



# The “rule of thumb” on domestic violence torts

*Civil actions resulting from domestic violence  
– some of the defendants may surprise you*

BY RICK FRIEDLING

The phrase, “rule of thumb,” originated in England but was carried over into this country where, well into the last century, it was legal for a husband to beat his wife or children with a stick as long as the weapon was no thicker than the husband’s thumb.

*This is the second in a series of articles* presenting an overview of how domestic violence victims can be “plaintiffs.” We’ll explain how civil causes of action can be used to obtain redress for the various forms of domestic violence perpetrated against spouses, children and, in an increasing number of cases, third parties.

## **Intentional interference with parental rights**

### **Parental Alienation**

Parental Alienation Syndrome (“PAS”) was coined by Dr. Richard Gardner in 1987 as “a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child’s campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent’s indoctrination and the child’s own contributions to the vilification of the targeted parent.”<sup>1</sup>

While not an independent cause of action in tort, obsessive alienators often resort to or incorporate recognized torts into their behavior due to their evangeli-

cal hatred of the other parent and mistrust and lack of respect of courts and judicial procedure; theirs is a “higher” calling than mere family court jurisdiction: the protection of their children from all others who are either their allies or their enemies. They no longer can separate their children’s feelings, beliefs and desires from their own and have the zealot’s disdain for any intimation that their behavior is inappropriate.

### **Interference with parental rights/custody**

The tort of Intentional Interference with Parental Custody is set forth in the Restatement of Torts (Second) which states that:

One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.<sup>2</sup>

### **Kidnapping and Abduction**

While an increasing number of states have enacted statutes which permit recovery in tort for child abduction, others, such as Ohio – specifically exclude from liability a parent who abducts his or her own child. Most states have, however, recognized tort actions against parents who interfere with the other parent’s relational rights with their children.

While a parent has no common-law right of action for the alienation of a child’s affections, both common law and

the Restatement of Torts have held liable any person who intentionally interferes with the custody of children by abducting a child, enticing a child away, or harboring a child who had left home against the wishes of his or her parent.<sup>3</sup>

In 1983, Texas enacted a statute enabling a non-custodial parent to recover against a person who damages his or her court-ordered “possessory interest,” defining that as a “right of possession of or access to a child” including custody and visitation rights.<sup>4</sup> Other states such as New York have refused to recognize such a cause of action for alienation of affections of a child,<sup>5</sup> as have Iowa, Indiana, North Carolina, and Massachusetts.

In any action for interference with the custodial relation of parent and child, the defendant – including the other parent in those jurisdictions in which a parent may be charged with abduction of his or her own child – may be sued for kidnapping or abducting the child by force, consent being no defense as minors may not validly consent to violation of existing court orders or other torts. The parent or a third party (often assisting the non-custodial parent) may be charged for enticing the child away from the custodial parent; for harboring the child by way of inducing or encouraging the child to remain away from home without the custodial parent’s consent; or for providing the instrumentality by which the child is abducted, concealed, or detained in violation of a valid court order – even if the act was merely the mailing of a bus ticket.



Many courts are affirming increasingly large recoveries for compensatory and exemplary damages for such acts, including for the loss of the right to love, advice, comfort, companionship, and society of the child, the wronged person's damaged feelings, mental suffering (intentional and negligent), expenses incurred in effecting recovery of the child, medical treatment, psychiatric treatment, travel expenses, legal costs, and even a variable award of punitive damages when the tort is ongoing and continuous.

In California, the The Synclair-Cannon Child Abduction Prevention Act of 2002 (Fam. Code §3048, modified effective 7/14/03 as urgency legislation) mandates trial courts to make specific findings in every custody and visitation order and, where certain objective factors exist, to make extensive orders designed to combat possible child abduction.<sup>6</sup>

In 1979, after extensive searching to recover children wrongfully taken by a non-custodial father with the assistance of relatives, and utilizing the services of the United States State and Treasury Departments, local police, sheriffs, and a psychic to locate the children, one angry California trial court awarded \$1 million in compensatory damages and \$550,000 in cumulative punitive damages against the father.<sup>7</sup>

### **Interference with visitation rights and child enticement and harboring**

A parent is liable to the other if, with knowledge that the child has left the home of the custodial parent against that parent's wishes, he or she induces the child not to return or prevents the child from returning.<sup>8</sup> There must be some affirmative act, such as "decoying" or enticing away in order to find liability for this tort.

