created a special relationship between the state and the Johnsons.[94]

A county welfare department may have no prior dealings with an assailant. If so, then the county welfare department has no knowledge of an assailant's temperament or tendencies, violent or otherwise. Unlike the situation in *Johnson*, a social worker probably did not introduce the assailant into the household. Nor would a social worker's actions or inactions place a child in any greater risk of danger than before the report of abuse was made.

In *Tarasoff v. Regents of University of California*,[95] the court held that the plaintiffs could state a claim against a psychiatrist for failing to protect their daughter, an identifiable victim, from an assailant who had threatened her life.[96] A duty to warn the victim of the danger was imposed on the psychiatrist, in part because of his special relationship to the assailant.[97] The relationship of psychiatrist and patient fosters open dialogue between a psychiatrist and his patient. Therefore, a psychiatrist should have the access to information, training, and skill necessary to discern a patient's serious threats of violence.[98]

In most cases, an alleged assailant is essentially a stranger to the

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90. Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

91. *Id.*

92. *Id.* at 784-85, 447 P.2d at 354, 73 Cal. Rptr. at 242.

93. *Id.* at 785, 447 P.2d at 354, 73 Cal. Rptr. at 242.

94. *Id.* at 785-86, 447 P.2d at 355, 73 Cal. Rptr. at 243. *But see* Thompson v. Alameda County, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980). In *Thompson*, a juvenile offender was released from a county institution to the custody of his mother without warning her of his threat to kill an unspecified young child. *Id.* at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72. The juvenile murdered the plaintiffs' young child within twenty-four hours of his release. *Id.* The court distinguished *Tarasoff*'s duty to warn because *Tarasoff* had involved a named or readily identifiable victim. *Id.* at 752-56, 614 P.2d at 733-37, 167 Cal. Rptr. at 76-79. The court also justified the absence of duty on the public policy grounds of effective operation of a parole system. *Id.* at 756-57, 614 P.2d at 737, 167 Cal. Rptr. at 79.

95. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

96. *Id.*

97. The court also based its decision upon a determination that society's interest in confidentiality must be subordinated to an interest in public safety. *Id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27. The court concluded that the therapeutic relationship with the assailant was sufficiently "special" to justify the creation of a new exception to the general no-duty rule in nonfeasance situations. *Id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.

98. The court compared the role of the psychiatrist to that of a physician who must often make predictions based upon evaluations. *Id.* at 438, 551 P.2d at 345, 131

county welfare department social worker. There is no dialogue between them, no sharing of violent or secret thoughts. However, a trained social worker may have special knowledge about child abuse and therefore may have the special knowledge and responsibility required to impose a special relationship.

In *Tarasoff*, the court concluded that the campus police who briefly detained the assailant did not have a special relationship with the assailant or the victim.[99] Although the court did not explain its conclusion, a possible rationale is that it was not foreseeable to campus police that the patient would still kill the victim. Like the campus police in *Tarasoff*, a county welfare department is informed that an assailant might present a danger to a child. If a county welfare department cannot foresee imminent danger to a child, then a special relationship between an assailant and the county welfare department should not be imposed.

In *Davidson v. City of Westminster*,[100] the plaintiff was stabbed in a laundromat that police officers had under surveillance.[101] The plaintiff asserted that a special relationship existed between the officers and the assailant based on the officers' status as policemen and their recognition of the assailant as a dangerous person.[102] The court held that mere proximity to an assailant even with knowledge of his assaultive tendencies was too tenuous a connection to impose a special relationship.[103]

In most situations, the connection between a social worker and a potential assailant is less than the connection in *Davidson*. First, a social worker has no physical proximity to a potential assailant. Second, a social worker is unlikely to recognize an assailant. Finally, the social worker probably does not have knowledge of the assailant's tendencies. If this was the first report about a potential assailant, a social worker may have determined that the potential assailant was not dangerous.[104] As such, the connection between the social worker

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Cal. Rptr. at 25. The psychiatrist need only exercise a reasonable degree of skill, knowledge, and care in determining whether a patient presents a serious danger of violence. *Id.*

99. *Id.* at 432, 444, 551 P.2d at 341, 349, 131 Cal. Rptr. at 21, 29.

100. 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982).

101. *Id.* at 201, 649 P.2d at 895, 185 Cal. Rptr. at 253.

102. *Id.* at 205, 649 P.2d at 898, 185 Cal. Rptr. at 256.

