ORAL ARGUMENT — 1/7/98
97-0573
PERRY V. NASH

LAWYER: I am speaking on behalf of three petitioners who urged successfully at the TC below, that §261.101a of the Texas Family Code is not an appropriate basis for a negligence per se or gross negligence claim.

Briefly, the facts supporting the decision below. The plaintiffs contended below that their minor children were physically and sexually abused by the proprietor of a day care center between March 25 and August 28, 1991. The only specific date of abuse that is alleged in the 4th pleading filed by plaintiffs below was in an abuse that occurred in approximately August 1991, as appears on page 12 of the clerk's record.

The petitioners are three persons who are contended to have known of the acts of abuse, and yet, did not report them at unspecified times. They were sued below on theories of negligence and negligence per se. The TC in response to the petitioners motion for summary judgment below granted no duty summary judgments on the negligence and negligence per se claims. The CA below affirmed the TC's summary judgment as to the common law claims, reversed the TC as to the negligence per se claims.

The narrow question before this court is whether §261.101a creates or should be adopted by this court as defining a standard of care. Petitioners recognize that while the 261 series of the family code advances an important and paramount public interest, that is the protection of children, the framework that's created by the 261 series of the Family Code simply is not workable to be adopted by this court as defining a tort standard of care and a tort duty...

ENOCH: Is it a failure to report a crime in Texas?

LAWYER: Yes. It's penalized under that section.

ENOCH: Aren't criminal statutes generally speaking got to be a lot more specific than civil duty statutes?

LAWYER: That is generally true. And I believe there is one case that has tested whether or not this statute is void for vagueness as a criminal statute.

ENOCH: And what resulted in that case?

LAWYER: In a CA case out of Houston it was held that certain provisions were not unconstitutionally void for not imparting fair notice, that a person would not know what type of actions are criminal.

ENOCH: So if it's sufficient for criminal prosecution why would it be insufficient for civil liability for violating that statute?

LAWYER: For three principal reasons. First, although it has been tested by one CA as a criminal statute, it has not yet been adopted by this court. There are three principal reasons and our core contentions why it should not be adopted by this court. First, that the framework of §261 and its subponents don't easily transfer into a workable tort duty. And I will explain why that series or that framework under 261 is intended to advance a legislative goal and doesn't transfer easily to a tort duty. Secondly, the foreseeability element of a cause of action should the court adopt 261 and its subponents as creating a tort duty is so problematic as to be unworkable, as the members of the court who were trial judges remember how to charge the jury and how this court's pattern jury charge committee devises and constructs jury charges, we contend that it's unworkable. And finally, we would contend that the adoption of 261.101a as a tort duty would cause a proliferation of destructive litigation.

I would address first what this statute is intended to accomplish. We would urge that in the totality of 261 and its components a person who has cause to believe that a child's physical or mental welfare has been or may be affected by abuse or neglect has to immediately make a report. Under this section a professional, such as a teacher, a nurse, a doctor or a daycare professional has 48 hours within which to make a report. Under the statute as it's presently written those who are presumably better qualified to make those determinations about whether a child's welfare is being affected have a longer period of time within which to report the suspected acts of abuse.

Under 261 there is a provision that in effect trumps the attorney/client privilege, the clergy privilege, medical practitioner privileges and mental health professionals' privilege. Furthermore, 261 creates an immunity from civil or criminal liability for those who make a good faith report to a law enforcement authority. It also allows immunized reporting persons to recover attorney's fees if they are later sued and the contention is made that it was not a good faith reporting. 261 also makes confidential the report, the identity of the reporter and all of the investigations that are conducted as a result of the report made to the agency.

In totality in addressing Justice Enoch's specific concern, the statutory scheme that's constructed under 261 is well-suited to the promotion of the investigation of suspected acts of child abuse. However, it would take a broad leap for this court to conclude that one section of this statutory scheme was either intended by, or it would be prudent for this court to adopt that section as creating a tort duty.

ENOCH: Are you aware of any other statutes that make certain omissions of conduct, failure to do something a criminal offense that this court or any other court has declared does not create a duty to per se?

