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CIVIL SUITS FOR SEXUAL ASSAULT: COMPENSATING RAPE VICTIMS

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I. INTRODUCTION

A few years ago, civil suits for damages arising from sexual assaults were rare; most practitioners did not encounter such complaints. The rarity of these cases was probably due to the reluctance of the sexual assault victim to expose herself to the public scrutiny inherent in any kind of legal process. The same reasons that inhibit the victim from making a report to police lead her to avoid seeking compensation for her injuries: the victim tends to be blamed for her own assault; she knows that reliving the experience as a witness in a legal proceeding will be emotionally trying; she has little expectation of justice; she experiences shame and guilt which lead her to conceal the attack; and she fears the adverse reactions of family and friends.[1]

These factors still operate to silence many sexual assault victims. However, changes in society's attitudes toward victims and in victims' feelings about themselves are leading to an increase in both criminal and civil sexual assault complaints. There is a growing tendency for a sexual assault victim to react to the assault against her with anger rather than shame. Anger leads increasing numbers of victims to the police and through the criminal process. Anger at the frequent inadequacies in the criminal process[2] in turn leads more and more victims to civil litigation.

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1. LeGrand, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 922 (1973).

2. Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391 (1975); Burgess & Holmstrom, *Rape Victim Counseling: The Legal Process*, 38 NAT'L A. WOMEN DEANS, ADMINISTRATORS, & COUNSELORS 24 (1974); Holmstrom & Burgess, *Rape: The Victim and the Criminal Justice System*, 3 INT'L J. CRIM. & PENOLOGY 101 (1975).

The sexual assault victim tends to perceive her assailant as unconscious of the gravity of the offense he has committed.[3] She views the legal system as an educational device, a means of showing the assailant that his conduct is abhorrent and should not be repeated. Unfortunately, the tendency of police to discourage rape complaints, the frequency of negotiated pleas to lesser offenses, and the token sentences meted out to rapists[4] combine to make the sexual assault victim highly dissatisfied with a criminal justice system which gives her little reason to hope the rapist will not rape again and which seldom makes any provision for restitution.[5] This dissatisfaction is particularly strong because victims tend to feel that they participate in the criminal justice system at a high emotional cost to themselves.

The sexual assault victim is turning increasingly to the civil suit as a means of accomplishing what she could not achieve through the criminal process. She hopes that a substantial money judgment with punitive damages will communicate to the rapist the seriousness of his offense. Further, and perhaps more importantly, she seeks validation of her view that the offense is grave, a validation which the criminal justice system rarely provides.

For these reasons, the sexual assault victim who seeks civil damages usually has already been through a criminal proceeding in which her assailant either pleaded guilty or was convicted and then received a minimal sentence. If the assailant went to state prison, the victim usually feels satisfied enough not to seek damages. If he spent a few months in county jail or received straight probation, she is often sufficiently outraged to call upon the services of a civil attorney.

Victims whose complaints are not taken to the district attorney by police often are diverted to civil attorneys by the police themselves. The victim is told there is insufficient evidence for a criminal complaint, particularly in cases of delayed reporting, and is directed to see an attorney concerning a civil complaint. Such a victim often comes to the civil attorney uncertain as to

3. Bromberg & Coyle, *Rape: A Compulsion to Destroy*, 22 MEDICAL INSIGHT 21, 21 (1974).

4. Galton, *Police Processing of Rape Complaints: A Case Study*, 4 AM. J. CRIM. L. 15 (1975); LeGrand, *supra* note 1, at 927-28.

5. However, California does provide for limited restitution by the state to the victims of violent crime who are poor. CAL. GOV'T CODE §§ 13959-13969.1 (West Supp. 1978). *See* note 59 *infra*.

what can be accomplished in a civil suit since few lay people understand the distinction between the criminal and civil processes. Once she understands that the civil attorney cannot put the assailant in jail, she may lose interest in all legal proceedings.

Due to changing attitudes toward rape, women's inhibitions about public exposure are diminishing and juries are becoming more sensitive to the victim's position. Thus a new climate is developing in which civil suits for damages are more frequently feasible from the perspective of both the victim and her attorney. Consent defenses, which traditionally consisted of smearing the woman's character by direct calumny and innuendo, are becoming less successful. The public, rendered more sophisticated by wide media attention to the problem of rape, tends to understand that few, if any, women will bring an unwarranted sexual assault complaint.

The California attorney faced with a sexual assault victim interested in a civil suit is usually unfamiliar with both the practical aspects of handling such a suit and with the law which may govern it. This article will first describe the extralegal considerations in whether to bring suit. The emphasis in the first part is on the problems of evaluating the emotional and psychological elements and the economic feasibility of such a suit as well as the practical problems of proof. The second part of the article will address the legal issues which may arise in the sexual assault suit.

II. PRACTICAL CONSIDERATIONS IN BRINGING A CIVIL SUIT FOR SEXUAL ASSAULT

A. Emotional and Psychological Factors

The emotional and psychological factors are probably more important than any others in determining whether or not a civil suit for damages should be brought on behalf of a sexual assault victim. No matter how simple the proof of the case, no matter how easily a judgment can be collected, the civil process may have consequences for the victim which negate all positive considerations.

If the victim is a witness in an ongoing criminal prosecution, she will be participating in a court process which many victims feel is one of the most trying experiences of their lives. Some victims have even complained that their experience with the criminal justice system was worse than the sexual assault itself.

Suffering severe stress as a result of up to a year or more in the role of prosecution witness may produce an emotional exhaustion which leaves the victim unwilling or unable to participate further in the legal system. The very length of the civil process, especially in metropolitan areas where trial calendars lag behind two years or more, means involvement in the civil suit far past the completion of the criminal trial. The victim must thus maintain a kind of interaction with the assailant for several years. The demands of the civil suit, or simply the fact of pending litigation, may impede the victim's desire and ability to move on with her life and leave the sexual assault, as much as she can, behind her.

Many sexual assault victims change jobs or leave the area where the assault occurred. Some victims even change their entire identities in an effort to repair the psychic damage of the assault.[6] The need to participate in discovery in the civil process, to involve herself in settlement negotiations, to prepare herself for trial several years after the event, may hamper the emotional recovery of the victim. As a result, a year into litigation she may announce that she is unable to go on and that she wants to drop the suit because her need to forget is stronger than her need for restitution or revenge. Or worse, she may simply disappear, unable to cope with the stress the lawsuit is producing in her.

It is critical that the emotional condition of the victim be examined carefully and that she understand the degree of commitment a lawsuit requires. She must be forced to evaluate carefully her particular needs and to project, as well as she can, those needs into the future. Often a therapist can be of assistance in making this determination. And often it is advisable to wait, if possible, until the criminal process is completed before the decision to sue is made.

The attitude of the victim's therapist toward a civil suit is another factor to be considered. Frequently the therapist opposes such a suit, either because of a reluctance to become involved in the legal process or because of a conviction that the victim's involvement is counterproductive to therapeutic goals. The therapist may favor lessening the victim's preoccupation with memories of the attack and may feel that a lawsuit forces the victim to constantly relive the experience, which harms her mental health.

6. Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCH. 981 (1974).

On the other hand, some therapists will view a lawsuit as therapeutically helpful since it may provide a means for the victim to reassert control over her life in a substantial, if symbolic, way. Bringing a lawsuit can be an assertive act to help overcome feelings of powerlessness which are the typical residue of a sexual attack. The view the therapist takes depends to a large extent upon the anticipated length of the civil process and upon the therapist's prior experiences with the legal system. The success of any sexual assault suit depends heavily upon the attorney's willingness to work with the therapist to reconcile conflicts between the therapist's role as therapist and as witness, since those conflicts may create an emotional difficulty for the victim which effectively paralyzes the civil suit.

One additional psychological factor to be considered is the victim's residual fear of the assailant. She may not realize that bringing a civil suit may once again bring her into contact with her assailant. As a consequence, the victim may experience terror which inhibits her ability to function well as a witness. She may fear that simply initiating the suit will result in retaliation. Although such retaliation is probably rare, the fears of the victim have potential impact on the suit.

The potential psychological difficulties for a victim involved in a civil suit may be outweighed by a number of possible psychological gains: a feeling of renewed control over her life; satisfaction in an effort to prevent other such attacks; release of vengeful and angry emotions; and restoration of faith in justice through the legal system. These gains may make such a suit worthwhile to the victim despite the emotional difficulties, and even if she never collects a penny for her damages. The attorney, however, will have to take a harder look at the economic feasibility of the case before deciding whether the suit should be brought.

B. Economic Considerations

There is seldom insurance coverage for general damages due to intentional torts committed by the policy holder. In one case, a man being sued for sexually assaulting a woman was initially defended by his insurer, a homeowners policy carrier. After a year, the carrier brought an action for declaratory relief, arguing that it was not obligated to defend the insured since the policy clearly excluded coverage for willful acts, including sexual as-

sault.[7] The sexual assault victim will not be able to rely on insurance coverage for payment of damages; she must either collect them directly from her assailant or establish third party liability.

Initially, the possibility of suit against the assailant may seem remote because criminal defendants are known for their poverty and are assumed to be "judgment proof," that is, they have no assets from which a judgment can be satisfied. However, the rapist does not fit the typical profile of the criminal defendant since rapists are found in every sector of society.[8] A rapist is as likely to be a "respectable" professor or business executive as he is to be a derelict. Such is not the case for burglars or bank robbers or muggers. Thus, it is likely that there are a substantial number of sexual assault defendants who have some assets available to recompense the victim.

Although defendants in negligence actions might seek escape from a large judgment by declaring bankruptcy, the sexual assault defendant cannot discharge a judgment against him in bankruptcy because liabilities for "willful and malicious injuries to the person" are not dischargeable.[9] He therefore has a strong motive to settle the civil suit against him. His only other alternatives are to dispose of all his assets or flee the jurisdiction; disposing of assets may be a disagreeable prospect and fleeing may be impractical if he is on probation for the criminal charge. If he doesn't settle and is firmly rooted in his community, he will be in jeopardy of being pursued year after year with a judgment which may total hundreds of thousands of dollars. For the economically stable middle class defendant with ties to a community, the motive to settle, even if it means taking out a second mortgage on the house or borrowing against his business, is generally strong enough for an attorney to anticipate small to moderate settlements.