103. *Id.*

104. A social worker who receives a complaint of suspected child abuse evaluates the risk to the child. CAL. WELF. & INST. CODE § 16504 (West 1991 & Supp. 1992). Responses to a complaint of suspected child abuse include immediate in-person response or no in-person response. *Id.* If the social worker did not respond immediately, then the social worker may have determined that an in-person response was not required. If so,

and the potential assailant is too attenuated, and therefore, a special relationship should not be imposed.

A plaintiff may assert that a special relationship based on special knowledge exists. The strength of a claim that a special relationship exists between the county welfare department and the abused child may depend on the extent of the contact between the county welfare department and the child. If the plaintiff asserts that a special relationship exists between the county welfare department and the assailant, the claim is unlikely to prevail because the connection between the county welfare department and an assailant is minimal.

C. Special Relationship Based on Reliance

A third situation in which a special relationship may arise is where the defendant causes another to justifiably rely on him or her to the other's detriment.[105] As noted earlier, in *Davidson v. City of Westminster*,[106] the plaintiff was stabbed in a laundromat that the police officers had under surveillance.[107] The plaintiff asserted that a special relationship existed between the police officers and herself because of her dependence upon the police officers to secure her safety.[108] The court held that a special relationship did not arise between the police officers and the plaintiff even though the plaintiff was a potential victim of a potential assailant.[109]

When a county welfare department receives a report of suspected child abuse, the child could be characterized as a potential victim of a potential assailant. However, the child's status as a potential victim should not be sufficient to give rise to a special relationship. The county welfare department may have been aware of the danger that an assailant posed to the child, but the county welfare department's failure to protect the child placed the child in no worse position than he or she would have been otherwise.[110]

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then the social worker probably considered the potential assailant as not dangerous.

105. *See supra* note 29.

106. 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982); *see supra* notes 100-03 and accompanying text.

107. 32 Cal. 3d at 201, 649 P.2d at 895, 185 Cal. Rptr. at 253.

108. *Id.* at 206, 649 P.2d at 898, 185 Cal. Rptr. at 256. The plaintiff alleged that two special relationships existed: a special relationship between police officers and the assailant which gave rise to a duty to control the assailant and a special relationship between police officers and herself which gave rise to a duty to protect her. *Id.* at 205-06, 649 P.2d at 898-99, 185 Cal. Rptr. at 256-57. Specifically, the plaintiff alleged that the special relationship existed between the plaintiff and the officers because of the decision to conduct surveillance, the observation of the potential assailant in the laundromat where the plaintiff was present, and the recognition of the assailant as the likely perpetrator of a previous assault. *Id.* at 206, 649 P.2d at 898, 185 Cal. Rptr. at 256.

109. *Id.* at 208-09, 649 P.2d at 900, 185 Cal. Rptr. at 258.

110. A similar argument was made in Deshaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989). In declining to find a constitutional violation by the state, the majority in *DeShaney* concluded that the state might have been aware of a

In *Von Batsch v. American District Telegraph Co.*,[111] police officers responded to a burglar alarm, failed to check the roof, and a few hours later the home's occupant was murdered at the hands of intruders.[112] Even though the officers reported that there were no intruders on the premises, a special relationship between the officers and the decedent was not imposed.[113] The court noted that responding to an alarm and investigating the premises did not make the officers responsible for the occupant's safety.[114]

Similarly, social workers respond to reports that indicate that a person may be at risk. County welfare departments, like police departments, deal each day with many potential victims at risk. Because of limited resources, these agencies must assign priorities among these risks. A social worker may make a reasonable decision not to respond immediately to a call of suspected child abuse. The social worker's response, like the response in *Von Batsch*, should not be considered tantamount to insuring a child's safety.

D. Special Relationship Based on Dependence

A fourth context in which a special relationship may arise is where there is dependency or mutual dependency between persons.[115] In *Mann v. State*, a special relationship was imposed due to the dependency between a motorist and a California Highway Patrolman.[116] In *Mann*, a motorist was injured when the patrolman left the stranded motorist without lighting protective flares or without waiting until a tow truck could effectively protect the person.[117] Because the patrolman was an "expert in traffic safety" the plaintiff did not act to protect himself but relied on the patrolman having taken all steps necessary to protect him from passing cars on the highway.[118]

A child probably depends on those he or she knows and loves to

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danger that a child's father posed to the child, but argued that the state's failure to protect placed the child in no worse position than he would have been otherwise. *Id.* at 201.