LAWYER: I would characterize probably three categories of decisions that this court has

held either do or do not create a negligence per se duty, which I think are instructive. And those would be what I would characterize as the motor vehicle statute cases, the alcohol cases and the cases that have to do with matters relating to building codes and construction of buildings.

At the threshold and to directly answer the question, the motor vehicle cases present a particular set of circumstances in which the court has at sometime said, that the statute under the highway code may or may not be alleged as a negligence per se cause of action if the claimant can prove the breach of a duty. In the *Parrot v. Garcia* case from this court in 1969, which is the drag racing case, we believe that's particularly illuminating because that's an example of a case where an omission or an act under a statute, a failure to comply with the statue can be isolated and identified as being in effect, the injury producing event. Contrasted to this case this statute in its criminal context is directed at the reporting of conduct that has already occurred. We believe that that makes the proximate cause element very problematic.

Now with regard to the alcohol cases and the case beginning with *El Chico* in 1987 and up through this court's decision in *Smith v. Merritt* in 1997, it's clear that when you look at an industry, such as the vending of alcohol an activity that is so heavily regulated by the legislature professionals, who have been trained and have to be trained and demonstrate a level of competence before even receiving permission from the state to engage in a particular activity are held to a different standard. And it's easy to see in those cases why the violation of a statute that prohibits for example, the sale of alcohol to an obviously intoxicated person, why that can cause the injury producing event contrasted again with §261.101a, which focuses on reporting of suspected conduct that has already occurred.

And finally with regard to the building code or what I call the construction cases, the most illuminating in our contention is the *MoPac v. Austin American Statesman* case from 1977, that had to do with the construction of a railroad tram to a proper clearance. Now in that case, the reason that statute was a good fit is that it was easy to see how someone who is in the business and who is charged with compliance with building a railroad track to a proper clearance could be charged with not only complying with the building code provision, but also have that be defined as a standard of care by the court, because the construction of the tram at a proper clearance would have prevented the type of damage for which the plaintiffs sought recovery. Contrasted with this case, there is not the type of clear and direct connection between the failure to report and the injury that is claimed.

BAKER: Isn't it possible that there could be subsequent abuse, is the basis for the claim? And you can make the argument: But for this person's failure to report, a second or third or however many incidents would not have occurred because of an investigation?

LAWYER: Yes. There are certain types of cases where that contention could be made, where the failure to report could have prevented a subsequent act of abuse. And that was something that was cited by former Justice Cornyn in his concurrence in the *Golden Spread* case. The difference between what you have propounded and the need to adopt this statute as defining a

standard of care is as follows: There is no certainty that the reporting, picking up the phone and calling the authorities as former Justice Cornyn noted in *Golden Spread* would actually prevent subsequent acts of abuse. Because, we would have to assume that the report would be received timely and that other authorities over whom the reporter would have no control would investigate it, investigate it timely, investigate it thoroughly, and reach the proper conclusion. And that's one of the reasons that this statute is particularly fraught with peril in terms of saying that it defines a tort standard of care. Because unlike the other cases in which this court has adopted statutes as defining a standard of care this statute is not directed at a perpetrator.

ENOCH: The per se negligence doesn't subsume the argument that the result of proximate cause. Per se just says, you don't have to decide that this was above or below the standard of ordinary prudence. It's just violated. You then move to the proximate cause issue. Even if this were a per se violation there would still have to be evidence that that failure to report was a proximate cause of the injury. And I don't see how that's any more problematic than any other per se violation under a criminal statute.

LAWYER: The reason is, for example: Imagine a case in which a perpetrator and a person who is a reporter or a reported reporter who failed to make the report were sued together. The broad form submission would say: Would the negligence, if any, of the persons named below proximately cause the incident or the injuries complained of? Then there would be a line for the perpetrator and a line for the reporter. Somewhere in there there would have to be a charge to the jury that says: Negligence means the knowing failure to report suspected incidences of abuse or neglect of a child. Failure to report is negligence in and of itself. There is in effect blended within that charge what in other circumstances wouldn't be a comment on the weight of the evidence, but in this case may very well be. That's the first problem. The second problem is, that the statute although the court is correct and your observation is perfectly valid, that the proximate cause element still has to be there. In cases such as this, it is not a type of statute that is directed as a perpetrator, and that's why it is different. In the other cases where this court has said the statute defines a standard of care it is easy to draw the conclusion that if the reporter or the person who was charged with complying with the statute had complied, the injury producing conduct would not have occurred. Here, it is difficult to charge the jury that that conduct, that failure to report is negligence and then have us go to the second step and have them make findings with regard to proximate cause.