Additionally, the economic considerations surrounding the sexual assault civil suit can involve other, sometimes creative, attempts to see that the victim is recompensed. Sentencing judges in the criminal process may order restitution for victims; an attorney can assist the victim with preparing a letter to the

7. Canadian Indemnity Co. v. Blakemore, Civ. No. 394452 (Santa Clara County, Cal., filed Feb. 17, 1978).

8. Cohen, *The Psychology of Rapists*, 3 SEMINARS IN PSYCHIATRY 307 (1971).

9. 11 U.S.C. § 35(a)(8) (1976).

sentencing judge concerning the damage she has incurred, along with a request for a restitution order. If a civil suit has already begun, settlement might involve a stipulated restitution order whereby the assailant on probation agrees to allow his probation officer to determine monthly restitution payments to the victim. These payments would continue as long as the assailant remains on probation, with the amounts subject to review by the court upon application by the victim or the assailant. Alternatively, the assailant might stipulate to a voluntary wage assignment for a period of time.

Overall, despite the absence of insurance coverage, the possibility of collecting a settlement or judgment is good enough to make many suits feasible, especially if proof problems are minimized by the existence of a conviction in the criminal process.[10]

C. Evaluating the Case

An experienced personal injury attorney may be able to tell within a few hundred dollars what a whiplash or a broken leg is worth in settlement terms. No one can value a sexual assault tort so easily. Settlements and judgments vary so much that there is virtually no predictability. In the last few years, juries have brought in judgments ranging from fourteen thousand to hundreds of thousands of dollars in compensatory damages. Few cases involve substantial special damages since therapy costs are often under one thousand dollars, wage loss is usually small, and there is little medical expense other than therapy.

California has recognized that special damages are not needed in the civil sexual assault case. In *Berger v. Southern Pacific*,[11] the court was squarely presented with this damage issue.[12] Plaintiff alleged the sexual assault and nothing more, that

10. In some respects, a conviction may lessen the feasibility of a civil suit. A victim who institutes a civil suit against a convicted assailant is likely to find the assailant's assets greatly reduced if he has financed his own criminal defense. Also, having suffered the ignominy of the criminal trial process, the assailant may no longer feel pressured to settle by his fear of public exposure as a rapist. The damage to his reputation, if any, has already occurred in the criminal process. In the small percentage of cases in which a criminal conviction results in imprisonment of the assailant, the likelihood that he will have any assets for the victim is further reduced. Moreover, incarceration may also toll all civil proceedings. If the assailant pleads guilty to the sexual assault charge rather than face trial, he is more likely to conserve assets by not spending them on attorney's fees and costs.

11. 144 Cal. App. 2d 1, 300 P.2d 170 (1956).

12. *Id.* at 10, 300 P.2d at 175.

is, no special damages for physical injury, intentional infliction of emotional distress, medical expenses, or wage loss.[13] The court found the fact of the sexual assault sufficient for an award of general damages: "[I]n a sexual assault case it is extremely difficult to estimate the extent of the shock and the duration of the emotional disturbance resulting from the assault. . . . [A] sexual assault, of itself, is a sufficient basis for a substantial award of damages."[14]

Compensatory damages are assessed without regard to the amount of special damages and it is difficult to predict the amount that will be awarded.[15] Where punitive damages are awarded, judgments may vary even more. Given this unpredictability, settlement negotiations more frequently depend upon the assets available to recompense the victim than upon the value of the anticipated judgment.

D. Problems of Proof

The Effect of a Criminal Conviction or Guilty Plea

The outcome of the criminal process is an important element in the decision to sue. If the assailant is convicted of felonious sexual assault, then the issues decided against him in the criminal action are conclusive in the civil suit.[16] The likelihood of settlement is high in this event since the only issue remaining for trial is one of damages and the chances of a very large judgment are substantial.

A guilty plea is admissible for civil purposes,[17] but it is not conclusive on any issue since the defendant has the right to explain the plea.[18] However, juries are likely to view such explanations with skepticism. Moreover, a frivolous contest on this issue

13. *Id.* at 10-11, 300 P.2d at 176.

14. *Id.*

15. While in some cases the amount of damages awarded is minimal, in a Washington, D.C., third party suit, compensatory damages of $640,000 were awarded to a physically mature ten year old elementary schoolgirl who contracted a venereal disease after being sexually assaulted on three separate occasions by the school janitor. Reported in 6 Off Our Backs 11 (Sept., 1976).

16. Teitelbaum Furs v. Dominion Ins. Co., 58 Cal. 2d 601, 607, 375 P.2d 439, 442, 25 Cal. Rptr. 559, 562 (1962).

17. The guilty plea may be offered in evidence in a civil suit stemming from the same incident. Vaughn v. Jonas, 31 Cal. 2d 586, 595, 191 P.2d 432, 438 (1948); Langensand v. Obert, 129 Cal. App. 214, 218, 18 P.2d 725, 727 (1933).

18. Teitelbaum Furs v. Dominion Ins. Co., 58 Cal. 2d 601, 605, 375 P.2d 439, 441, 25 Cal. Rptr. 559, 561 (1962); Risdon v. Yates, 145 Cal. 210, 213, 78 P. 641, 642 (1904).

may be limited by a motion in limine. When such a defense is conducted, however, the assailant may be able to relitigate the facts of the assault, thus increasing the complexity of the trial process and rendering the prospective civil suit less attractive to both attorney and victim.

If there is an acquittal in the criminal process, or if the charges are dropped by the prosecution, a civil suit is still possible even though the difficulty of proving the assault may make the suit less attractive to the trial attorney. However, because of the lesser burden of proof in the civil process,[19] some of these suits may remain feasible.

The civil attorney faces another problem because it may be difficult to anticipate the outcome of the criminal prosecution. Frequent delays in the criminal process often result in trials long after the one year statute of limitations for torts[20] has run. Such delays may force the victim and her attorney to decide whether or not to sue before the outcome of the criminal prosecution is known. One alternative is to file the civil complaint with a written agreement between attorney and victim that the complaint will be served and litigated only in the event the criminal prosecution is successful. Additionally, where assets to satisfy a judgment are limited, it may be feasible to file suit early. With the pressure of both criminal and civil litigation, some defendants will choose to negotiate a plea in order to use their assets to satisfy the civil suit rather than to conduct an expensive criminal defense.

The Consent Defense

In a number of cases, there will be no guilty plea or conviction on the charge of rape. In other cases, there may be pleas or convictions on the charge of unlawful intercourse,[21] which consists solely of sexual intercourse with a minor. In both instances, the victim faces the possibility in the civil suit, as she did in the criminal prosecution, that a consent defense will be used in an attempt to defeat her claim. The assailant will try to persuade the jury that she consented to the sexual acts charged and thus minimize or eliminate his civil liability.

19. In most civil suits, a plaintiff must prove a case by a preponderance of the evidence, CAL. EVID. CODE § 115 (West 1966), while in a criminal prosecution the state must establish guilt beyond a reasonable doubt, CAL. PENAL CODE § 1096 (West 1970).

20. CAL. CIV. PROC. CODE § 340 (West 1954).

21. CAL. PENAL CODE § 261.5 (West 1970).

It is unclear to what extent consent provides a defense in the civil suit. Psychiatrists have been held liable for having consensual intercourse with their adult patients when the patients could show damage arising from the sexual relationship. When the victim is a minor, consent is no defense in a civil sexual assault suit.[22] However, if the minor consented, there may well be no damage.[23] In cases involving adult sexual assault victims, the issue of consent will arise only in respect to whether a sexual assault occurred. Once the existence of the tortious act is established, the only remaining issue is the extent of the victim's harm.

The Nature of the Injury

A complex step in evaluating the sexual assault civil suit is ascertaining exactly what the injury is and how it can be demonstrated. Traditional emotional distress injuries are seen in terms of traditional psychological dysfunction: the distressed person is unable to sleep, loses weight, is sexually maladjusted, and performs poorly in employment and social situations.[24] Sometimes these kinds of dysfunction are also present when a sexual assault has occurred, but frequently the injury creates different and more subtle effects.

The injury can be described in terms of certain kinds of trauma: the victim feels cut off from her sense of being part of a community; she feels alienated and powerless; she is overcome at times with profound distrust and anxiety. She may also suffer great guilt; she may dislike her body and view it as damaged; she may experience acute flashbacks to the assault itself. She often experiences severe anxiety for six months to two years, and then retains a low level permanent loss of her sense of security in the world. For years afterward, many a victim is haunted by a feeling that there is no place she can be safe.[25]

22. Gaither v. Meacham, 214 Ala. 343, 344-45, 108 So. 2, 3 (1926).

23. In Gaither v. Meacham, the Alabama Supreme Court found that consent was relevant to the issue of punitive damages, but irrelevant as to actual damages. *Id.* at 345, 108 So. at 3.

24. *See* discussion in 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW 3171-77 (8th ed. 1974).

25. Burgess & Holmstrom, *supra* note 6; Fox & Scherl, *Crisis Intervention with Victims of Rape*, 17 SOC. WORK 37 (1972); McCombie, *Characteristics of Rape Victims Seen in Crisis Intervention*, 46 SMITH C. STUD. SOC. WORK 137 (1976); Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 AM. J. PSYCH. 408 (1976); Peters, *Emotional Recovery from Rape*, 7 MED. ASPECTS OF HUMAN SEXUALITY 9 (No. 10, 1973); Symonds, *The Rape Victim: Psychological Patterns of Response*, 36 AM. J. PSYCHOANALYSIS 27 (1976).

Since the defense will not elicit evidence of this kind of injury by standard questions during discovery, the victim as plaintiff in the civil suit must exert extraordinary effort to communicate the damage done to her by the assault. This is especially true in the usual case wherein she appears functionally recovered after a few months, even though she may perceive, or others may perceive, that her life has been greatly altered.

In many cases, the victim herself may not be able to articulate clearly the damage she has suffered, especially if she is very young. Or she may, in an effort to minimize the effects she feels, deny there has been any damage at all. She may instead take the position that she feels angry about the assault, but that she is handling it without any adverse effect. Rarely would a therapist agree with this victim's analysis of her own mental condition, but the problem remains a serious one for litigation purposes.