111. 175 Cal. App. 3d 1111, 222 Cal. Rptr. 239 (1985).
112. *Id.* at 1116-17, 222 Cal. Rptr. at 241.
113. *Id.* at 1125, 222 Cal. Rptr. at 247.
114. *Id.*
115. Mann v. State, 70 Cal. App. 3d 773, 779-80, 139 Cal. Rptr. 82, 86 (1977).
116. *Id.*
117. *Id.* at 777, 139 Cal. Rptr. at 84.
118. *Id.* at 780, 139 Cal. Rptr. at 86.

protect him or her from harm rather than depend on the county welfare department. Although at some point a child may come to depend on the county welfare department for protection, the dependence standard as applied by the court in *Mann* remains uncertain. The California Legislature attempted to overrule *Mann* by enacting California Government Code section 820.25 as an urgency measure in 1979.[119] Furthermore, in *Williams v. State*,[120] the court characterized *Mann* as an application of the good Samaritan rule.[121] A good Samaritan is one who voluntarily comes to the aid of another.[122] As such, the doctrine does not pertain to whether the county welfare department has an initial duty to protect abused children.[123] The *Williams* court also concluded that a requisite factor in

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119. California Government Code § 820.25 provides:

(a) For purposes of Section 820.2, the decision of a peace officer . . . or a state or local law enforcement official, to render assistance to a motorist who has not been involved in an accident or to leave the scene after rendering assistance, upon learning of a reasonably apparent emergency requiring his immediate attention elsewhere or upon instructions from a superior to assume duties elsewhere, shall be deemed an exercise of discretion.

(b) The provision in subdivision (a) shall not apply if the act or omission occurred pursuant to the performance of a ministerial duty. For purposes of this section, "ministerial duty" is defined as a plain and mandatory duty involving the execution of a set task and to be performed without the exercise of discretion.

CAL. GOV'T CODE § 820.25 (West 1980). This section was apparently enacted due to the concern that officers might be found liable for leaving one scene and going to another just as urgent. Williams v. State, 34 Cal. 3d 18, 25 n.5, 664 P.2d 137, 141 n.5, 192 Cal. Rptr. 233, 237 n.5 (1983).

120. 34 Cal. 3d 18, 664 P.2d 137, 192 Cal. Rptr. 233 (1983).

121. *Id.* at 26, 664 P.2d at 141, 192 Cal. Rptr. at 237. In *Williams*, the plaintiff was a passenger in a moving automobile when a piece of heated brake drum from a passing truck flew through the windshield of the car and struck her in the face, causing severe injuries including the loss of one eye. *Id.* at 21-22, 33, 664 P.2d at 138, 146, 192 Cal. Rptr. at 234, 242. The California Highway Patrol officers arrived within minutes and investigated the accident. *Id.* at 21, 664 P.2d at 138, 193 Cal. Rptr. at 234. The police failed to pursue the truck, thus destroying plaintiff's opportunity to obtain compensation for her injuries. *Id.* at 21-22, 664 P.2d at 138, 192 Cal. Rptr. at 234. In examining the duty issue, the court applied the general rule that there is no duty to aid others, but that a good Samaritan who does so voluntarily assumes a duty to exercise due care in that aid. *Id.* at 23, 664 P.2d at 139, 192 Cal. Rptr. at 235. Specifically, a good Samaritan may only be found liable "if (a) his failure to exercise such care increases the risk of [the] harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." *Id.* at 23, 664 P.2d at 139, 192 Cal. Rptr. at 235-36. The court concluded that a patrol officer who comes to the aid of an injured or stranded motorist is a good Samaritan and should be held only to that standard of care. *See id.* at 26, 664 P.2d at 141, 192 Cal. Rptr. at 237.

The special relationship doctrine does not define what circumstances constitute sufficient dependence to justify a special relationship finding. In fact, one factor cited in *Williams* as showing that a relationship of dependence arose was that "it was reasonably foreseeable that plaintiff would rely on [the officer's] expertise." *Id.* at 33, 664 P.2d at 147, 192 Cal. Rptr. at 243 (Bird, J., dissenting). This mention of reliance illustrates the confusion that may result in determining dependence.

122. *Id.* at 23, 664 P.2d at 139, 192 Cal. Rptr. at 235.