Harboring requires a showing of conduct by the non-custodial parent which induces the child not to return to the custodial parent or which prevents the child from doing so.<sup>9</sup>

Critical here is ensuring that the acts complained of are in derogation of a

clear, specific, valid court order of which the accused parent was aware – essentially, the elements needed to find a party guilty of contempt of court for violation of such order.

### ***Intentional Infliction of Emotional Distress***

The elements needed to find liability under this theory are no different from that needed to find this liability appurtenant to any other tort, and include that:

- The defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his or her conduct;
- The defendant's conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community.

Vermont recognized this distinct tort in the family law context in 1978, when one parent willfully and maliciously prevented the other from having any personal contact with their child for one month.<sup>10</sup>

California has held that the psychotherapist-patient privilege does not prevent testimony regarding a doctor's report made under the Child Abuse Reporting Act in a tort action by the husband, whose visitation was temporarily limited due to false allegations of abuse, for defamation and intentional infliction of emotional distress, the court holding that after balancing the competing public policies regarding the wife's privacy rights, the fostering of open communication with therapists, protection of children and the ascertainment of truth in tort litigation, the husband's need for limited disclosure in his tort suit outweighed the other considerations.<sup>11</sup>

However, in California, an action by one parent against the other for damage to the parent/child relationship should be brought in the Family Law Act proceeding, not as separate action for intentional infliction of emotional distress.<sup>12</sup>

### **Third-party domestic torts**

As was touched upon earlier, third parties may be liable in tortious civil conspiracy for aiding and abetting child abduction, or those who counsel such actions in derogation of a valid, existing court order of custody. When considering the possibility of a lawsuit against third parties to a marriage or parental relationship, or with regard to child endangerment or alienation of the parent-child relationship, defendants break down into several discrete classes:

- Treating Therapists; Physicians
- Those Breaching Duty of Reporting Imposed by Special Relationship
- Failure of Mandated Reporters or Others to Report Child Abuse or Neglect; these would include attorneys who fail to properly advise or obtain protective orders, and the other parent.
- Civil Conspiracy
- Insurance Companies

#### ***Treating physicians***

Treating physicians or therapists have a long-standing duty to third parties to warn them about, or even prevent, their injury at the hands of, patients who have or who the treating party has reason to believe constitute such a threat of violent behavior.<sup>13</sup> Courts have increasingly expanded the common law rule, which traditionally imposed liability for failing to control the conduct of another person, or to warn of foreseeable harm by that person, only when there was a special relationship to the dangerous person or to the potential victim.

#### ***Special relationship situations***

Generally, one does not have a duty to control the conduct of another person so as to prevent that person from harming someone else; an exception exists where there are certain defined "special relationships" between the parties. Closely allied with the information above, therefore, is the concept that a treating physician has a duty to warn potential victims of the threat posed by a patient who possesses a communicable disease, a concept brought to a head in the 1980s as



the threat and extent of HIV/AIDS became more widely known. Physicians and therapists may likewise have a duty to inform the person at risk, such as the patient's spouse, of the infection and the risk of harm.

Following California's lead in *Tarasoff*, the State of Michigan has held that a defendant psychiatrist owed a duty to those persons readily identifiable as foreseeably endangered by the violent or assaultive conduct of his patient.<sup>14</sup> The following year that same court expanded the Davis Court's narrow interpretation of "special relationship" to include a physician who administered drugs to control his patient's epilepsy, holding that the doctor-patient relationship was sufficiently "special" to impose a duty on the psychiatrist with respect to other persons who might be injured by the patient – including the driver the patient killed when his medications led to his crossing the center line of a freeway.<sup>15</sup> The *Duvall* Court left it as a matter for the jury to determine foreseeability; if established, liability followed as a matter of law.

#### **Municipality/Law Enforcement Special Relationships**

A special duty of protection arises between a municipality, its law enforcement agencies and officers, and a plaintiff spouse or child when the plaintiff spouse has obtained a valid domestic violence or other CLETS protective order and served it upon the public agency(ies). This is not, however, identical to a "special relationship" which would create liability toward an injured third party. As a practical matter, a municipality cannot be held liable for injuries inflicted resulting from a failure to provide adequate police protection absent a special relationship existing between the municipality and the injured party. A municipality does not owe to its citizens a general duty in the performance of governmental functions, and courts will not normally examine the reasonableness of the municipality's actions.<sup>16</sup>

The key distinguishing factor where courts have found such a special relation-

ship to exist stems from some direct contact between agents of the municipality and the injured party, such as when a municipality fails to protect the safety of a witness to a violent crime and who collaborated with the police in the apprehension of a dangerous fugitive, and who received death threats as a result.<sup>17</sup> This has been expanded in some jurisdictions to include civil liability for police departments and their officers who repeatedly fail to take action to prevent recurrent violations of valid domestic violence protection statutes, finding that a special relationship, on the facts of specific cases, existed between the municipality and the victim due to the foreseeability of the harm which was occurring over a protracted period of time, and arising from:

- The existence of, and the municipality's having been served with, a valid domestic violence prevention order of protection;
- The police department's awareness of the perpetrator's ongoing pattern of violence toward the plaintiff;
- Failure to respond to the victim's pleas for assistance on the dates of the incidents in question; and
- The victim's reasonable expectation of police protection.<sup>18</sup> In the *Sorichetti* case, the New York Court of Appeals upheld a \$2 million verdict against the City of New York for its breach of the special relationship found to exist based on the criteria noted above.

#### **Failure to Report Evidence of Child Abuse**

Child abuse and neglect reporting statutes by certain professionals initially included only physicians; this has been almost greatly expanded in most states to embrace, variously, nurses, surgeons, medical examiners or coroners, dentists, osteopaths, optometrists, chiropractors, podiatrists, psychologists, school teachers and officials, police, social workers, and day care personnel. Most states imposing such requirements provide for civil penalties for a knowing and willful failure to report where such failure results in the commission of an act which, but for the failure to report, might foreseeably and proximately

have been prevented, as well as for criminal penalties, usually misdemeanors.

Such statutes break down roughly into two categories: on one, an objective standard abides since there must be "reasonable cause to believe" that abuse or neglect has occurred to trigger the duty to report; in the other category, the reporter must know or suspect that abuse or neglect has occurred – a subjective standard more readily allowing the reporter to shield his or her poor judgment in failing to report. California follows the former standard, and has one of the most expansive categorizations of mandated reporters in the country.<sup>19</sup>

#### **Improper Release, Supervision, or Placement**

Following the reasoning of *Tarasoff*, public entities such as parole boards or child protective agencies may be held liable for releasing, without warning to potential victims, defendant spouses or parents who pose a foreseeable threat of harm to the plaintiff spouse or child if the plaintiff was readily identifiable and who could be effectively warned of the danger. In *Johnson v. State*, the State of California, acting through a youth authority placement officer, placed a minor with "homicidal tendencies and a background of violence and cruelty" in the plaintiff's home; he later attacked the plaintiff. In sustaining the plaintiff's judgment, the appellate court held that:

the state's relationship to plaintiff was such that its duty extended to warnings of latent, dangerous qualities suggested by the parolee's history or character. [Citations omitted]. These cases impose a duty upon those who create foreseeable peril, not readily discoverable by endangered persons, to warn them of such potential peril. Accordingly, the state owed a duty to inform Mrs. Johnson of any matter its agents knew or should have known that might endanger the Johnson family. . . .<sup>20</sup>

#### **Civil Conspiracy**

Compensatory damages have been assessed against parents, grandparents, stepparents, other relatives, well- (or ill-)



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meaning friends, and even attorneys who counsel parents to so act in child-snatching cases.

Civil conspiracy consists of a combination of two or more persons to do an unlawful or criminal act or to do a lawful act by unlawful means or for an unlawful purpose.<sup>21</sup> This tort has been employed to hold liable relatives who assist a non-custodial parent in violating a valid court order by interference with the other parent's parental rights, in at least Missouri one case holding a defendant mother-in-law liable for assisting her son in derogation of a valid court order, and imposing both compensatory and punitive damages.<sup>22</sup>

#### To come in the next installment:

- Claims cognizable under Section 1983 of the Civil Rights Act, 42 USC §1983 (1981);
- Invasions of Privacy;
- Liability of Attorneys who recommend mental health professionals;
- Availability of Insurance coverage for familial torts.



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Also: Actions in tort by children themselves, and anticipation of defenses to the torts raised in parts I and II.

*Rick Friedling is a family law attorney with The Law Offices of Wayne*

*A. McFadden in San Mateo, California.*

*E-mail him at [mockingbirdlaw@yahoo.com](mailto:mockingbirdlaw@yahoo.com).*

#### Endnotes:

- <sup>1</sup> R. Gardner, *The Parental Alienation Syndrome and the Difference Between Fabrication and Genuine Sex Abuse* (1987).
- <sup>2</sup> Restatement (Second) of Torts §700.
- <sup>3</sup> See: Restatement of Torts (Second) §700.
- <sup>4</sup> Tex Fam Code Ann §§36.01-.08 (Vernon Supp 1985), cited in Karp, Leonard and Karp, Cheryl, *Domestic Torts: Family Violence, Conflict and Sexual Abuse*, (1989) Clark, Boardman, Callaghan (1989) p. 226.
- <sup>5</sup> Miles v. Cuthbert, 122 NYS 703 (Sup Ct 1909). See also: Annotation, *Right of Child or Parent to Recover for Alienation of Other's Affections*, 60 ALR3d 931, 957 (1974).
- <sup>6</sup> See, for example, *Catherine D. v. Dennis B.* (1990) 220 Cal.App.3d 922, 269 Cal.Rptr. 547, affirming change of custody for a 5-year-old as the result of mother's frustration of visitation in violation of numerous court orders and insistence