Due to the potential problem in establishing and proving the nature of the injury, the attorney must take care to elicit the victim's perception of her own injury. This places great importance on the victim's therapist, if she has one. To the extent that the therapist has experience with sexual assault victims, she or he is likely to be more effective both as a therapist and as a witness. There are, unfortunately, still therapists who discount the importance of a sexual assault and who refuse to deal with it in therapy. The decision to sue depends to a great degree upon the victim's selection of a competent therapist, one sensitive to the particular trauma of the sexual assault victim and able to articulate for a jury the essence of the injury. An expert witness who has substantial experience with, or knowledge of, sexual assault victims may be helpful in establishing the nature and permanency of the injury to the victim.

Even a competent, sensitive therapist may, however, prove to be a mixed blessing at trial. The therapist may feel strong conflict in his or her roles as therapist and witness. The therapist's goal is to make the victim whole; testimony that the victim is permanently injured by the sexual assault may make the victim feel that the goal in therapy is unattainable, that she is doomed to a life of anxiety from which she can never recover. The victim may become extremely upset by the therapist's description of her psyche, since she may have tended to minimize the traumatic effects of the sexual assault upon her. This problem may be solved by the simple expedient of an agreement with the

victim that she be absent from the courtroom during her therapist's testimony. Otherwise, the therapist, sensitive to the patient's need to feel she is conquering the intense feelings of powerlessness created by the assault, may minimize the injury in court and thus reduce the compensatory damages awarded.

Prior Sexual Conduct

In California, the statutes comprising the Robbins Rape Evidence Law[26] virtually exclude evidence of a rape victim's prior sexual conduct from criminal trials. The law precludes the use of such evidence on the issue of consent, unless the prior conduct was with the defendant.[27] Additionally, evidence of prior sexual conduct is not admissible on the issue of credibility unless the victim or her witness volunteers untruthful testimony about her prior sexual conduct at trial, in which case the defendant can rebut the evidence.[28] Although the code sections on prior sexual conduct make no reference to civil trials, the legislative conclusion that such evidence is irrelevant and prejudicial to the victim in a criminal trial should lead to the exclusion of such evidence in a civil trial as well.

Although excluded on the issues of consent and credibility, evidence of the victim's prior sexual conduct may be relevant to the issue of damages, an issue not present in the criminal trial. If the victim alleges harm to her sexual adjustment, then to some extent her prior sexual history will be relevant in order to prove or disprove the injury; she will have to show that she did not have the injury before the assault. If, however, she does not allege any injury to her sexuality, then her sexual history would remain irrelevant.

Having introduced her prior sexual history to prove harm, she exposes herself, in some cases, to the kind of smear tactic many defense attorneys used in criminal trials before the Robbins Rape Evidence Law: character assassination intended to cast doubt on the fact of the sexual assault itself. If the victim has an extensive sexual history, the jury may conclude that such a "loose woman" would not be much harmed by a sexual assault and lower the damages accordingly. Due to changing attitudes toward

26. CAL. EVID. CODE §§ 782, 1103 (West Supp. 1978).
27. *Id.* § 1103(2)(a) and (b).
28. *Id.* § 1103(2)(c).

sexual mores and toward rape, this view is less prevalent, but there remains a potential problem with some jurors.

III. LEGAL THEORIES

An attorney who has concluded that a civil suit is feasible in terms of the psychological state of the victim and the economic potential of the case must of course also consider the legal theories available to support the suit. The following section presents a survey of tort law and of sexual assault cases brought under the various tort theories. In addition to a brief review of the potential problems and strengths of each theory, the differences between California law and the law of other jurisdictions will be discussed in light of the effect of these differences on the viability of a possible suit. Each of the short discussions which follow could be the subject of a separate, detailed study. The purpose of this section is to provide a summary of potentially applicable law and to encourage in-depth exploration of legal arguments to support sexual assault suits.

A. SUITS AGAINST THE ASSAILANT

Assault and Battery

The common law has historically treated assault and battery as two distinct causes of action in tort. Technically, sexual assault is confined to the non-touching sexual attack sometimes referred to as "indecent assault."[29] This tort includes such unwanted sexual encounters as indecent exposure, lewd remarks, or behavior in a setting which inspires fear in the victim.[30] When the victim is physically touched in an unwanted manner, a battery occurs.[31] Battery comprises a wide range of unwanted sexual contact including criminal rape, most attempted criminal rapes, forcible sodomy and oral sex, as well as forcible intrusion with a foreign object.

Courts and commentators often use the terms assault and battery interchangeably.[32] The "touching" distinction between

29. *See* discussion at 6 AM. JUR. 2d *Assault & Battery* § 119 (1963).

30. *See, e.g.*, Newell v. Whitcher, 53 Vt. 589 (1880). This cause of action encompasses the non-physical sexual approaches made to children of both genders.

31. For a general discussion of the similarities and differences between assault and battery, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS 41 (4th ed. 1971).

32. *See, e.g.*, Berger v. Southern Pac., 144 Cal. App. 2d 1, 300 P.2d 170 (1956). A Pullman porter allegedly attempted intercourse with a sleeping passenger and had bodily contact with her. Despite the touching, the court described the act as a "sexual assault."

sexual assault and sexual battery is of little significance because the gravamen of the torts is emotional or psychological injury to the victim. Although most sexual torts that involve a touching will be pleaded as sexual battery, pleading such a tort as a sexual assault or as a sexual assault and battery should not present any problem.

On the other hand, the conceptual distinction between the *torts* of sexual assault and battery and the *crime* of rape is of great significance.[33] California's criminal rape statute includes penetration as a requisite element and excludes a man's wife as a possible victim of the crime.[34] Application of the criminal definition to the civil wrong unjustifiably restricts the definition of sexual assault torts, since any unwanted touching is sufficient to satisfy the elements of the tort of sexual assault and battery but not the crime of rape.[35]

California has recognized sexual assault as a cause of action in tort distinct from criminal rape. In *Berger v. Southern Pacific*,[36] a railroad employee attempted intercourse with a sick and drugged passenger. Actual penetration was not alleged by the plaintiff.[37] The California court, nevertheless, allowed the cause of action.[38] Thus, lack of penetration, which would defeat a criminal charge, does not preclude the victim from instituting a civil suit against the assailant.

Intentional Infliction of Emotional Distress

A cause of action for the intentional infliction of emotional distress can be included in every sexual assault suit. The concep-

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Id. at 11, 300 P.2d at 176.

This article also adopts the term "sexual assault" to include battery.

33. Most states first recognized civil liability for rape early in the twentieth century. *See, e.g.*, Boyles v. Blankenhorn, 168 App. Div. 388, 153 N.Y.S. 466 (1915), *aff'd per curiam*, 115 N.E. 443 (1917); Watson v. Taylor, 35 Okla. 768, 131 P. 922 (1913); Hough v. Iderhoff, 69 Ore. 568, 139 P. 931 (1914).

In many early cases, the courts had difficulty in trying to conform the tort to the various criminal statutes. *See, e.g.*, Gaither v. Meacham, 214 Ala. 343, 108 So. 2 (1926); Ellig v. Powell, 122 Neb. 270, 240 N.W. 271 (1932).

34. CAL. PENAL CODE § 261 (West 1970).

35. In the civil context, it is best to consider the term "rape" as a layperson's term and avoid its use in civil pleadings to eliminate confusion.

Damages in the civil suit may be affected by the presence or absence of penetration, but the survival of the cause of action for sexual assault and/or battery is not.

36. 144 Cal. App. 2d 1, 300 P.2d 170 (1956).

37. *Id.* at 4, 300 P.2d at 172.

38. *Id.* at 11, 300 P.2d at 176.

tion of the civil wrong as an intentional outrage to the victim finds support in the criminal statute which specifically states that "[t]he essential guilt of rape consists in the outrage to the person and feelings of the female. . . ."[39] In California, emotional distress may be considered in two contexts: as an element of damages in another tort; or as an independent tort.

The independent tort creates liability for outrageous conduct intended or likely to cause severe mental distress.[40] It seeks to compensate the victim for emotional and physical injuries. The physical injuries compensated for are those that are a consequence of the mental distress, such as nausea, tremor, nervous rash, and headache. Any physical harm that accompanied the attack is compensable under basic tort theory. In California, a compensable injury has also been recognized by the courts to consist of any highly unpleasant mental reaction such as fright, shame, humiliation, embarrassment, anger or worry.[41]

In most states, including California, the cause of action for intentional infliction of emotional distress can be established with or without proof of physical harm or reaction to the emotional distress.[42] However, when the plaintiff alleges emotional distress unaccompanied by physical symptoms or injuries, she must usually make a stronger showing that the defendant's conduct was extreme and outrageous[43] in order to support the inference that the resulting emotional distress was severe.[44]

In situations in which the plaintiff has other theories of recovery on which to rely (e.g., battery, third party liability, etc.), infliction of emotional distress should also be pleaded, since the

39. CAL. PENAL CODE § 263 (West 1970).

40. For a discussion of the emergence of intentional infliction of emotional distress as an independent tort, see W. PROSSER, *supra* note 31, at 49-53.

41. *See, e.g.*, Golden v. Dungan, 20 Cal. App. 3d 295, 97 Cal. Rptr. 577 (1971); Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

42. *See, e.g.*, State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952); Delta Fin. Co. v. Ganakas, 93 Ga. App. 297, 300, 91 S.E.2d 383, 385 (1956); Mitran v. Williamson, 21 Misc. 2d 106, 108, 197 N.Y.S.2d 689, 691 (Sup. Ct. 1960); Samms v. Eccles, 11 Utah 2d 289, 293, 358 P.2d 344, 346-47 (1961).

43. *See, e.g.*, Golden v. Dungan, 20 Cal. App. 3d 295, 308, 97 Cal. Rptr. 577, 585-86 (1971); Grimes v. Carter, 241 Cal. App. 2d 694, 699-700, 50 Cal. Rptr. 808, 811 (1966); Perati v. Atkinson, 213 Cal. App. 2d 472, 474, 28 Cal. Rptr. 898, 899 (1963).