123. The question here is whether a county welfare department has an initial duty.

finding a special relationship is detrimental reliance by the plaintiff; mere dependence is insufficient.[124] Thus, it is unclear whether dependence alone is sufficient to impose a special relationship.

Analyzing the four contexts in which a special relationship may arise reveals that a special relationship should not be imposed when a social worker receives a complaint of child abuse and determines that the situation is non-urgent. First, a special relationship may be created by statute. However, the California child abuse statute is similar to statutes that have not created a special relationship. A special relationship may also arise if the defendant has some special knowledge or responsibility, if the plaintiff detrimentally relies on the defendant, or if there is a relationship of dependence between the parties. Whether any of these three contexts is sufficient to find a special relationship depends greatly on the closeness of the contact between the county welfare department and the child or the assailant. If the relationship between the county welfare department and the child is attenuated, then a special relationship should not be imposed regardless of whether the child is a foreseeable victim. Additionally, in most instances the relationship between the county welfare department and the assailant will be too minimal to impose a special relationship.

124. *Williams*, 34 Cal. 3d at 25, 664 P.2d at 141, 192 Cal. Rptr. at 237. The court reached this conclusion while examining the possibility that there was a special relationship between the motorist and the patrol officers. *Id.* at 23-27, 664 P.2d at 139-43, 192 Cal. Rptr. at 235-38. The court analyzed *Mann* and two irreconcilable cases. In Winkelman v. City of Sunnyvale, 59 Cal. App. 3d 509, 130 Cal. Rptr. 690 (1976), a truck that caused two cars to collide left the scene. The truck driver went to the police station to report that he may have been a participant in an accident. The police at the station were not liable for allowing the truck driver to leave the police station without obtaining his identity. In Clemente v. State, 101 Cal. App. 3d 374, 161 Cal. Rptr. 799 (1980), a pedestrian was struck by a motorcyclist. The officer who stopped to investigate was liable for failing to secure the motorcyclist's name. In reaching its conclusion, the *Williams* court overruled *Clemente*, which had found a special relationship based only on dependence. *Williams*, 34 Cal. 3d at 28 n.9, 664 P.2d at 143 n.9, 192 Cal. Rptr. at 239 n.9. The *Williams* court reaffirmed its earlier judgment that *Mann*, which had also found a special relationship based on dependence, was simply an application of the good Samaritan doctrine. *Id.* at 26, 664 P.2d at 141, 192 Cal. Rptr. at 237. The court also distinguished *Mann* from *Williams*, finding that in *Mann* the officer was liable for failing to protect the plaintiff from future physical harm, as opposed to *Williams*, in which the officer allegedly failed to investigate the cause of harm already incurred. *Id.*

III. IMMUNITY

If a duty is imposed on a county welfare department, the issue of governmental immunity arises.[125] The duties and immunities of governmental entities are closely related, and it is difficult to separate them into distinct categories.[126] The two issues raise similar policy considerations which require a balancing between an entity's unique powers and an entity's potential liability for the consequences of executing those powers.[127] Nonetheless, some courts have separated the two issues into the "duty horse" and "immunity cart."[128]

In California, the liabilities and immunities of public employees have been specifically outlined by the legislature in the California Tort Claims Act.[129] Because social workers are public employees,

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125. *See supra* note 6.

126. Whether a court finds that a governmental entity has no duty or is immune from liability, the result is the same: the governmental entity is not liable for allegedly negligent conduct. *See* McCarthy v. Frost, 33 Cal. App. 3d 872, 109 Cal. Rptr. 470 (1973); Bratt v. San Francisco, 50 Cal. App. 3d 550, 123 Cal. Rptr. 774 (1975). In *McCarthy* and *Bratt*, the court characterized an act or omission as an immune discretionary function when the same result could be reached by holding that the defendant did not owe a duty of care. Another example of the relatedness of the two issues is when a court assumes that a special relationhip obviates the need to consider whether the governmental entity is immune from liability. *See* Hartzler v. City of San Jose, 46 Cal. App. 3d 6, 120 Cal. Rptr. 5 (1975); Antique Arts Corp. v. City of Torrance, 39 Cal. App. 3d 588, 114 Cal. Rptr. 332 (1975); McCarthy v. Frost, 33 Cal. App. 3d 872, 109 Cal. Rptr. 470 (1973).