HANKINSON: In this instance are you arguing under the current Texas test, the Restatement Test, or are you proposing that this court adopt a different test for determining when a statute can be used as the basis for negligence per se action?

LAWYER: Presently we would suggest that even applying the restatement test which is the test before the court back from the *Ipsam(?)* case in 1967 or 1972, that is the test. And when applying that test, we would still reach the conclusion that this statute does not fit the test.

PHILLIPS: Are you aware of Texas cases that have declined to import negligence per se merely on these types of grounds in Texas?

LAWYER: There are reported appellate decisions. For instance, the CA cases that have been the precursor to the *Butcher v. Scott* case. Those cases probably more precisely say that the appellate court declined to adopt the statute as defining standard of care. I haven't found one case that outlines all of the particular grounds that I've articulated here. But I think if you draw from the body of the cases that have dealt with this particular issue at the CA, and contrast that with other cases where the court has adopted a statute as defining a standard of care, we reach that conclusion.

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RESPONDENT

LAWYER: The real question this court will be answering in this case is whether or not the civil law is going to be made available to protect the children of this state. Try as I might, I cannot see this as a difficult case that my opponent seems to try to make it.

OWEN: So the cause of action belongs to the child, is that correct? Assuming that we were to recognize this cause of action would be the child's cause of action?

LAWYER: Absolutely.

OWEN: And the damages would go presumably to the child?

LAWYER: Yes.

OWEN: And that would mean that because it's a minor usually in these situations that limitations would be out there for 18 years or so in these cases, is that correct?

LAWYER: That is entirely possible. And in these types of cases, cases dealing with child abuse, unfortunately the damage far exceeds even 18 year statute of limitations, which might apply in the matter of a child.

OWEN: How does allowing a child once they reach majority to sue for something that may have happened 15 years ago further the interest of the statute, which is immediately requiring people to report child abuse to authorities so it may be investigated promptly and stopped. How does allowing a damage action 15 years _____ that policy?

LAWYER: It depends. I believe that if a tort-feasor is brought to justice even 15 years after the tort was committed that that is a valid policy that this state should pursue.

OWEN: Why doesn't the criminal statute adequately protect that interest?

LAWYER: I don't know how to answer that question other than to simply say that it doesn't. Because I don't see how you can ever say: We have enough protection for our children from child abuse when the incidences of child abuse are notorious. We hear about them all the time and

it's something that we can't escape in our society.

OWEN: So this would allow a child once they reach majority to sue a parent, a grandparent or a stepparent?

LAWYER: That is possible. Just like as occurs sometimes today a child will sue to determine who abused them after they reached majority. I'm certain that that instance could happen. However, that does not mean that we should not basically throw out the baby with the bath water and say that this statute does not establish a duty that violates for which is negligence per se. As far as I am aware, this state does follow the restatement of torts as outlined by this court in the *Imson* case in talking about when a criminal statute will not be used as negligence per se. And that case set out five factors in the restatement of torts. I think it's §288a. The five factors are among others when a statute is not an appropriate statute to adopt for negligence per se. And this case clearly doesn't fit in any of those factors.

When this court in the past has said, Here is a criminal statute, it's clearly designed to protect a particular class of persons and has been a violation of the statute, and damages proximately resulting to a member of the class the statute was designed to protect, that is negligence, that's the law.

Now this court has on occasion said: We must carve an exception to that law because this particular statute will not work in a just way. And in fact, it's been codified in the Second of Restatements, §288a. There are times when you can have someone, because of lack of capacity, an 8 year old who jaywalks, well they can't be held to an adult standard. They have to be held to an 8 year old standard, and possibility to comply with the criminal statute, or when compliance with the criminal statute would put yourself in greater danger. In these certain instances, this court has in the past held that that particular statute is not a statute which should be used for establishing a negligence per se standard. But that is not this case. This statute is easy to apply.

