

# CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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## Alternative Dispute Resolution

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### *Smith v Freund (2/2/11)*

#### **Parental Liability; Special Relationship; Duty of Care**

Plaintiffs sued defendants for wrongful death, alleging defendants negligently supervised their 19 year old son. Defendants were the adoptive parents of their only son, who shot and killed two family members of plaintiffs. Despite his age, plaintiffs alleged defendants had a duty because the boy, “was an autistic teenager who lived at home with his parents, and was supported by them.”

The medical evidence established that several years earlier, a pediatric neurologist confirmed the son had “rages, and physically attacked his parents.” He also complained of problems concentrating and understanding the conversations of other students. He was diagnosed with Asperger’s Syndrome generally, with an ultimate diagnosis of major depressive disorder with psychotic features. Plaintiffs alleged that as the result of conduct in the months before the shooting described as “irritability and nastiness” his psychiatrist prescribed a new antidepressant medicine. The parent defendants were instructed to remain vigilant for the emergence of acute psychiatric symptoms. A month before the shootings, the defendants told the doctor their son was “in and out of reality” and “acting weird.”

Also in the month before the shootings, defendants’ son bought a gun and posted messages on the internet indicating he was going to commit suicide, and that he might, “take others with him.” In fact, the defendants did not know of the threats of violence or suicide, or that he possessed a firearm. They knew of no threat by their son against any member of plaintiffs’ family. Still, plaintiffs alleged defendants had actual knowledge that the son had acted violently in the past, and had “suicidal ideation.”

Defendants moved for summary judgment, averring that the fact their son was 19 years old at the time of the shooting negated all of the negligence claims

against them. The mere fact their son lived with them did not change this conclusion. They also contended that because the attack was unforeseeable, plaintiffs could not establish the negligence element of duty of care. The trial court granted the summary judgment and plaintiffs appealed, contending defendants had a duty to monitor and control their son's actions, and to prevent him from harming others. Plaintiffs alleged defendants had a "special relationship" with their son, under the law creating a duty, and voluntarily undertook a duty to monitor him. They claimed the violent outburst was foreseeable, based on the son's history.

The Fourth District Court of Appeal began by referencing the elements of negligence, noting the duty element is the defendant's legal duty to protect plaintiff from harm. (*Bily v Arthur Young & Co.* (1992) 3 Cal.4<sup>th</sup> 370) A determination that a duty exists amounts to a policy decision that a particular plaintiff should be protected (*Dillon v Legg* (1968) 68 Cal.2d 728), i.e., that, in cases of a particular type, liability should be imposed for damage done. (*Tarasoff v Regents of University of California* (1976) 17 Cal.3d 425)

In a parental liability action, based on parental negligence, analysis of the duty element depends on whether the plaintiff has alleged "misfeasance" or "nonfeasance" by the parents. Most such cases may be characterized as situations in which the parents have "failed to act" or failed to control their child for the protection of another (nonfeasance). The common law traditionally holds that one has no duty to take affirmative actions for the protection of another, absent special duty-creating circumstances.

This is a case predominantly of nonfeasance, alleging defendants failed to monitor and control their son. Where plaintiff alleges defendant had a duty to control another person's conduct, "special rules come into play." (*Megeff v Doland* (1981) 123 Cal.App.3d 251) The courts have created limited exceptions based on special relationships between the defendant and the person whose conduct needs to be controlled. The relationship between parent and child is one such special relationship. (*Wise v Superior Court* (1992) 222 Cal.App.3d 1088) Another special relationship ensues when a party "takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled. (*Hansra v Superior Court* (1992) 7 Cal.App.4<sup>th</sup> 630)

A basic requisite of a duty based on a special relationship is the defendant's ability to control the other person's conduct. If the relationship "creates no inference of an ability to control, the actual custodial ability must affirmatively

appear.” In addition, the foreseeability of the harm is critical to the existence of a duty. (*Megeff*, at p. 261) The Fourth DCA noted that a court should consider several factors, including (1) foreseeability of harm to the plaintiff, (2) the degree of certainty the plaintiff suffered injury, (3) the closeness of the connection between the defendant’s conduct and the injury suffered, (4) the moral blame attached to the defendant’s conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost and prevalence of insurance for the risk. (*Davidson v City of Westminster* (1982) 32 Cal.3d 197)

These factors apply to negligence cases where there is no privity of contract between the plaintiff and the defendant. (*Greenberg v Superior Court* (2009) 172 Cal.App.4<sup>th</sup> 1339) The Justices stated that a court must weigh and balance these factors, recognizing that the most important among them is foreseeability of the harm to plaintiff. (*Rowland v Christian* (1968) 69 Cal.2d 108; *Biakanja v Irving* (1958) 49 Cal.2d 647) A plaintiff who alleges a duty to control another based on a special relationship must show both, (1) that the defendant had the ability to control the actor, and (2) that the defendant bore a duty of care under a *Biakanja/Rowland* analysis.

Here, the DCA observed, the parents could not foresee their son’s violent acts because they knew of no propensity or intention he harbored to harm third parties (as opposed to himself or his parents). As the psychiatrist testified, there is no substantial correlation between Asperger’s Syndrome and physical hostility toward others. The doctor had never described or encountered psychotic features as in delusions or hallucinations. The recent new medication had only “slight” risks of suicidal behavior and none for “homicidal propensities.” Although the record showed the boy had once slapped a fellow student, this “lone instance” which occurred after the other student struck him first, was not enough for defendants to “reasonably foresee that he would, several years later, harm a third party.”

Even though the recent commencement of a new antidepressant medication may have created a foreseeable risk that the boy might attack his parents or hurt himself, the behavior provided no forewarning that he might kill family members of his best friend, or any other third party. The other *Biakanja/Rowland* factors make clear there can be no moral blame attached to the parents who chose to help their son rather than abandon him. Any connection

between the defendants' conduct and the shooting is "speculative." Defendants allowed their son to live in their home, attended therapy sessions with him, monitored his medicine, and reported to his doctors as requested. To impose a duty of care on defendants could cause greater harm in future cases by encouraging parents to dissociate from their adult children with chronic serious problems. The factors weigh heavily in favor of a finding of no duty on the part of the defendant parents here.

As such, there is no triable issue of material fact concerning a duty of defendants to control their son's actions, and the trial court properly granted summary judgment. The judgment is therefore affirmed.

Defendants shall recover their costs on appeal.