127. Both issues provide important limitations on governmental liability. Courts "have invoked the concept of duty to limit generally 'the otherwise potentially infinite liability which would follow every negligent act.' " Thompson v. County of Alameda, 27 Cal. 3d 741, 750, 614 P.2d 728, 732, 167 Cal. Rptr. 70, 74 (1980) (quoting Dillon v. Legg, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968)). Courts apply immunity to assure

> judicial abstention in areas in which the responsibility for basic policy decisions has been committed to coordinate branches of government. Any wider judicial review . . . would place the court in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government. Moreover, the potentiality of such review might even in the first instance affect the coordinate body's decision-making process.

Newton v. County of Napa, 217 Cal. App. 3d 1551, 1560, 266 Cal. Rptr. 682, 687 (1990) (quoting Johnson v. State, 69 Cal. 2d 782, 793, 447 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968)). *See also* Lisa McCabe, Comment, *Police Officers' Duty to Rescue or Aid: Are They Only Good Samaritans?*, 72 CALIF. L. REV. 661 (1984) (discussing arguments for and against governmental duty and immunity).

128. " 'Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.' " Williams v. State, 34 Cal. 3d 18, 22, 664 P.2d 137, 139, 192 Cal. Rptr. 233, 235 (1983) (quoting Davidson v. City of Westminster, 32 Cal. 3d 197, 201-02, 649 P.2d 894, 896, 185 Cal. Rptr. 252, 254 (1982)). The question of " 'duty' is only a threshold issue, beyond which remain the immunity barriers." Whitcombe v. County of Yolo, 73 Cal. App. 3d 698, 706, 141 Cal. Rptr. 189, 193 (1977).

129. The California Tort Claims Act is contained in CAL. GOV'T CODE §§ 810-895.8 (West 1980). The California Tort Claims Act was enacted in 1963 and superseded common law rules on sovereign immunity. *Id.* § 810 (Historical Note).

statutory governmental immunity may be applied to their negligent acts or omissions as a basis for limiting governmental tort liability.[130] This Part proposes that, even if a duty is imposed on a county welfare department, the California Government Code should provide immunity from liability.

A welfare department's potential liability will hinge on whether the social worker who handled the case engaged in a discretionary act.[131] A mechanical analysis of the term "discretionary" has been rejected in favor of evaluating those policy considerations which underlie grants of immunity to determine which acts are protected.[132] A basic policy decision is a decision that is "expressly entrusted" to an agency by statute.[133]

An example of a discretionary act is the selection of custodians for potentially dangerous minors.[134] In *Thompson v. County of Alameda*,[135] a juvenile offender was released from a county institution to the custody of his mother without warning her of his threat to kill an unidentified young child.[136] The juvenile murdered the plaintiffs' young child within twenty-four hours of his release.[137] Because the

130. All tort liability of public entities is constitutional or statutory in origin. CAL. GOV'T CODE § 815 (West 1980) (Legislative Committee Comment-Senate). California Government Code § 815.2(b) shields a public entity from liability "for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." CAL. GOV'T CODE § 815.2(b) (West 1980). Thus, a county welfare department will be immune from liability if the social worker is immune from liability.

131. California Government Code § 820.2 provides: "Except as otherwise provided by statute, 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." CAL. GOV'T CODE § 820.2 (West 1980).

132. Johnson v. State, 69 Cal. 2d 782, 788, 447 P.2d 352, 357, 73 Cal. Rptr. 240, 245 (1968).

133. *See id.* at 788, 447 P.2d at 356-57, 73 Cal. Rptr. at 244-45. The *Johnson* case has been consistently used by courts for interpreting whether an act is discretionary under California Government Code § 820.2. *See* Mouchette v. Board of Educ., 217 Cal. App. 3d 303, 312, 266 Cal. Rptr. 1, 5 (1990); Lopez v. Southern Cal. Rapid Transit Dist., 40 Cal. 3d 780, 793, 710 P.2d 907, 915, 221 Cal. Rptr. 840, 848 (1985); Thompson v. County of Alameda, 27 Cal. 3d 741, 747, 614 P.2d 728, 731, 167 Cal. Rptr. 70, 73 (1980); Sanborn v. Chronicle Pub. Co., 18 Cal. 3d 406, 414-15, 556 P.2d 764, 768-69, 134 Cal. Rptr. 402, 406-07 (1976).