ABBOTT: There was a case that you referenced that sets forth those five standards, is that the *Impasan* case?

LAWYER: Yes. The cite is 487 S.W.2d 694.

PHILLIPS: The standard that gives rise to your proposed tort is having cause to believe under the statutory language?

LAWYER: That is correct.

PHILLIPS: And if you have cause to believe and don't make a report to the authorities laid out in the statute, if you see abuse at a school and report it, a report of a teacher's abuse or another student's abuse to the principal, then you have not carried out your civil responsibility?

LAWYER: That's certainly possible. It's possible that you have not carried out your civil duty if you see abuse and do not report it.

PHILLIPS: If you have cause to believe...so you may well lose your job but that' just part of it?

LAWYER: In this case seeing actual abuse occur we argue is sufficient to establish cause to believe. In this case, we allege that the defendants witnessed the owner of a daycare center abusing children in his charge. And we stated that that gave cause to believe that other children at the center may be abused by that actor.

ABBOTT: The facts of this case are particularly egregious. But if we were to adopt this statute, it would be applicable to facts not quite so egregious. As one example, which is still bad, but lets assume that a parent goes to a grocery store with a child and just has to run in very quickly, and leaves the child in the car seat in the car and comes back out 10 minutes later. Arguably, every person who passes by who views that child locked in that car in a car seat has witnessed an incident of child abuse, of child neglect that harms that child perhaps both physically and mentally, would the child be able to sue each of those 50 people who passed by but did not report that neglect? Let me say it this way. It's my belief that if we adopt this statute, that child wouldn't be able to sue each of those people. Why would that not lead to such an extreme situation that it makes this particular statute not one that is suitable to adopt as a standard of care?

LAWYER: In that situation, we will have to have one other event transpire in order for the cause of action to be successful. We must satisfy the proximate cause element. Now, if you take your example further and the child was later seriously injured or died because he was stuck in a locked car in the middle of August, and you had people who knew: "Yes, I knew that that person left that child locked in the car when they went into the store", in other words, I had cause to believe that this child was in danger from neglect or abuse, then yes, the estate of the child might have a cause of action against someone who knew that might happen, and yet, did not satisfy their legal duty to do something about it.

HECHT: But even if he doesn't die, suppose he keeps on being abused. His argument is going to be isn't it: "If you had reported it, it would have come to light, the authorities would have stopped it, and I wouldn't have been abused further; therefore, you are responsible for that." Isn't that the argument?

LAWYER: Yes it is. If he would have reported it, then it would have come to light. Now if the person had reported it now they've satisfied their legal obligation, they are not going to be exposed to criminal liability or...

HECHT: But if they don't report it, as far as the plaintiff is concerned, they are liable for everything else that happens, because the reporting of it would have stopped the abuse, that's the theory?

LAWYER: That is correct. Or the duty is to report. So if they reported it first of all they are off the hook.

HECHT: But if they don't they are on the hook for everything?

LAWYER: Yes, they are.

PHILLIPS: Petitioners says that these other duties have been created when you had some sort of training or expertise. Here this is just a duty on the world, on you and on me, to keep our eyes and ears open and distinguish between child abuse and what's discretionary child raising. That's a pretty awesome duty isn't it? I mean I don't believe I can go to the grocery store, certainly not to Toys R Us without having to make some judgment calls.

LAWYER: Well there is a judgment call to be made. But this court is not creating a duty. The duty is there. The criminal statute exists. We have that duty. We all, as adults, have that duty.

OWEN: Let's talk about the criminal statute. What's the penalty for a Class B misdemeanor? What's the range of punishment?

LAWYER: I believe it's up to a maximum of 6 months in jail on a Class B misdemeanor.

OWEN: And you would be subject to punitive damages in addition to actual damages under a civil violation of this statute, is that correct?

LAWYER: Yes.

OWEN: So we would be imposing in some cases civil penalties that far exceeded the criminal liability?

LAWYER: Yes. But you're not imposing civil penalties. What you are doing when you recognize a negligence per se cause of action...

