

Who assumes risk when someone stands in for a parent?

Whether a baby sitter or family friends, those who agree to watch over children owe a duty to use reasonable care

By Daniel Pleasant

Two families – call them the Millers and the Smiths – had been vacationing together for a number of years. Each family had 12-year-old daughters. Melissa Miller and Susan Smith were the best of friends.

The families were staying together at the Miller family cabin in the Sierras. One night, while watching the Winter Olympics on TV, the group decided to go skiing the next day, which happened to be Susan's birthday. The children – Melissa, Susan, and Melissa's younger brother Sam – had participated in a one-day ski school two years before. That was Susan Smith's one and only downhill skiing experience.

The next morning, Susan's mother, Kate, learned she would have to work. So Melissa's mother, Bonnie, agreed to take all the children skiing. Kate gave Bonnie some money to rent skis and equipment for her daughter. Bonnie took the children to a ski shop. Although the shop offered ski helmets for rent, Bonnie chose not to rent one for Susan.

The party went to a Sierra ski resort, and spent a couple of hours on the bunny slope. Around 11:00 a.m., Bonnie telephoned Kate to report that the girls were doing well. But shortly thereafter, Bonnie took Susan down a run that was inappropriate for a skier with her age and experience level. During the run, Susan lost control and collided with a tree. She lost consciousness. She was transported by helicopter to a hospital, where she was found to have sustained a traumatic brain injury.

When the Smiths came to us for help, we realized a lawsuit against the ski resort would be futile because the resort would be protected by the doctrine of primary assumption of the risk.[1] Instead, we filed suit against Bonnie Miller. We alleged Bonnie breached her duty to act as a reasonable parent, a duty we maintained she assumed when she agreed to watch over Susan during the ski outing.

We then filed a motion for summary adjudication on this duty issue. It is a settled principle that the existence and scope of a duty is a question of law for the court.[2] In negligence cases, the duty of care issue is particularly amenable to summary judgment.[3] Courts may summarily adjudicate "that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs."[4]

We focused on drawing a distinction between Bonnie Miller's various roles on the date of the accident. We alleged that Miller was not a co-participant in a sport with Susan when she made the decisions that were the subject of our lawsuit: deciding to forego helmet rental, and deciding which run to ski. Bonnie Miller and

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12-year-old Susan Smith weren't peers who happened to be skiing together; Miller had accepted responsibility for a minor in her charge, and the duty she owed Susan flowed from that relationship.

Miller responded by filing a motion for summary judgment of her own, alleging primary assumption of the risk as a complete bar to our action. The case settled for a confidential amount before the motions were heard.

Persons undertaking child supervision owe a duty of care

The rule that, in general, persons who undertake to watch over young children owe a duty to use reasonable care to protect the child is set forth in *Corpus Juris Secundum*: "Primary responsibility for injury to very young children must be placed on the parents of children or those entrusted with supervision of children…. When a person other than a parent undertakes to control an infant, such person becomes responsible for any injury proximately caused by his or her negligence; such person is required to use reasonable care, as measured by the reasonable person standard, to protect the infant over whom he or she has assumed temporary custody and control."[5] And "[g]enerally, when a person undertakes to control and watch over a young child, even without compensation, the person becomes responsible for injury to the child through his or her negligence… [T]he measure of duty of a person undertaking control and supervision of a child to exercise reasonable care for the safety of the child is to be gauged by the standard of the average reasonable parent. As otherwise stated, the measure of precaution that must be taken by one having a child in his or her care, who stands no relation to the child except that he or she has undertaken to care for the child, is that which a person of ordinary prudence, charged with similar duties, would exercise under similar circumstances. The amount of care due increases with immaturity, inexperience, and relevant physical limitations."[6]

California Courts and the duty of care

No California case has affirmed this principle so precisely. But in an unpublished 1995 case, *Wicker v. Oosten*, the Court of Appeal characterized a then-four-year-old California Supreme Court case as so holding:

> In *Mitchell*,[7] defendants invited plaintiffs' 12-year-old son to accompany them on a picnic to Lake Gregory. Plaintiffs testified that they had informed defendants that the 12-year-old could not swim. Nonetheless, while at the lake defendants allowed the children, including the 12-year-old, to rent paddleboards and go out on the lake. One of the paddleboards tipped and the 12-year-old drowned. **The Supreme Court found that the defendants had a duty to supervise the 12-year-old**.[8]

But the finding of the *Mitchell* court was not that explicit. The issue there was not the existence of a duty, but rather the proper wording of the causation instruction.[9]Nevertheless, as the dissent in *Wicker* pointed out, "the Supreme Court in dictum acknowledged the duty of supervision owed by the adult defendants, stating: 'The jury's verdict, amply supported by the evidence, indicates that Mr. and Mrs. Gonzales and their son Luis were at least partially responsible for [decedent's] predicament. Mr. and Mrs. Gonzales failed to supervise [decedent] adequately....'"[10]

Restatement of Torts, section 324A

But California has recognized the general principle embodied by Restatement of Torts (2d), section 324A. The cases[11] establish that a volunteer who, having no initial duty to do so, undertakes to provide protective services to another, will be found to have a duty to exercise due care in the performance of that undertaking if one of two conditions is met: either (a) the volunteer's failure to exercise such care increases the risk of harm to the other person, or (b) the other person reasonably relies upon the volunteer's undertaking and suffers injury as a result. This is referred to as the negligent-undertaking doctrine, or sometimes as the "Good Samaritan" rule.

The California Supreme Court has applied this principle to impose a duty on adults directing the activities of minors. In *Schwartz v. Helms Bakery Limited*,[12] plaintiff, age four, was struck by a car as he crossed a street to buy a doughnut from defendant, the driver of a retail truck owned by defendant. The Supreme Court held "that by undertaking to direct the child to an assigned rendezvous with the truck the defendants assumed a duty to exercise due care for his safety."[13]

Other states and duty on child watchers

Other jurisdictions have also used section 324A principles to impose a duty on persons who undertake to supervise or watch over children.

In 1973, the Alabama Supreme Court also relied on the rule articulated by section 324A in imposing a duty on a nonparent caregiver; in that case, a volunteer babysitter on her own premises was found to have a duty of due care in supervising a one-and-a-half-year-old child who, while under her care and control, pulled a skillet of hot grease off a counter onto himself.[14] The court cited Alabama cases that stood for the proposition that "where one undertakes a duty requiring skill and care, reasonable care must be exercised in the performance thereof even though there may be no consideration given therefor."[15] After noting that this position was in accord with Restatement, section 324A, the court buttressed its conclusion with decisions from sister states that had considered this principle in the following volunteer-babysitter cases.[16]

For example, the New York Court of Appeals upheld a judgment against the aunt and uncle who cared for the four-year-old plaintiff while her mother was working. The child sustained injuries

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when a swing set on which she was playing fell over on her. The court stated:

> Even without compensation, when defendants undertook to control a young child and provide care for her, they became responsible for her injury through their negligence (citations omitted). Thus defendants' duty to use reasonable care to protect the infant was not measured by what their duty would have been to a social guest or a mere licensee. They were required to use reasonable care to protect the infant plaintiff from injury.[17]

Similarly, in a 1969 Louisiana Court of Appeal case involving the drowning death of a 12-year-old on a lake outing with his foster father's adult son, the court stated that as a "general rule, a person who undertakes the control and supervision of a child, even without compensation, has the duty to use reasonable care to protect the child from injury."[18]

And in 1957, a New Jersey court reversed a trial court judgment of involuntary dismissal in an action by an infant who was left with his grandmother under an arrangement with his mother by which the grandmother would babysit the child without pay while the mother was shopping. The child was permitted to recover for injuries he sustained when he thrust his arm into an unattended washing machine in operation. The court stated:

> The pretrial order and the testimony clearly show that the defendant voluntarily assumed a duty which she was under no legal obligation to assume. It is well settled principle of law that 'a volunteer must act with due care.' Where one undertakes to do an act for another without compensation, the other relying thereon, he is responsible for the exercise of reasonable care in so doing when he assumes and attempts to perform a duty in which he fails."[19]

The Alabama Supreme Court decided that the same principles governed its case, and held that "defendant undertook to supervise, watch and care for plaintiff. By undertaking to perform these services, defendant binds himself to the exercise of due care in their execution, irrespective of compensation."[20]

Other courts have reached the same conclusion. In a 1983 Florida case, Charlotte Langley agreed with Jane Barfield to watch her eight-year-old son, Jason, at the Langleys' home. Charlotte's nine-year-old son Joey phoned his friend Shane, also nine, and told him to come over with his BB gun. While playing – you know what's coming if you've ever seen *A Christmas Story* – Shane shot Jason's eye out. Saying it was "axiomatic" that "an action undertaken for the benefit of another, even gratuitously, must be performed in accordance with an obligation to exercise reasonable care," the Florida Court of Appeal reversed the summary judgment the trial court had granted defendant Charlotte Langley on the duty issue.[21]

Another case, involving a six-year-old boy who was skateboarding when he was struck and injured by a city truck, was decided by the Illinois Appellate Court in 2005. There, the parents filed suit against the city, and the city filed a third-party contribution complaint against child's grandmother, who was caring for child at time of accident. The trial court's dismissal of the third-party complaint was reversed, because the complaint's allegation that the child was under the care and supervision of the grandmother gave rise to the grandmother's duty to protect and supervise the child.[22]

Likewise, the mother of an 11-year-old drowning victim sued the owner of a swimming pool, alleging negligent supervision and premises liability. The Georgia Court of Appeals held that summary judgment for the defendant should be reversed because there was a genuine issue of fact as to whether owner, as temporary custodian of child, was negligent in allowing child to swim in deep end of pool. The owner's duty was to be gauged by the average-reasonable-parent standard.[23]

And the parents of a 13-year-old child who was injured when he poured gasoline on burning fire while playing with a neighbor's son brought an action against the landowners. The Indiana Court of Appeals held that complaint stated a cause of action for failure to supervise separate from premises liability. "There is a 'well-recognized duty in tort law that persons entrusted with children, or others whose characteristics make it likely that they may do somewhat unreasonable things, have a special responsibility recognized by the common law to supervise their charges.' The duty is one to exercise ordinary care on behalf of the child in custody. The duty exists whether or not the supervising party has agreed to watch over the child for some form of compensation. However, the caretaker is not an insurer of the safety of the child and has no duty to foresee and guard against every possible hazard."[24]

Agreeing to assume duty of responsibility

We argued that these cases illustrate that when an adult, like Bonnie Miller, agrees to be responsible for a minor, like 12-year-old Susan Smith, that choice comes with a duty to use reasonable care. Miller agreed to take Susan skiing with her family. Susan's mother gave Miller money for Susan's expenses. Miller decided what ski equipment to rent, and decided to forego helmets for the youngsters. She decided which runs the group would ski. She had 35 years of skiing experience; it was the second day of downhill skiing ever for the children, including Susan Smith. We concluded that under these facts, Miller had a duty to exercise reasonable care on Susan's behalf, and she was not relieved of that duty under the doctrine of primary assumption of the risk.

So, in cases involving injuries to minors, be sure to consider adults who may have had supervisory responsibilities as potential defendants. In addition to the skiing case described, our office also re cently settled a case where a mother allowed a neighbor's child she was watching to skateboard without a helmet, with

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tragic consequences when the child was struck by a car. We also settled a case where parents who were watching their neighbor's children left the home, leaving one of their older children in charge. The older child sexually molested his young charges. In each case, homeowner's insurance was available to provide some remedy for the injured minors.