44. An essential element of the tort is a showing of severe emotional distress. Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 498, 468 P.2d 216, 218, 86 Cal. Rptr. 88, 90 (1970); Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 396, 89 Cal. Rptr. 78, 90 (1970).

victim of a sexual attack will generally have little difficulty in establishing its requisite elements.

False Imprisonment

Another possible avenue for recovery by a sexual assault victim is a civil suit for false imprisonment. In California, the tort and the crime of false imprisonment are defined similarly; both require restraint of one's movement.[45] Actual physical force is unnecessary since the injury to the plaintiff results from the apprehension arising from the defendant's words or conduct. Although there is no reported case in California in which the victim of a sexual assault utilized this theory for civil recovery, false imprisonment charges are often brought in criminal sexual assault cases. There is no reason that this theory could not be used in civil cases in the appropriate factual situations.

Marital Sexual Assault

The issue of whether a woman can recover in tort for sexual assault by her husband is unresolved in California. It is well established that she can recover for personal injuries suffered at his hand which constitute ordinary assault and battery.[46] However, the California Penal Code defines criminal rape to exclude the wife of the perpetrator from the class of potential victims.[47] Recent legislative attempts to remove the marital exclusion from the criminal rape statute have failed.[48]

The rationale for the marital exclusion is not compelling. Historically, the concept of marriage entailed ownership of the wife by the husband.[49] A husband could not rape his wife just as he could not burglarize his own home; one cannot steal what one already owns. More recently, the wife has been regarded as having consented, by virtue of her marriage vows, to all sexual intercourse with her husband.[50]

45. CAL. PENAL CODE § 236 (West 1970) provides that "[f]alse imprisonment is the unlawful violation of the personal liberty of another." Civil courts often adopt the penal code definition of false imprisonment. Parrott v. Bank of America, 97 Cal. App. 2d 14, 22, 217 P.2d 89, 94 (1950); Vandiver v. Charters, 110 Cal. App. 347, 355, 294 P. 440, 444 (1930).

46. Interspousal tort immunity for intentional torts was abolished in California in Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962) (wife sued husband for assault).

47. CAL. PENAL CODE § 261 (West 1970).

48. Cal. A.B. 327 (1977); Cal. A.B. 4173 (1974).

49. S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 17-18, 376-77, 379 (1975).

50. *Id.* at 380-82.

The historical rationale for the marital exclusion from rape is weak. Current resistance to its elimination probably stems from the reluctance to involve the criminal justice system in the marriage relationship, although it should be noted that any other crime involving a victim can be committed by one spouse against the other.[51] The ease with which criminal complaints can be made and withdrawn and the fear that raped wives, like battered wives, would tend to drain the resources of the criminal justice system without following through with prosecution may also be factors in the opposition to a change in the law.[52] The difficulties of proof and the unlikelihood of successful prosecution are pragmatic reasons for survival of a statutory provision which is currently without conceptual foundation.

Even these pragmatic considerations are absent in the tort of sexual assault, since the expense of private litigation would tend to eliminate the non-serious plaintiff. If California courts would look to ordinary assault and battery principles rather than to the criminal law, there would be no issue of interspousal immunity in sexual assault cases. If a wife is injured by her husband by virtue of a forcible sexual act, there is no reason that she should not be compensated for her loss when the law is clear that she can be compensated for any other assault injury. The difficulties of proof should suffice to limit sharply the number of viable lawsuits.

B. Suits Against Third Party Defendants

Preliminary Considerations

Although most third party suits will sound in negligence, there will be occasions when misrepresentation, fraud, or contract theories should be pleaded.[53] A suit against a third party for the

51. *See* note 46 *supra.*

52. C. LeGrand, J. Reich, D. Chappell, Forcible Rape: An Analysis of Legal Issues (1978).

53. For cases in which a cause of action for misrepresentation or fraud was alleged, see Duarte v. State, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979); O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977). For sexual assault cases based on contract theory, see Duarte v. State, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979); McKee v. Sheraton-Russell, Inc., 268 F.2d 669 (2d Cir. 1959). For a short discussion of *McKee*, see text accompanying notes 93 & 94 *infra.*

In *Duarte*, the victim college student was sexually assaulted and murdered in her university owned dormitory room. In a wrongful death suit, the victim's mother alleged deceit on the part of the university, contending that the university was not only aware of the increasing pattern of violence on the campus, but also that it undertook to cover up the events, 88 Cal. App. 3d at 478, 151 Cal. Rptr. at 729. In reliance on the appear-

sexual assault of another, however, will most often be appropriate where the third party's negligence is responsible for the attack. The third party can be sued in addition to, or in place of, the assailant. Liability can arise vicariously or because the third party is responsible for allowing dangerous conditions to exist which increase the possibility that a sexual assault will occur.

The major legal principles in establishing third party liability for sexual assault are the concepts of duty, foreseeability and an intervening force. The duty to warn or control can arise when the third party is in a position to protect the victim from the danger of assault. For this duty to arise there must be a special relationship between the holder of the duty and the one to whom the duty is owed. Although this relationship need not rise to the level of a legal relationship such as parent-child, husband-wife or employer-employee, it is clear that mere bystanders are not liable for their failure to prevent a harm.[54]

For the tort of sexual assault, the duty question should be considered from two perspectives: where the third party is in a special relationship with the assailant and has reason to anticipate that the assailant will attack someone; and where the third party is in a special relationship with the victim and has reason to foresee the assault on her. The sexually assaulted plaintiff must therefore examine the relationships existing between herself and those who could have warned her, as well as between the assailant and those who could have controlled him.

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ance of safety and security, the student's mother placed her in the dormitory. *Id.* at 477, 151 Cal. Rptr. at 729. The court held that the representations of safety were made by persons in authority with presumed superior knowledge, and were sufficient to support a complaint stating a cause of action for negligent misrepresentation. *Id.* at 486, 151 Cal. Rptr. at 735. *Duarte* is also discussed at notes 105-110 *infra* and accompanying text; text accompanying notes 131-33 *infra*.

Deceit or fraud has also been successfully pleaded in California in a sexual assault suit. In O'Hara v. Western Seven Trees Corp., an apartment dweller alleged fraud on the ground that representations of apartment security and patrol were made to her. The appellate court upheld the cause of action. 75 Cal. App. 3d at 804-05, 142 Cal. Rptr. at 491. *O'Hara* is also discussed at notes 101-04 *infra* and accompanying text.

54. *See generally* W. PROSSER, *supra* note 31, at 340-43. The relationship necessary for a duty to arise is not well defined by the courts in California. Merely being in a position to foresee the harm is not sufficient to establish liability. DeSuza v. Andersack, 63 Cal. App. 3d 694, 703, 133 Cal. Rptr. 920, 927 (1976). The court in Mann v. State, 70 Cal. App. 3d 773, 139 Cal. Rptr. 82 (1977), noted, however, that "special relationship is an expanding concept in tort law" and the law is beginning to recognize a duty to aid or protect when there is a relationship of dependence. *Id.* at 779-80, 139 Cal. Rptr. at 86. In *Mann*, the court found such a relationship between a highway patrol officer who had undertaken an investigation of the situation of some stranded motorists and those motorists.

In California, if the assailant's act was a reasonably foreseeable result of the third party's negligence, third party liability may be established.[55] It may be difficult to prove that the sexual nature of the assault was foreseeable, but if the third party had notice of prior sexual assaults in the same locale, this should be no problem. When an attack by an unknown assailant occurs in an apartment hallway, for example, or an unlighted parking lot, prior muggings and other non-sexual assaults should provide notice to the person responsible for maintaining the site that a dangerous condition exists.[56] By the same token, if the assailant is in a special relationship with the third party defendant, notice of prior sexual assaults by the assailant should also provide a basis for proving notice to the third party that the person was dangerous. However, if the assailant has a history of violence that is non-sexual, such as fistfights, it may be more difficult to establish the necessary notice to the third party.[57]

Even if the duty of the third party and the foreseeability of the sexual assault can be established, consideration must be

55. *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); Landeros v. Flood, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976); Davis v. Erickson, 53 Cal. 2d 860, 350 P.2d 535, 3 Cal. Rptr. 567 (1960).

56. *See, e.g.*, Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970), discussed in text accompanying note 99 *infra*; Duarte v. State, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979), discussed in note 106 *infra*; O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977), discussed in text accompanying note 102 *infra*.

57. Some state courts have addressed this issue, but as yet the California courts have not. In a Michigan case, a woman customer was raped and severely injured by a gas station attendant. She sued the station owner on a theory of negligent hiring. The Michigan Supreme Court found that the owner knew of the attendant's violation of a spousal support decree but not that the attendant was out on bail awaiting trial for rape. In affirming a decision for the defendant station owner, the court indicated that knowledge of the rape charge on the part of the owner would have conferred liability; knowledge of violations of a spousal support order did not. Bradley v. Stevens, 329 Mich. 556, 46 N.W.2d 382, Annot., 34 A.L.R.2d 372 (1951).

In a Louisiana case, the prior record of the assailant employee was not similar enough to establish liability for negligent hiring. The employer made only a cursory investigation. The court concluded, however, that even had he adequately investigated, the employer would still not have incurred liability because the employee had no prior history of sex offenses. Mays v. Pico Fin. Co., 339 So. 2d 382, 385 (La. App. 1976).