on being directly involved with father's visitation activities, undermining his parental role.

<sup>7</sup> *Whitelaw v. Whitelaw*, No. 301136 (Cal Supreme Ct. 1979), reported in 7 Fam. Advoc 38 (1985).

<sup>8</sup> Restatement (Second) of Torts §70.

<sup>9</sup> 59 Am Jur 2d *Parent and Child* §108, at 206 (1987).

<sup>10</sup> *Sheltra v. Smith*, 136 Vt 472, 393 A2d 431 (1978).

<sup>11</sup> *Roe v. Super. Ct.* (Roe) (1991) 229 Cal.App.3d 832, 280 Cal.Rptr. 380.

<sup>12</sup> *In re Marriage of Segel* (1986) 179 Cal.App.3d 602, 224 Cal.Rptr. 591 [The proper forum for custody disputes is in family law court: "[T]he judicial recognition of a cause of action for loss of filial consortium would undermine the purposes of the Family Law Act which is designed, among other things, to regulate and supervise the care, custody and financial support of minor children whose parents are the subject of dissolution proceedings.... [1] A parent who has difficulties concerning the rights of visitation should be directed to the family law court for a speedy resolution of these disputes.

Otherwise, disputes over visitations could be used as a vehicle for claiming monetary damages, a rather distasteful resolution of a problem which is supposed to involve primarily the best interests of the child, and not the parent." (*Id.* at p. 609.).

<sup>13</sup> See, for example, *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 551 P2d 334, 131 Cal.Rptr. 14 (Cal. 1976)

<sup>14</sup> *Davis v. Lhim*, 124 Mich App 291, 335 NW2d 481 (1983).

<sup>15</sup> *Duvall v. Golden*, 139 Mich App. 291, 335 NW2d 275 (1984).

<sup>16</sup> See, e.g., *O'Connor v. City of New York*, 58 NY2d 184, 447 NE2d 33, 460 NYS2d 485 (1983), cited in Karp, Leonard and Karp, Cheryl, *Domestic Torts: Family Violence, Conflict and Sexual Abuse*, (1989) Clark, Boardman, Callaghan (1989) p. 315.

<sup>17</sup> *Shuster v. City of New York*, 5 NY2d 75, 154 NE2d 534, 180 NYS2d 265 (1958).

<sup>18</sup> See, for example, *Nearing v. Weaver*, 195 or 702, 670 P2d 137 91983; *Sorichetti v. City of New York*, 65 NY2d 461, 482 NE2d 70, 492 NYS2d 591 (1985).

<sup>19</sup> Karp, Leonard and Karp, Cheryl, *Domestic Torts: Family Violence, Conflict and Sexual Abuse*, (1989) Clark, Boardman, Callaghan (1989) App. C, p.534; Cal. Penal C. §§11165-11174.5 (West Supp 1988).

**1165.7.** (a) As used in this article, "mandated reporter" is defined as any of the following:

- (1) A teacher.
- (2) An instructional aide.
- (3) A teacher's aide or teacher's assistant employed by any public or private school.
- (4) A classified employee of any public school.
- (5) An administrative officer or supervisor of child welfare and attendance, or a certificated pupil personnel employee of any public or private school.
- (6) An administrator of a public or private day camp.
- (7) An administrator or employee of a public or private youth center, youth recreation program, or youth organization.
- (8) An administrator or employee of a public or private organization whose duties require direct contact and supervision of children.
- (9) Any employee of a county office of education or the State Department of Education, whose duties bring the employee into contact with children on a regular basis.
- (10) A licensee, an administrator, or an employee of a licensed community care or child day care facility.
- (11) A Head Start program teacher.

(12) A licensing worker or licensing evaluator employed by a licensing agency as defined in Section 11165.11.

(13) A public assistance worker.

(14) An employee of a child care institution, including, but not limited to, foster parents, group home personnel, and personnel of residential care facilities.

(15) A social worker, probation officer, or parole officer.