Also, if there is any doubt as to whether the supervisory adults owed a duty to the minors, consider using a motion for summary adjudication to resolve the issue. This motion can be an effective tool to encourage settlement.

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Endnotes

[i] See, e.g., *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262.
[ii] See *Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 477; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674.
[iii] *Vournas v. Fidelity Nat'l Title Ins. Co.* (1999) 73 Cal.App.4th 668, 672.
[iv] Code Civ. Proc., § 437c(f)(1); see *Linden Partners v. Wilshire Linden Assocs.* (1998) 62 Cal.App.4th 508, 518 [either contract or tort "duty" may be adjudicated].
[v] 65A *Corpus Juris Secundum*, Negligence, § 78.
[vi] *Id*., § 538.
[vii] *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041 [reversing jury verdict of no causation, based on instructional error, in case involving drowning death of minor while on a picnic with neighboring family]
[viii] *Wicker v. Oosten* (1995) 43 Cal.Rptr.2d 556, 562 [holding no duty on part of nonparent adult who was driving boat when minor waterskier was injured, based on primary assumption of the risk] [depublished Nov. 2, 1995].
[ix] The court disapproved of the "but-for" test in favor of the current "substantial factor" test.
[x] *Wicker*, *supra*, 43 Cal.Rptr.2d at 566, fn. 8 [Ramirez, J., dissenting] quoting *Mitchell v. Gonzales*, *supra*, 54 Cal.3d at p. 1054.
[xi] See *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 249 citing *Williams v. State of California* (1983) 34 Cal.3d 18, 23 (discussing circumstances in which police officers will be found to have undertaken an affirmative duty owed to members of the public); *Weissich v. County of Marin* (1990) 224 Cal.App.3d 1069, 1077 ("Liability may be imposed on a person who has no general duty to act, but who has voluntarily assumed a protective duty toward an individual and undertakes action on his or her behalf, thereby inducing reliance"); see also *Schwartz v. Helms Bakery, Ltd.* (1967) 67 Cal.2d 232, 238-244 (describing the negligent undertaking theory of liability as "[f]irmly rooted in the common law," and finding that liability could be premised upon a breach of the duty undertaken); see generally *Paz v. State of California* (2000) 22 Cal.4th 550, 558-562 (recognizing potential duty to act pursuant to the negligent undertaking doctrine, but finding no such undertaking, and hence no duty, in litigation concerning delayed installation of a traffic signal); *Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 613-618 (recognizing potential duty to act pursuant to the negligent undertaking doctrine, but finding no such undertaking, and hence no duty, in litigation concerning safety of silicone breast implants).
[xii] (1967) 67 Cal.2d 232.
[xiii] *Id*. at p. 235.
[xiv] *Standifer v. Pate* (Ala. 1973) 282 So.2d 261, 262-263.
[xv] *Id*. at p. 263.
[xvi] *Id*. at p. 264.
[xvii] *Zalak v. Carroll* (N.Y. 1965) 205 N.E.2d 313 [Ex. 5]; see also *Adolph E. v. Lori M.* (N.Y. App. Div. 1990) 166 A.D.2d. 906 [same, citing *Zalak*].
[xviii] *Whitney v. Southern Farm Bureau Casualty Insurance Co.* (La. App. 1969) 225 So.2d 30 [finding duty, but no breach as a matter of law under facts presented].
[xix] *Barbarisi v. Caruso* (N.J. App. 1957) 135 A.2d 539, 541-542, citations omitted.
[xx] *Standifer*, *supra*, 282 So.2d at p. 265.
[xxi] *Barfield v. Langley* (Fla. App. 1983) 432 So.2d 748, 749.
[xxii] *Ryan v. Yarbrough* (Ill. App. 2005) 823 N.E.2d 259, 262.
[xxiii] *Hemphill v. Johnson* (Ga. App. 1998) 497 S.E.2d 16.
[xxiv] *Johnson v. Pettigrew* (Ind. App. 1992) 595 N.E.2d 747, 752, citations omitted.

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