A New York court addressed the problem of admitting prior similar happenings into evidence for the purpose of establishing notice. A public schoolteacher sent a thirteen year old girl on an errand during which she was sexually assaulted. The appellate court held it was error to admit evidence of a pushing incident involving a female student twenty months earlier and of a knifing incident involving male students four months earlier on the question of notice. These prior happenings did not describe conditions which were substantially the same as those in the case at bar. Gallagher v. City of New York, 30 App. Div. 2d 688, 292 N.Y.S.2d 139 (1968).

given in every suit to possible statutory limitations on the recovery of damages. California has enacted various laws which govern compensation for personal injuries. These include the Workers Compensation Act,[58] the Victims of Crime Act,[59] and California Civil Code section 1714.1, which establishes parental liability for the willful torts of a child.[60] However beneficial these legislative programs have been for victims of ordinary personal injury who can prove pecuniary damages, there has been a legislative blindspot with respect to the sexual assault victim, who may suffer primarily emotional injuries. The deficiency common to all of these statutes is the failure to compensate for any loss that is not pecuniary. While the Workers Compensation Act and section

58. CAL. LAB. CODE §§ 3201-4855 (West 1971) include provisions concerning the scope and operation of the Act and compensation under the Act. If the victim is sexually assaulted while she is on the job, the compensation allowed under the Workers Compensation Act is her exclusive remedy against the employer in most circumstances. *Id.* § 3600 (West 1971). The broad coverage of the Act is due in part to the expansive definition under the Act of "course of employment." Course of employment is not to be confused with the more narrowly defined "scope of employment," which term is pertinent to the doctrine of respondeat superior. *See* notes 113-19 *infra* and accompanying text for a discussion of scope of employment. As one court noted, "[i]f an injury is within the 'scope of employment,' it will probably be 'arising . . . in the course of the employment'; however, the reverse is not true." Church v. Arko, 75 Cal. App. 3d 291, 300, 142 Cal. Rptr. 92, 97 (1977).

Furthermore, many sexual assault victims suffer no harm compensable under the Act; if the sexual assault or sexual harassment has left the victim without medical bills or lost wages, as is often the case, then she is barred from recovery. The outrage caused by the violation of her person is not compensable under the Act. Her employer is also immune from suit under the Act for his or her negligent hiring, failure to supervise, or failure to provide a safe place of employment.

If the employer's conduct is serious and willful misconduct, the amount of compensation is increased one-half, to a limit of $10,000, together with costs and expenses of up to $250. CAL. LAB. CODE § 4553 (West Supp. 1978). The California Supreme Court has not yet decided the question of whether an employer who makes a work-related assault on an employee may lose his or her civil suit immunity. However, in Magliulo v. Superior Court, the First District Court of Appeal suggested that "[t]here are facts which would justify a civil recovery even though the injury was work connected." 47 Cal. App. 3d 760, 780, 121 Cal. Rptr. 621, 636 (1975).

59. CAL. GOV'T CODE §§ 13959-13969.1 (West Supp. 1978). The Victims of Crime Act was enacted to indemnify and assist in the rehabilitation of residents of California who are victims of crimes in California or outside the state while they are on a temporary visit. *Id.* §§ 13959, 13961. While this Act entitles the sexual assault victim who has suffered pecuniary loss to recover from the state, the sexual assault victim who has not suffered medical expenses or wage loss will not be compensated. *Id.* The victim is entitled to recover from the state the full cost of medical expenses up to $10,000, *id.* § 13965(a)(1), and/or $10,000 for loss of income or support, *id.* § 13965(a)(2).

60. CAL. CIV. CODE § 1714.1 (West Supp. 1978). The common law doctrine of nonimputation to the parents of the torts of the child has been abrogated by this statute in California with respect to willful torts. The statute compensates for property damage and/or medical expenses to a ceiling of $2,000. *Id.* As with Workers Compensation and the Victims of Crime Act, the essence of the injury to the victim of a sexual assault, the outrage to her spirit, is not compensable.

1714.1 may severely curtail damages in some cases, their applicability is limited[61] and suits based on other special relationships do not face these statutory obstacles.

Suits Based on Special Relationships

If any special relationship exists, a cause of action for negligent infliction of emotional distress should be considered. As in a cause of action for intentional infliction of emotional distress, the victim is compensated for severe mental distress.[62] However, unlike the intentional tort, a successful suit for negligent infliction requires proof of physical symptoms[63] and that the distress produced was reasonably foreseeable.[64] In sexual assault cases, once the foreseeability of the assault is established, the foreseeability of the resulting emotional distress should be relatively easy to show. The only remaining obstacle to recovery will be proof of physical symptoms.

In addition to the suit by the victim, a suit for negligent infliction of emotional distress can be initiated by a party who is not the victim. In California, under the holding in *Dillon v. Legg*,[65] such a suit requires the plaintiff to be a close relative of the victim, that both the assault and presence of the plaintiff were foreseeable, and that the plaintiff was a percipient or sensory witness, though not necessarily an eyewitness.[66] Thus, if a parent, child, or spouse is forced to see or overhear the sexual assault of the relative, the witnessing relative should consider a suit for negligent infliction of emotional distress against the as-

61. *See* discussion in note 58 *supra* and in notes 147 & 148 *infra* and accompanying text.

62. *See* notes 39-44 *supra* and accompanying text.

63. Vanoni v. Western Airlines, 247 Cal. App. 2d 793, 56 Cal. Rptr. 115 (1967).

64. Dillon v. Legg, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968).

65. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

66. Unlike California courts, Washington courts have not yet recognized the right of a third party bystander outside the zone of physical danger to institute a cause of action for negligent infliction of emotional distress. In Schurk v. Christensen, 80 Wash. 2d 652, 497 P.2d 937 (1972), the Washington Supreme Court held that the parents of a five year old girl who was sexually assaulted by a fifteen year old male babysitter could not bring a negligence action against the boy's parents for their emotional distress. The boy's mother had recommended him for the job, knowing that he had a history as a sex molester and concealing this fact from the girl's parents. The court reiterated its rule that there can be no recovery for emotional distress in cases not involving malice or wrongful intent, unless there has been an actual invasion of a plaintiff's person or a direct possibility thereof. *Id.* at 658-59, 497 P.2d at 941. In a strong dissent, which cited *Dillon*, it was implied that the court should overrule the zone of danger rule and recognize a cause of action in a third party for the negligent infliction of emotional distress. *Id.* at 658-59, 497 P.2d at 941.

sailant and against anyone with the duty to protect the plaintiff or control the assailant.

Common Carrier-Passenger

The law regarding common carriers[67] is useful to the sexual assault victim because many of the sexual assault cases reported in the nation on the appellate level are carrier cases in which the victim has been successful. Success is likely to result from two factors: the courts' recognition of the vulnerable position of the female passenger, who turns over the control of her safety to the carrier; and the high duty of care imposed on common carriers by courts and legislatures. These two factors create a contract of safe carriage[68] which all but eliminates the employer's defenses that the employee's acts were outside the "scope of employment" or that the employer exercised due care in hiring.[69]

Under the common law, a common carrier owes to its passengers a duty of "the utmost care and diligence for their safe carriage."[70] Unfortunately for the sexual assault victim, large areas of the passenger transport industry have been assumed by governmental agencies such as Amtrak, Bay Area Rapid Transit District, and the various municipal transit systems. As a result, sovereign immunity and state and federal Tort Claims Acts[71] have replaced the common law with much narrower grounds for recovery. Although airports are usually owned and operated by government agencies, space within them is often leased by the airline, thus making the individual airline subject to suit under carrier law. Moreover, carriers such as taxicab companies and nationwide bus lines remain within the private sector.

Liability of a carrier for the sexual assault of a passenger depends in part on whether the assailant is the carrier's em-

67. Carrier law is codified in California. A common carrier is anyone who offers to the public carriage of persons, property, or messages. CAL. CIV. CODE § 2168 (West 1954). Even elevators are considered common carriers. Champagne v. A. Hamburger & Sons, 169 Cal. 683, 690, 147 P. 954, 957 (1915). This fact could be important if the situs of the sexual assault were in an elevator stopped by the assailant midfloors.

68. *See* CAL. CIV. CODE § 2100 (West 1954), which provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must . . . exercise to that end a reasonable degree of skill."

69. *See* notes 117-21 *infra* and accompanying text.

70. CAL. CIV. CODE § 2100 (West 1954). The court in Gray v. City and County of San Francisco, 202 Cal. App. 2d 319, 20 Cal. Rptr. 894 (1962), noted that the high degree of care required of a common carrier "might impose a greater duty to inspect and thus make notice or knowledge more easily established." *Id.* at 330, 20 Cal. Rptr. at 902.

71. *See* notes 122-34 *infra* and accompanying text.

ployee, passenger, or a stranger. If the assailant is an employee, the courts have had no problem finding carrier liability despite defenses which would defeat non-carrier suits, such as acts not within the scope of employment or due care in hiring.[72] A California court, for example, curtly disapproved a scope of employment defense raised in a case in which a Pullman porter sexually assaulted a passenger: "To a female passenger a carrier owes a special duty to protect her . . . from indecent assaults . . . on the part of its employees, and . . . such duty should not be frittered away by nice questions as to whether the employee was acting within the scope of his employment."[73]

A carrier has a duty to protect its passengers from the acts of fellow travelers and must be reasonably cognizant of the habits, customs, and practices of passengers with respect to the safety of others.[74] If there is no knowledge or reason to know of the existence of danger, then there is no liability.[75] In *Hanback v. Seaboard Coastline Railroad,*[76] a passenger was raped by another passenger late at night in the women's restroom on the train. The court noted that the defendant railroad had no reason to know of the vicious tendencies of the passenger-rapist and therefore found defendant Seaboard Coastline free from liability for the basic injuries.[77] However, because defendant Amtrak, in the person of its passenger service representative, did hear and ignore the victim's screams, it was held liable for the increase in injuries occasioned thereby.[78]

Compared to the liability of the carrier for acts by its employees or passengers, liability for sexual assaults by "mere strangers" is more narrowly defined. The carrier owes the duty of reasonable

72. *See* notes 112-21 *infra* and accompanying text. In the following cases the carrier was found liable for a sexual assault committed by its employee: Rydberg v. Mitchell, 87 F. Supp. 639 (D. Alaska 1949) (passenger assaulted by a cab driver); Berger v. Southern Pac., 144 Cal. App. 2d 1, 300 P.2d 170 (1956) (a Pullman porter sexually assaulted a sleeping compartment passenger); Radio Cabs v. Tolbert, 86 Ga. App. 181, 71 S.E.2d 260 (1952) (a cab driver sexually assaulted a female passenger); McManigal v. Chicago Motor Coach Co., 18 Ill. App. 2d 183, 151 N.E.2d 410 (1958) (a bus driver indecently exposed himself to a minor passenger); Haser v. Pape, 77 N.D. 36, 39 N.W.2d 578 (1949) (a cab driver and a male passenger both sexually assaulted a female passenger).