(16) An employee of a school district police or security department.

(17) Any person who is an administrator or presenter of, or a counselor in, a child abuse prevention program in any public or private school.

(18) A district attorney investigator, inspector, or local child support agency caseworker unless the investigator, inspector, or caseworker is working with an attorney appointed pursuant to Section 317 of the Welfare and Institutions Code to represent a minor.

(19) A peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, who is not otherwise described in this section.

(20) A firefighter, except for volunteer firefighters.

(21) A physician, surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, optometrist, marriage, family and child counselor, clinical social worker, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code.

(22) Any emergency medical technician I or II, paramedic, or other person certified pursuant to Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

(23) A psychological assistant registered pursuant to Section 2913 of the Business and Professions Code.

(24) A marriage, family, and child therapist trainee, as defined in subdivision (c) of Section 4980.03 of the Business and Professions Code.

(25) An unlicensed marriage, family, and child therapist intern registered under Section 4980.44 of the Business and Professions Code.

(26) A state or county public health employee who treats a minor for venereal disease or any other condition.

(27) A coroner.

(28) A medical examiner, or any other person who performs autopsies.

(29) A commercial film and photographic print processor, as specified in subdivision (e) of Section 11166. As used in this article, "commercial film and photographic print processor" means any person who develops exposed photographic film into negatives, slides, or prints, or who makes prints from negatives or slides, for compensation. The term includes any employee of such a person; it does not include a person who develops film or makes prints for a public agency.

(30) A child visitation monitor. As used in this article, "child visitation monitor" means any person who, for financial compensation, acts as monitor of a visit between a child and any other person when the monitoring of that visit has been ordered by a court of law.

(31) An animal control officer or humane society officer. For the purposes of this article, the following terms have the following meanings:

(A) "Animal control officer" means any person employed by a city, county, or city and county for the purpose of enforcing animal control laws or regulations.

(B) "Humane society officer" means any person appointed or employed by a public or private entity as a humane officer



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who is qualified pursuant to Section 14502 or 14503 of the Corporations **Code**.

(32) A clergy member, as specified in subdivision (d) of Section 11166. As used in this article, "clergy member" means a priest, minister, rabbi, religious practitioner, or similar functionary of a church, temple, or recognized denomination or organization.

(33) Any custodian of records of a clergy member, as specified in this section and subdivision (d) of Section 11166.

(34) Any employee of any police department, county sheriff's department, county probation department, or county welfare department.

(35) An employee or volunteer of a Court Appointed Special Advocate program, as defined in Rule 1424 of the California Rules of Court.

(36) A custodial officer as defined in Section 831.5.

(37) Any person providing services to a minor child under Section 12300 or 12300.1 of the Welfare and Institutions **Code**.

(38) An alcohol and drug counselor. As used in this article, an "alcohol and drug counselor" is a person providing coun-

seling, therapy, or other clinical services for a state licensed or certified drug, alcohol, or drug and alcohol treatment program. However, alcohol or drug abuse, or both alcohol and drug abuse, is not in and of itself a sufficient basis for reporting child abuse or neglect.

(b) Except as provided in paragraph (35) of subdivision (a), volunteers of public or private organizations whose duties require direct contact with and supervision of children are not mandated reporters but are encouraged to obtain training in the identification and reporting of child abuse and neglect and are further encouraged to report known or suspected instances of child abuse or neglect to an agency specified in Section 11165.9.

(c) Employers are strongly encouraged to provide their employees who are mandated reporters with training in the duties imposed by this article. This training shall include training in child abuse and neglect identification and training in child abuse and neglect reporting. Whether or not employers provide their employees with training in child abuse and neglect identification and reporting, the employers shall provide their

employees who are mandated reporters with the statement required pursuant to subdivision (a) of Section 11166.5.

(d) School districts that do not train their employees specified in subdivision (a) in the duties of mandated reporters under the child abuse reporting laws shall report to the State Department of Education the reasons why this training is not provided.

(e) Unless otherwise specifically provided, the absence of training shall not excuse a mandated reporter from the duties imposed by this article.

(f) Public and private organizations are encouraged to provide their volunteers whose duties require direct contact with and supervision of children with training in the identification and reporting of child abuse and neglect.

<sup>20</sup> 69 Cal.2d 782, 447 P2d 352, 73 Cal.Rptr. 240 (1968).

<sup>21</sup> *Ammlung v. City of Chester*, 494 F2d 811 811 (3d cir 1974).

<sup>22</sup> See, for example, *Kramer v. Leineweber* 642 SW2d 364 (Mo Ct App 1982).