OWEN: What are punitive damages?

LAWYER: Punitive damages are penalty. Punitive damages we must remember are tied to your actual damages. What we are allowing to happen is for a child to recover their actual damages that they incurred because of a violation of the statute. We can't forget our duty as adults to protect the children. These children cannot protect themselves. That's why this chapter of the family code exist. That's why it is a criminal duty. That in itself is almost extraordinary that there is a criminal duty to report when you have cause to believe that a child is in danger.

HECHT: Do you know whether this statute is broader or narrower than other state statutes?

LAWYER: I do not know.

PHILLIPS: You allege abuse starting in March, but these defendants would not be responsible for any abuse until after they saw the event you allege they saw in August, correct?

LAWYER: That's not exactly correct. We've alleged actually that one of these defendants knew Fran Keller well, was a close personal friend of Fran Keller, and that she would have known of these events of abuse long before. Obviously when they actually witnessed abuse, that's a watershed event for...it's almost conclusive that they would have cause to believe that these childrens' welfare would be in danger. However, the allegations are broader than that, that they simply had one event at least with respect to one of the defendants. It is alleged that she knew the defendant quite well, or one of the defendants, and Fran Keller had confided in her about Dan Keller's abusive nature.

SPECTOR: Does the criminal statute have a statute of limitations?

LAWYER: I am not aware if it does or not.

HECHT: If you sued the daycare owner for controlling the premises in allowing employees negligently to abuse a child, and he didn't know it was happening, could he sue another employee who did know it was happening and didn't report it?

LAWYER: So I am assuming now the owner of the daycare is an innocent actor?

HECHT: Well he owned the premises, and the allegation is you never should have let this guy be an employee.

LAWYER: He negligently hired someone who was abusing the children? Someone else knew about it, took no action to report it? I would think so.

PHILLIPS: If this is the child's cause of action as you said earlier, what cause of actions do the parents have? What rights do they have to recover money for their own injuries apart from just those as next friend?

LAWYER: I probably misspoke when I said it was solely the child's cause of action. Certainly it is the child's cause of action. However, the parents would retain the cause of action for the medical expenses that they have incurred because of the injuries to the children. So they were going to have their individual responsibility for that which they can sue for. I also believe that the parents should be able to recover on a loss of consortium theory, or the damage...

PHILLIPS: What in the statute shows that they are a protected class?

LAWYER: There's nothing in the statute which specifically states that parents are a

protected class. The statute seems to be directed primarily at protecting children, which seems correct since the children are the ones who cannot protect themselves adequately.

However, simply because the statute doesn't speak to protecting the parents' interests, I believe they would have a derivative cause of action certainly if their children are injured to sue for their own injuries that they would incur because the children were abused. And I believe it causes grievous damage to the parents when they find out that the children have been abused by someone else.

HECHT: One of the parents may be the abuser?

LAWYER: It certainly could. In their brief, petitioners have attempted to distinguish this case from cases in the past and this court has recognized causes of action based upon doing something or failing to do something, *El Chico v. Poole*. And they attempt to say well *El Chico v. Poole* is quite clear that's certainly a type of case providing alcohol to a obviously intoxicated person that we can apply and we can come up with a charge with and we can use as a proper negligence per se cause of action, but this statute is too vague or this statute is too difficult to apply. I don't see what the difference is. When a person is serving alcohol to an obviously intoxicated person, the server has to use their judgment to determine whether the person is obviously intoxicated. When *El Chico* was basically codified and modified by Chapter 2 of the Alcoholic Beverage Code, the state said, that a person can incur liability for serving alcohol to a person who was obviously intoxicated to the extent that they pose a danger to themselves or others. That calls for the same judgment call as this statute calls for when a person with cause to believe a child is in danger is required to report.