73. Berger v. Southern Pac., 144 Cal. App. 2d at 7, 300 P.2d at 174, quoting 10 C. J. *Carriers* § 1328 (1917).

74. Garrett v. American Airlines, Inc., 332 F.2d 939, 942 (5th Cir. 1964).

75. Hanback v. Seaboard Coastline R.R., 396 F. Supp. 80, 88 (D.S.C. 1975).

76. *Id.*

77. *Id.* at 88-90.

78. *Id.* at 90.

care to prevent danger from the vicious acts of non-employees and non-passengers of which it has or should have knowledge.[79] It is therefore less likely that a sexual assault victim will be able to maintain a successful suit against a carrier if she is assaulted, for example, by a "mere stranger" while she is waiting in the station or while she is in a parking lot.

Carrier law may offer a useful model for broadening the tort liability of employers. That some situations cry out for adoption of the higher standard of care used in carrier law is manifestly illustrated by *Rabon v. Guardsmark, Inc.*[80] In that non-carrier case, a security guard raped the employee he was hired to protect. The federal district court attempted to reach into carrier law to overcome the "motive-benefit" test of the doctrine of scope of employment, pursuant to which an employee is considered to be acting in the scope of his or her employment if the purpose of the act is to benefit the employer.[81] The Fourth Circuit Court of Appeals found no justification under South Carolina law for the application of carrier principles, and reversed. An eloquent dissent pleaded for the sexual assault victim and urged the court to adopt the higher standard:

> [t]he voice of all that is right and just cries out for affirmance in this case. The trial judge clearly recognized that the plaintiff had been wronged by the defendant even though he had difficulty in finding precedent for his rulings. We have passed the point in the law where there must be a writ for every right, and we must, if necessary, articulate new law to cover new circumstances.[82]

Innkeeper-Patron

Innkeepers are under a duty of reasonable care for the safety of their patrons[83] and the invitees of their patrons.[84] The duty

79. Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 223 (S.D.N.Y. 1975), *cert. denied*, 429 U.S. 890 (1976). Although *Day* involved potential liability under an international treaty, the court found the principles of common law tort instructive for purposes of comparison. *Id.*

80. 571 F.2d 1277 (4th Cir. 1978).

81. *See* text accompanying notes 113-19 *infra*.

82. 571 F.2d at 1282 (Hall, J., dissenting). The majority rejected the district court's finding that statutory regulation of security guards placed their employers in the same category as common carriers with respect to liability for the unauthorized acts of their servants. *Id.* at 1281. Judge Hall would have upheld the district court's finding. *Id.* at 1282.

83. Topley v. Zeeman, 216 Cal. 182, 13 P.2d 666 (1932); Rahmel v. Lehndorff, 142 Cal. 681, 76 P. 659 (1904).

owed here, however, is not as high as that of a common carrier to its passengers. As in carrier law, the doctrine of respondeat superior applies in innkeeper law to assaults on patrons by employees. However, unlike the common carrier, the innkeeper is only liable if the assault occurs within the scope of employment, or if the innkeeper negligently hired one with known violent propensities.[85] When one patron assaults another, innkeeper liability exists only if he or she negligently harbored a guest of known violent tendencies.[86] Ordinarily there is no innkeeper liability for assaults by one who is a stranger to the innkeeper unless negligence can be found in not affording proper protection to the guest.[87]

Although the courts have enunciated a duty of ordinary care on the part of the innkeeper,[88] they have scrutinized the facts in individual cases quite carefully in order to find liability in the following situations: negligent hiring of a porter with felonious tendencies;[89] failure to protect a guest from another intoxicated guest;[90] failure to supervise a bellboy, drunk and absent from his post;[91] and breach of the confidential relationship between hotel and guest.[92]

In fact, some courts have been rather creative in upholding innkeeper liability. In *McKee v. Sheraton-Russell, Inc.*,[93] the facts did not support a cause of action for negligence in hiring and supervision, or for liability based on respondeat superior, but the court applied a contract theory. The complaint alleged that lewd and sexual remarks were made by the bellman who entered the victim's room with a passkey. There was no physical touching alleged. The Second Circuit Court of Appeals, applying New York law, found a breach of the hotel's implied contractual agreement of decent and respectful treatment, which it implied from the confidential relation of the parties.[94]

84. Goldstein v. Healy, 187 Cal. 206, 201 P. 462 (1921); People v. Vaughan, 65 Cal. App. 2d 844, 150 P.2d 964 (1944).

85. Rahmel v. Lehndorff, 142 Cal. 681, 683-85, 76 P. 659, 660-61 (1904). *See* notes 113-21 *infra* and accompanying text.

86. Rahmel v. Lehndorff, 142 Cal. at 683-85, 76 P. at 660-61. *See also* Kingen v. Weyant, 148 Cal. App. 2d 656, 307 P.2d 369 (1957).

87. *See generally* 37 CAL. JUR. 3d *Hotels, Motels and Restaurants* § 26 (1977).

88. Rahmel v. Lehndorff, 142 Cal. at 685, 76 P. at 661; Kingen v. Weyant, 148 Cal. App. 2d at 661, 307 P.2d at 372.

89. Harvey v. De Weill, 102 Ga. App. 394, 116 S.E.2d 747 (1960).

90. Gurren v. Casperson, 147 Wash. 222, 265 P. 472 (1928).

91. Danile v. Oak Park Arms Hotel, Inc., 55 Ill. App. 2d 2, 203 N.E.2d 706 (1964).

92. McKee v. Sheraton-Russell, Inc., 268 F.2d 669 (2d Cir. 1959).

93. *Id.*

94. *Id.* at 672.

Landowner-Entrant and Landlord-Tenant

Landowner liability for assaults occurring on the premises depends on three principles. Thus, every sexual assault situation should be analyzed in terms of: (1) the relationship between the landowner and the victim; (2) the degree of landowner control over the situs of the attack; and (3) the foreseeability of the attack. As it has in many areas of law, California has broadened the older common law theories[95] which would otherwise have defeated a sexual assault suit.

In the landmark decision of *Rowland v. Christian,*[96] the California Supreme Court held that landowners owe to all entrants on their land a duty of reasonable care, measured by the reasonable foreseeability of the harm.[97] The significance of *Rowland* was augmented by the adoption in California of an expanded concept of the duty of apartment owners to secure common areas. This concept was first enunciated in *Kline v. 1500 Massachusetts Avenue Apartment Corp.,*[98] a federal court of appeals decision. In *Kline,* the Court of Appeals for the District of Columbia Circuit held that an apartment owner has a duty to protect tenants from foreseeable criminal acts if the landowner has notice of numerous prior assaults and exclusive control of the common area.[99] The *Kline* standards of notice and exclusive control have been adopted by California appellate courts.[100]

In the California court of appeal case of *O'Hara v. Western Seven Trees Corp.,*[101] the court held that a rape victim had stated a cause of action against her landlord. The plaintiff rented an apartment after being assured by the manager that the building was safe and that it was patrolled twenty-four hours a day. In

95. Previously, under the common law in California, the landlord owed no duty to the tenant or the tenant's invitees, absent a contract, statutory duty, or concealment of a known defect. Harris v. Joffe, 28 Cal. 2d 418, 170 P.2d 454 (1946); Willson v. Treadwell, 81 Cal. 58, 22 P. 304 (1889).

96. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). In *Rowland,* the court abrogated the common law distinctions between the duties owed a trespasser, a licensee, and an invitee. They are each owed a duty of reasonable care. What is reasonable, however, might depend on the status of the entrant. *Id.* at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

97. *Id.*

98. 439 F.2d 477 (D.C. Cir. 1970).

99. *Id.* at 481.

100. Duarte v. State, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979); O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977); Totten v. More Oakland Residential Housing, Inc., 63 Cal. App. 3d 538, 134 Cal. Rptr. 29 (1976).

101. 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).

fact, the building manager was aware of several recent rapes in the building by an unknown assailant, and was further aware that there was no security patrol. Applying *Rowland* and *Kline,* the court found that a cause of action was stated against the corporate landlord for breach of its duty to protect against crimes of which it had notice and which were likely to recur if the common areas remained unsecured.[102] Although the rape occurred in the woman's apartment and not in a common area, the court did not find this fact dispositive because the failure to secure the common area could have contributed substantially to the harm.[103] The court reiterated the principle that a landlord will only be held liable for foreseeable acts.[104]

Following the reasoning in *Kline* and *O'Hara,* a California appellate court recently reversed a judgment sustaining a demurrer to a cause of action based, in part, on landowner negligence. In *Duarte v. State,*[105] a mother sued for the wrongful death of her eighteen year old daughter, who was raped and murdered in her dormitory room at the University of California at San Diego. The court noted the trend to hold urban landlords liable if they have failed to take reasonable steps to protect tenants from criminal activity.[106] The court distinguished cases in which landowners were not found liable, commenting that the landlord-tenant relationship was absent in those cases.[107] After a thorough discussion

102. *Id.* at 803-04, 142 Cal. Rptr. at 489-90.

103. *Id.* at 803, 142 Cal. Rptr. at 490. The *O'Hara* court also upheld a cause of action for fraud against the landlord, whose misrepresentation may have induced the plaintiff's reliance. *Id.* at 804-05, 142 Cal. Rptr. at 491.

104. *Id.* at 804, 142 Cal. Rptr. at 490. In Totten v. More Oakland Residential Housing, Inc., an apartment owner was not involved in any way in an altercation between passersby, who ran into the laundry room from the street. 63 Cal. App. 3d 538, 134 Cal. Rptr. 29 (1976). The altercation resulted in an injury to an innocent person who was visiting a tenant. The court concluded that in the absence of a special circumstance, which would have been found if there had been sufficient foreseeability, More Housing was not liable because it had no duty to protect strangers on its premises from the criminal attack of an assailant. *Id.* at 542, 134 Cal. Rptr. at 32-33.

The argument might be made that landlord liability for foreseeable hazards in common areas should be a matter of public policy. *Cf.* Henrioulle v. Marin Ventures, Inc., in which the California Supreme Court in a unanimous opinion held that exculpatory clauses in lease agreements which purport to hold the landlord harmless for injuries occurring on the premises are void as against public policy. 20 Cal. 3d 512, 518-19, 573 P.2d 465, 469-70, 143 Cal. Rptr. 247, 251 (1978).