134. *Thompson*, 27 Cal. 3d at 747, 614 P.2d at 731, 167 Cal. Rptr. at 73. The court dismissed the plaintiffs' action, deciding that the county's decision to release the juvenile, its selection of his custodian, and its supervision of her activities were statutorily immunized from liability. *Id.*

135. 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).

136. *Id.* at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72. The complaint alleged that the county was aware of the juvenile's tendency to assault young children and of an actual threat he had made to take the life of an unspecified young child. *Id.*

137. *Id.*

selection of custodians for potentially dangerous minors requires comparisons, choices, judgments, and evaluations, it comprises the very essence of the exercise of "discretion" and is immunized under section 820.2.[138]

Similarly, dealing with reports of suspected child abuse requires comparisons, choices, judgments, and evaluations. Social workers must balance the rights of parents with those of their children.[139] This task is as difficult as it is delicate. A social worker's decision, then, is the type of basic policy decision that the Government Code seeks to insulate from liability in section 820.2.

In *Newton v. County of Napa*,[140] the court held that "[c]ounty welfare department officials . . . are immune from liability for the decision to conduct an in-person response to an emergency situation."[141] In *Newton*, the defendant received a call of suspected child abuse and determined that an emergency situation existed.[142] The social worker's decision was immune under section 820.2 because it was a basic policy decision that was "expressly entrusted" to county welfare departments by Welfare and Institutions Code section 16504.[143]

Social workers are guided in their decision-making by California Welfare and Institutions Code section 16504, which requires an in-person investigation if, based on an "evaluation of risk" the social worker determines that an emergency situation exists that warrants an in-person investigation of a child abuse report.[144] Because the decision-making process is granted discretionary immunity, a decision not to investigate deserves the same discretionary immunity status as the social worker's decision to investigate in *Newton*. It is irrelevant if the decision results in a child's death, for if "discretion was exercised . . . the conduct cannot result in liability even though another person, acting equally reasonably, might have handled the situation differently."[145] Thus, a social worker's decision whether an emer-

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138. *Id.* at 748-49, 614 P.2d at 731-32, 167 Cal. Rptr. at 73-74.
139. *See* CAL. WELF. & INST. CODE § 16501 (West 1991 & Supp. 1992).
140. 217 Cal. App. 3d 1551, 266 Cal. Rptr. 682 (1990).
141. *Id.* at 1560, 266 Cal. Rptr. at 687.
142. *Id.* at 1556, 266 Cal. Rptr. at 684.
143. *Id.* at 1560, 266 Cal. Rptr. at 687.
144. CAL. WELF. & INST. CODE § 16504 (West 1991 & Supp. 1992).
145. Williams v. State, 34 Cal. 3d 18, 30, 664 P.2d 137, 144, 192 Cal. Rptr. 233, 240 (1983) (Mosk, J., concurring and dissenting in part).

> No matter which of the several alternatives [a social worker] selected, someone could persuasively argue that another [course of action was appropriate]. This scenario lends itself to the typical Monday-morning quarterbacking. It is for just such a circumstance that the Legislature provided immunity when discretion of a public employee is involved.

Id. The notion of a jury second-guessing every social worker's decision with the benefit of hindsight may be a signficant factor in providing immunity.

gency situation exists should be immune when the social worker makes a considered decision.

IV. CONCLUSION

County welfare department liability depends on two related issues: whether the county welfare department owes a duty of due care and, if so, whether the county welfare department should be immune from liability. Generally, a person has no duty to assist or protect another who is in danger. A duty may arise, however, if a special relationship exists between the county welfare department and the assailant or between the county welfare department and the abused child.

A special relationship may arise in four contexts. First, a special relationship may be created by statute. Analyzing the California child abuse statute indicates that the statute should not create a special relationship because it is similar to other states' statutes that have not created a special relationship. Furthermore, the California child abuse statute is similar to other California statutes which have not given rise to a duty. A special relationship may arise in three additional contexts: when the defendant has some special knowledge or responsibility, when the plaintiff detrimentally relies on the defendant, or when there is a relationship of dependence between the parties. Analyzing the circumstances where a special relationship has been found by California courts demonstrates that a special relationship should not exist when a social worker receives a complaint of child abuse and determines that the situation is non-urgent.

Even if a duty of care is imposed on a county welfare department, the social worker should be immune from liability because the social worker's decision that the situation is non-urgent is discretionary. Because social workers should be immune from liability for their discretionary acts, the employer, the county welfare department, should likewise be immune.

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