Similarly, the proximate cause element. In *El Chico v. Poole*, the liability in that case is predicated on the driver being drunk at the time they are served alcohol. How do you prove that the automobile accident that's subsequently caused is not caused by the drunkenness that existed at the time the defendant did the tortuous conduct, which is serve more alcohol to an obviously intoxicated person. And as the court recognized earlier, that is the jury question. That's the proximate cause question. Just because this court recognizes that a statute establishes a duty, the violation of which is negligence per se, doesn't summarily end the discussion as I would believe my opponents are arguing or at least inferring that it does. There is still a proximate cause element. The defendant would still have the protection of going before a jury and saying: Wait a minute. If you're talking about reporting one incident, if you're talking about one instance of child abuse and I didn't report it, then there's no damages proximately flowing to me, because there's no subsequent abuse by that particular actor. They can make that argument and we're not asking this court to take that argument away. However, when a child through his next friend can go before a jury and say: I was abused and I continued to be abused, that person knew about it, that person had the opportunity to stop it. All they had to do is pick up the phone. That's all they had to do. That's what shut this daycare down in this case. Someone picked up the phone and called and reported Fran & Dan Keller. The state jumped in and they shut it down. And there are no kids being abused by Fran and Dan Keller anymore. And there won't be for another 48 years.

GONZALEZ: Well the criminal system took care of that. There was no need for civil liability to get rid of the Kellers - the criminal system took care of that?

LAWYER: That is correct. They are both in TDC now, and will be for a very long time.

OWEN: I assume you have respondeat superior liability employers or employees who fail to report, churches, private schools, all those institutions would have respondeat superior liability for their employees who fail to report?

LAWYER: Well under respondeat superior though the employer is only libel for acts which occurred in the course and scope of employment. And when we go through the tests as determining whether or not an actor's actions are in the course and scope of employment, then you would have to determine...

OWEN: The teacher.

LAWYER: If it's the question whether or not someone didn't report, you would have to look at whether that was in the scope of the employment of the particular actor to determine whether...

OWEN: The statute requires professionals to report within 48 hours; and let's assume it's a private school and the teacher doesn't do that, is the school libel for that teacher's negligence?

LAWYER: They could be, yes.

ABBOTT: Can you have respondeat superior for the violation of a statute?

LAWYER: That's an open question. You can. If you have a situation where it's within the scope of that employee, the general nature of their job, they are charged to do something, as in this case they are charged to make reports when they are aware that a child is in danger, then yes, if that is their job you can have respondeat superior even if the statute is violated.

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REBUTTAL

HANKINSON: Why doesn't this statute pass the two-part restatement test? It's a rather simple test.

LAWYER: That being, that the person falls within the category of persons, it meets that part of the test. There's no question.

HANKINSON: What about whether or not the statute defines the standard of conduct of a reasonable person, which is the second element of the test?

LAWYER: Under that standard my response to that would be that to determine what a reasonable person would do under the same or similar circumstances requires further inquiry, and there may actually be fact issues within the framework of this statute with regard to whether or not a person had cause to believe that someone was being adversely affected.

HANKINSON: Why is the standard "cause to believe" any different than trying to decide what a reasonable person would do?

LAWYER: They are very close to being the same. I would concede that.

HANKINSON: Then why doesn't this statute pass both parts of the test?

LAWYER: At some level it probably does pass both parts of the test.

HANKINSON: Well then does this court need to change the test if we are going to reject the adoption of the negligence per se action in this instance?

LAWYER: That's a good question, and I thought about that after I answered the question in the first part of my presentation. I was thinking of the balancing that the court has historically engaged in in terms of determining if the statute satisfies the restatement test and then balancing the other competing interests to determine if the statute should be adopted. Now, with regard to that, the specific factors I had in mind where the magnitude of the burden again placed upon the defendant and the consequences of placing a burden upon the defendant, and those I must confess were the factors that I was thinking of in terms of engaging in a balancing test.

The questions from the panel to Mr. Roach displayed how this is so problematic a question with regard to third party practice for example. And to finally answer the question, if the court believes that need to be clarified, it is my understanding and my view that that is part of the jurisprudence and part of the balancing that has to be undergone under the present law. To the extent that needs to be clarified, then that may be something that can be done in this case with regard to _____ balance.

HANKINSON: What cases should we look to for this balancing test?

LAWYER: I would cite the court specifically to the *Roots v. Godshalt* case. It is also discussed in *Butcher v. Scott*, and *Parent v. Garcia*. It's not expressed in the terms that I've articulated, but I believe that those factors can be drawn from the holdings in those cases.