105. 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979).

106. *Id.* at 484, 151 Cal. Rptr. at 733. The court stated that the complaint alleged that the university had notice of "a chronic pattern of violent assaults, rapes and attacks on female members of the university community, and that this pattern was escalating." *Id.* at 477, 151 Cal. Rptr. at 729.

107. *Id.* at 485, 151 Cal. Rptr. at 734-35. Among the cases distinguished were Sykes

of modern case law pertinent to the issue of landlord liability, the *Duarte* court found a cause of action for negligence stated against the university landlord.[108]

The plaintiff in *Duarte* also alleged breach of contract. She based this cause of action on the lease contract, and the implied warranty of habitability. The court again followed *Kline*[109] in recognizing an implied contract between the landlord and tenant to provide those protective measures which are within the landlord's reasonable capacity.[110]

In addition to judicial decisions expanding a landlord's liability for foreseeable and preventable hazards on the property, municipal ordinances enacted for the purpose of tenant safety may also provide a basis for suit against a landlord. For example, violation of a city ordinance requiring landlords to install a one-inch deadbolt on all residential doors was the basis of a recent suit against a landlord by a tenant who was raped in her apartment.[111] Since many sexual assaults occur in a victim's own apartment as a result either of dangerously unsecured common areas or inadequate door or window latches, the legal trend imposing greater responsibility on landlords for the safety of their tenants augurs well for the success of sexual assault suits against landlords.

Employer-Employee

The employment relationship gives rise to a duty on the part of the employer to protect the employee victim[112] and to control the employee-assailant. The employer may either be vicariously liable on the basis of the doctrine of respondeat superior, in which case the employer's fault is irrelevant, or directly liable on the basis of negligent hiring or failure to supervise, in which case the employer's fault must be proved.

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v. County of Marin, 43 Cal. App. 3d 158, 117 Cal. Rptr. 466 (1974), discussed in text accompanying notes 123-25 *infra*, and Totten v. More Oakland Residential Housing, Inc., 63 Cal. App. 3d 538, 134 Cal. Rptr. 29 (1976), discussed in note 104 *supra*.

108. 88 Cal. App. 3d at 486, 151 Cal. Rptr. at 735.

109. 439 F.2d 477, 485 (D.C. Cir. 1970).

110. 88 Cal. App. 3d at 485, 151 Cal. Rptr. at 734.

111. San Francisco Chronicle, Feb. 3, 1978, at 2, col. 1. Breach of a statutory duty in California creates an inference of negligence, rebuttable only by justification, or excuse, if the injury was of the type sought to be prevented by the ordinance, and if the injured party was within the class sought to be protected. CAL. EVID. CODE § 669 (West Supp. 1978).

112. When the employer is the victim's employer, the Workers Compensation Act may apply. *See* note 58 *supra* and accompanying text.

A sexual assault victim might be able to hold a faultless employer liable in California under the doctrine of respondeat superior for an assault committed by an employee acting within the scope of his employment.[113] Other jurisdictions which have considered this cause of action for sexual assault have applied the rigid "motive-benefit" rule.[114] Using this traditional concept, courts in other jurisdictions have concluded that sexual assault in no way benefits the employer, but is a "mere frolic," and therefore outside the scope of the doctrine of respondeat superior.[115]

California, however, has abandoned the motive-benefit rule[116] in favor of a broader test for scope of employment which underscores the notion of risk-spreading through employer liability insurance.[117] Under California law, if "the risk is one arising out of the employment, the employer is liable even though the act causing harm may serve the employee's needs and not those of the employer."[118] However, if an assault was motivated by personal malice not engendered by the employment, then there

113. CAL. CIV. CODE §§ 2338, 2339 (West 1954).

114. *See, e.g.*, Mays v. Pico Fin. Co., 339 So. 2d 382 (La. App. 1976); Bradley v. Stevens, 329 Mich. 556, 46 N.W.2d 382 (1951).

115. It is hard to imagine any situation in which a court applying the motive-benefit rule would find that a sexual assault by an employee benefitted the employer. Thus the employer usually evades liability. In a recent Fourth Circuit Court of Appeals case, a private security patrol officer sexually assaulted a company employee who was working late. In a suit against the patrol company on a theory of respondeat superior, the defendant patrol company successfully avoided liability, arguing that because the guard had been hired to protect employees, he was obviously acting outside the scope of his employment when he instead became the attacker. Rabon v. Guardsmark, Inc., 571 F.2d 1277, 1279 (4th Cir. 1978).

116. Carr v. Wm. C. Crowell Co., 28 Cal. 2d 652, 654, 171 P.2d 5, 7 (1946).

117. *See, e.g.*, United States v. Romitti, 363 F.2d 662, 665 (9th Cir. 1966) (applying California law); Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 618, 124 Cal. Rptr. 143, 148 (1975).

118. United States v. Romitti, 363 F.2d at 666.

The court in Rodgers v. Kemper Constr. Co. explained that

> [o]ne way to determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, "foreseeability" in this context must be distinguished from "foreseeability" as a test for negligence . . . . [F]oreseeability as a test for respondeat superior merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.

50 Cal. App. 3d at 618-19, 124 Cal. Rptr. at 148-49 (citations omitted).

would be no employer responsibility.[119] Although there is no reported California decision in which a sexual assault victim has sued the employer on a theory of respondeat superior, such civil suits in California should succeed, though in "motive-benefit" jurisdictions they have failed.

A suit against the employer for negligence in hiring the assailant avoids the scope of employment problem altogether. Moreover, courts would presumably be more amenable to finding liability against a wrongdoing employer than against a blameless employer being sued on a theory of respondeat superior. The reasonable foreseeability of the employee assailant's tortious act is the test for liability for negligent hiring.[120] The amount of investigation into the background of the prospective employee sufficient to satisfy the duty depends on the circumstances.[121] It seems fair to conclude that the thoroughness of investigation appropriate in the case of an applicant for a position requiring entry into a person's home would differ from that of an applicant for a position as a clerk in an office. Similarly, those positions typically commanding an aura of respect tend of themselves to create trust and, therefore, vulnerability on the part of the public. Hiring entities should be liable for inadequate investigation into the backgrounds of police officers, clergy, physicians, social workers, teachers and the like because of the very confidence such positions inspire.

It should be noted that there is a policy conflict between utilizing the tort of negligent hiring and encouraging nondiscrimination in employment against the former offender since potential liability may discourage the hiring of former offenders, regardless of the degree of rehabilitation. Employers are apt to refuse to hire anyone convicted of a sexual assault because they can hardly expect to predict which former offenders will commit future crimes. If held liable on the basis that one conviction for rape makes a future sexual assault foreseeable, the employer is

119. Carr v. Wm. C. Crowell Co., 28 Cal. 2d 652, 656, 171 P.2d 5, 8 (1946); Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d at 621, 124 Cal. Rptr. at 150. The court in *Carr* indicated that personal malice is not possible between strangers. The employee accused of assault testified that he had never seen the plaintiff before the day preceeding the incident, and had never conversed with him before the dispute which precipitated the assault. 28 Cal. 2d at 657, 171 P.2d at 8.

120. Worley v. Spreckels Bros. Com., 163 Cal. 60, 68-69, 124 P. 697, 701 (1912); Peters v. Southern Pac., 160 Cal. 48, 53-54, 116 P. 400, 403 (1911).

121. Worley v. Spreckels Bros. Com., 163 Cal. at 69, 124 P. at 701; Peters v. Southern Pac., 160 Cal. at 54, 116 P. at 403.

apt to avoid the risk altogether. The goal of preventing sexual attacks by employees whose jobs give them special authority, access, or opportunity with respect to possible assault victims would seem to preclude the hiring of persons with violent pasts for such positions. Society's interest in rehabilitation can be secured by placing such people in positions where opportunities for repeat conduct are limited, at least until an acceptable record makes a future attack no longer "foreseeable."

Government-Citizen

In California, liability of state and local government bodies is governed by the Tort Claims Act.[122] Therefore, if a sexual assault occurs on government property, the success of a suit will depend on the court's determination of the applicability of the Tort Claims Act. California appellate courts today are struggling with the issue of government liability under the Act for the crimes of third parties.

In *Sykes v. County of Marin,*[123] a First District Court of Appeal case, an assault occurred in a school parking lot. The court concluded that inadequate lighting of a parking lot "is not the kind of dangerous condition contemplated by the Legislature in its legislation concerning defective or dangerous condition of public property."[124] The court also found that the Act does not allow

122. CAL. GOV'T CODE §§ 810-996.6 (West 1966). Under the Act, a government entity is vicariously liable for any discretionary act or omission of an employee committed within the scope of employment which would be actionable under the common law. *Id.* § 815.2. Moreover, the government may be directly liable for injuries resulting from dangerous conditions on its property. *Id.* § 835.

When the assailant is an employee of the government, the victim is faced with the same obstacles as all other intentional tort victims suing on a theory of respondeat superior. She must prove the act was committed within the scope of employment. *Id.* § 815.2. *See* Morgan v. County of Yuba, 230 Cal. App. 2d 938, 945-46, 41 Cal. Rptr. 508, 513 (1964).

If an employee's negligent act or omission creates a condition which increases the likelihood of a sexual assault, the government and its negligent employee are immune from suit if the act or omission is deemed discretionary and not ministerial. *See* CAL. GOV'T CODE §§ 815.2, 820.2 (West 1966). Immune "discretionary acts" are often difficult to distinguish from "ministerial acts." In Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968), a state parole officer placed an offender with known homicidal tendencies in a foster home without informing the foster parents of the youth's tendencies. The youth subsequently attacked the foster mother. The California Supreme Court held that the decision to parole was discretionary, and thus immune, but the method of carrying out the parole was ministerial, and therefore reachable by suit. *Id.* at 795-96, 447 P.2d at 362-63, 73 Cal. Rptr. at 250-51. The *Johnson* decision is an important case for the sexual assault victim because it suggests that the California courts may be less likely to hold an act discretionary if it results in violence against the person.

123. 43 Cal. App. 3d 158, 117 Cal. Rptr. 466 (1974).

124. *Id.* at 164, 117 Cal. Rptr. at 470.

suits against a government entity based on attacks by third parties on public property.[125]

Sykes was distinguished in *Slapin v. Los Angeles International Airport,*[126] in which the Second District Court of Appeal found that the complaint stated a cause of action against the airport in alleging that maintenance of an inadequately lighted parking lot constituted a dangerous condition of property rendering the government entity liable under the Tort Claims Act.[127] While the *Slapin* court distinguished *Sykes,*[128] it also stated, without elaboration, that "[t]o the extent *Sykes* is not distinguishable from the case at bench we decline to follow it."[129]

In *Duarte v. State,*[130] where a young woman was sexually assaulted and murdered in a dormitory owned and operated by the University of California, the defense of sovereign immunity was raised by the State. The Fourth District Court of Appeal found that for a number of reasons the California Tort Claims Act did not bar the suit. First, the Tort Claims Act does not preclude suits against a government entity which are based on contractual obligations.[131] Second, maintaining a dangerous condition, "in the nature of an invitation to an intruder to come to molest," precludes the use of the sovereign immunity defense.[132] Finally, the court noted that a government entity is not immune from suit for the tortious acts or omissions of its employees, and the plaintiff alleged negligent failure of the state employees to protect her daughter from a foreseeable criminal act.[133]

Although *Duarte, Slapin,* and *Sykes* do not represent a direct conflict in the California courts of appeal, the issue of whether failure to provide adequate lighting or security constitutes maintenance of a dangerous condition on government property which precludes government immunity may well be before the Califor-

125. *Id.*

126. 65 Cal. App. 3d 484, 135 Cal. Rptr. 296 (1976).

127. *Id.* at 488, 135 Cal. Rptr. at 298.

128. The court noted that *Sykes* was an affirmance of a judgment of nonsuit granted after presentation of evidence by the plaintiff, while in *Slapin* the trial court had sustained defendant's demurrer: "In *Sykes*, the plaintiff presented his proof and failed to establish a case. In the instant matter, plaintiffs have not been given the opportunity to put on their proof." *Id.* at 489, 135 Cal. Rptr. at 299.

129. *Id.*

130. 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979).

131. *Id.* at 488, 151 Cal. Rptr. at 736. *See* text accompanying note 109 *supra.*

132. *Id.* 151 Cal. Rptr. at 736.

133. *Id.*

nia Supreme Court very soon. Additionally, the court will have to define the special relationships giving rise to a duty of care on the part of government entities. Until the California Supreme Court decides these issues, the *Duarte* and *Slapin* decisions by the courts of appeal are important precedents for bringing causes of action for sexual assault against government bodies on a variety of legal theories, including negligence, misrepresentation or fraud, and contract.[134]

Public schools in California come within the purview of the Tort Claims Act. Their liability for the conduct and safety of pupils is limited to those injuries which occur on school property or those which occur off the premises if the school provided transportation, or sponsored the activity.[135] If pupils or school employees are not involved, the liability of the public school for assaults occurring on school grounds will be determined in the same way as that of any other public entity.[136]

When pupils or employees are involved, schools are vulnerable to suit in ways that other public entities are not because the legislature and the courts have imposed a high duty of supervision on them. It encompasses both the duty to secure the victim's safety[137] and the duty to supervise the behavior of the students and employees.[138] A breach of either duty will lead to liability.[139]

134. *See* note 53 *supra*; text accompanying notes 109 & 110 *supra*.

135. CAL. EDUC. CODE §§ 44808, 87706 (West 1978). *See* Castro v. Los Angeles Bd. of Educ., 54 Cal. App. 3d 232, 126 Cal. Rptr. 537 (1976), for a discussion of what constitutes a school sponsored activity. The appellate court found that although the plaintiffs' first complaint described the ROTC summer camp as a "'field trip or excursion'. . . . [t]he activity itself was adequately pleaded as a school sponsored activity." *Id.* at 237, 126 Cal. Rptr. at 540.

High schools that grant students permission to leave the campus during the lunch period are exempted from liability for either the safety or conduct of the student during the time off campus. *See* CAL. EDUC. CODE § 44808 (West 1978).

136. *See* note 122 *supra*.

137. Ogando v. Carquinez Grammar School Dist., 24 Cal. App. 2d 567, 571, 75 P.2d 641, 643 (1938).

138. Beck v. San Francisco Unified School Dist., 225 Cal. App. 2d 503, 37 Cal. Rptr. 471 (1964).

139. The degree of care required of schools is that which a person of ordinary prudence charged with comparable duties would exercise under the same circumstances. Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 747, 470 P.2d 360, 363, 87 Cal. Rptr. 376, 379 (1970); Pirkle v. Oakdale Union Grammar School Dist., 40 Cal. 2d 207, 210, 253 P.2d 1, 2-3 (1953); Woodsmall v. Mt. Diablo Unified School Dist., 188 Cal. App. 2d 262, 10 Cal. Rptr. 447 (1961).

The court in Beck v. San Francisco Unified School Dist. commented that "[a] school district has the duty to supervise conduct of children on school grounds at all times and to enforce pertinent rules or regulations (citations omitted). The failure to do so may constitute actionable negligence." 225 Cal. App. 2d at 507, 37 Cal. Rptr. at 473.

In *Hoyem v. Manhattan Beach City School District,*[140] the California Supreme Court held that the plaintiffs, a ten year old schoolboy and his mother, had stated a cause of action against the school district for injuries suffered by the boy, who was truant and off school premises. The plaintiffs alleged that the school district was negligent because it had failed to exercise reasonable care in supervising a student in its care and that the negligence proximately caused the resulting injuries.[141]

As in any negligence action, the breach of the duty to supervise depends upon the foreseeability of the event. In at least one jurisdiction, prior incidents of assaultive behavior that were not sexual in nature were held inadmissible on the issue of notice to the school when a sexual assault occurred.[142] In California, however, there is authority that in suits against schools for negligent supervision, the plaintiff only must show that a reasonably prudent person would have foreseen "that injuries of the same general type would be likely to occur in the absence of adequate safeguards."[143]

Therefore, if the situs of the attack is school property and the victim is not a student, one should look to public entity law in general under the Tort Claims Act. If either the victim or the attacker is a student, the school's duty to supervise is the primary issue. In any case, the school will not be liable for punitive damages imposed as a punishment because of express provisions of the Tort Claims Act.[144]

Parent-Child

When the attacker is a minor, the issue of parental liability arises. Under California statute,[145] the victim of a sexual assault cannot recover from the minor's parents on a theory of vicarious liability unless she incurs pecuniary loss. However, parents may

140. 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978).

141. *Id.* at 513-14, 585 P.2d at 853, 150 Cal. Rptr. at 3.

142. Gallagher v. City of New York, 30 App. Div. 2d 688, 292 N.Y.S.2d 139 (1968). The court also held that the report of an incident occurring one year earlier which involved a female student who was threatened with a knife by a person who put his hand on her was admissible. *Id.*, 292 N.Y.S.2d at 140-41.

143. Dailey v. Los Angeles Unified School Dist., 2 Cal. 3d 741, 751, 470 P.2d 360, 366, 87 Cal. Rptr. 376, 382 (1970) (citations omitted). *See also* Taylor v. Oakland Scavenger Co., 17 Cal. 2d 594, 600, 110 P.2d 1044, 1048 (1941); Ziegler v. Santa Cruz City High School Dist., 168 Cal. App. 2d 277, 284, 335 P.2d 709, 713 (1959).

144. CAL. GOV'T CODE § 818 (West 1966).

145. CAL. CIV. CODE § 1714.1 (West Supp. 1978). *See* note 60 *supra.*

be liable for their own fault if they fail to control their son, or if they fail to warn others of his known dangerous propensities. Although this rule has been followed by courts in other jurisdictions which have considered direct suits against parents for sexual assaults committed by their sons,[146] the California courts have yet to report such a case.[147] However, there appears to be good grounds for such a suit if the parents have notice of a prior sexual assault by their son, and have the opportunity to intervene,[148] perhaps by refusing to lend the family car, by chaperoning a party, or by warning the girl's parents.

IV. CONCLUSION

Sexual assault, and the fear of sexual assault, governs the lives of all women to some extent, as every day the threat of such an assault curtails women's freedom and mobility. There are few assertive ways in which women can combat sexual assault; most women are merely taught how to avoid assault by limiting their own activities and conduct. Nonetheless, assaults occur with increasing frequency. The civil suit is one way the assaulted woman can accomplish several goals important to her. She can receive restitution for her own injury, and she can achieve control over her life by initiating a legal action in which she is the plaintiff. Ultimately, she has the hope that such actions will help establish what the criminal justice system has so far failed to achieve, accountability of an assailant for a sexual assault.

146. *See, e.g.*, Bowen v. Mewborn, 218 N.C. 423, 11 S.E.2d 372 (1940), in which the father loaned the family car to his son, having urged the son on many prior occasions to indulge in sexual relations. The son assaulted his date, and the victim brought suit against the boy and his father. The Supreme Court of North Carolina ruled that the demurrer to the cause of action against the father for negligence should have been sustained. The court concluded that there was insufficient evidence in the record to indicate that the father counselled or encouraged the specific assault against the victim or that it was foreseeable. *Id.* at 427-28, 11 S.E.2d at 375.

147. California does follow the general rule that parental negligence in making it possible for the child to commit a tort, when it was probable the child would do so, confers liability on the parent. Buelke v. Levenstadt, 190 Cal. 684, 689, 214 P. 42, 44 (1923). Moreover, in California, notice of a child's dangerous proclivity and failure by the parents to warn others or to control the child if they have the opportunity to do so may establish parental liability. Singer v. Marx, 144 Cal. App. 2d 637, 644, 301 P.2d 440, 444 (1956).

148. *Cf.* Ellis v. D'Angelo, 116 Cal. App. 2d 310, 317, 253 P.2d 675, 679 (1953) (plaintiff babysitter attacked by child stated a cause of action against parents who failed to warn of four year old child's habitual conduct of violently attacking other people). *See generally* W. PROSSER, *supra* note 31, at 872-73.