ABBOTT: Have you considered the factors that were setup in the law review article written by Jack Ratliff, which is cited to and _____ reviewed by the CA?

LAWYER: And basically that expands upon the *Insom* factors. I can't articulate them as we stand here, but the short answer is, no. I can't articulate and compare and contrast those factors

that Professor Ratliff alluded to. But I would suggest that the factors that should be considered by the court in doing this balancing with respect to the burden that would be placed upon the defendant would first as your honor pointed out, the problematic situation - the third party practice. If someone were at a baseball game at Arlington Stadium and saw a parent slap a child, would there then be people in the immediate vicinity or would there be thousands of people who could be potential third party defendants later on.

The second problem is the statute of limitation problems as Justice Owen alluded to with regard to when that cause of action accrues or when it would be time barred and how long children would have to later pursue this type of cause of action. The third type of problem is the indivisible nature of the injury as alluded to by Justices Hecht and CJ Phillips. For example: if this abuse occurred between March and August 1991, there would be no way or as Justice Hecht pointed out in his question, if this case were tried, then it is conceivable that a reporter who failed to report could be libel for an indivisible injury. Because it would be difficult to segregate out what effects happened from the March to August time frame for the abuse, and the August forward time frame for abuse. And that would be incredibly problematic. The respondeat superior problem is an additional problem with this statute.

There are an unusual potential class of plaintiffs. For example: In a 3-children family could the youngest child sue the older siblings 15 years down the line, or within 2 years after reaching majority, because you didn't call the police when mom spanked me too hard, and I feel badly about that, and that has affected my physical and mental well being. The potential problems with saying that this statute creates a civil cause of action balanced and mitigates strongly against the adoption of this statute as defining a standard of care. As the court has pointed out in the other questions, the criminal penalties under the statute provide ample opportunity to protect children. This statute creates a framework. The consequences of saying, of lifting out a portion of that statute out of that framework, and saying that it creates a civil cause of action are incredible in terms of the burden that would be placed upon defendants and the unusual situations that are not and frankly should not be the law, should not be the tort law of this case, because of the problems with limitations. Because of the problems with the enormous class of potential third-party defendants. Because of the fact that this in essence can help perpetrators. If a perpetrator is sued with a reporter and a prior decision of this court has held: Perpetration of sexual abuse is not a matter that's covered under traditional insurance policy. I can conceive of situations where it would be to the perpetrator's benefit, or if one nonreporter is sued, and every neighbor down the street is subsequently sued as an additional third-party defendant, or in CJ Phillips' hypothetical, the people at Toys R Us, when you see something the class of potential defendants, should the court adopt this as defining a standard of care on a tort duty is enormous, and it could do nothing but in the long run benefit the perpetrator.

ENOCH: It seems to me those parade of horribles affect even the criminal prosecution. You have all the people in the ballpark who are subjected to 6-months in jail because of a mother slapping a child and nobody reported it. What keeps that from happening is you have a prosecutor who just chooses not to prosecute. What is different between a prosecutor just choosing not to prosecute and a jury just saying there's no proximate cause? What's the difference between 12

people exercising their authority to find no proximate cause from all the people in the baseball stadium when a mother slaps her child, as opposed to a prosecutor, an individual, an elected official sitting in a county who just arbitrarily decides, maybe having looked at the facts, decides I'm not going to prosecute. What's the difference except that an abused child there's no duty of this report that will compensate the abused child for their damages.

LAWYER: In the case of a criminal prosecution an administrative officer stands between the action and the filing of an action, who is charged with the duty of determining if there is probable cause to go forward and marshaling evidence to do that in the civil context there is no such filter. Anyone can go down and file a lawsuit.

GONZALEZ: There are some cites for filing frivolous lawsuits?

LAWYER: Yes there are. That on the other end is a control over filing frivolous lawsuits. But under this statute there is immunity to someone who makes a good faith report. And how that fits into the requirements under Rule 13, and the relevant provisions of Civil Pract. & Rem. Code about frivolous lawsuits is another matter that is simply difficult to say to adopt this statute is defining a standard of care and harmonizing.