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Children and Whose Unvaccinated Children Infect Others**

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2013

# Tort Liability for Parents Who Choose Not to Vaccinate Their Children and Whose Unvaccinated Children Infect Others

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Tort Liability for Parents Who Choose Not to Vaccinate Their Children  
and Whose Unvaccinated Children Infect Others  
(forthcoming in *University of Cincinnati Law Review*)

Teri Dobbins Baxter\*

Introduction

In the past several years, the United States has experienced outbreaks of diseases that had been completely or nearly eliminated in past decades.<sup>1</sup> Among the diseases that have reappeared and sickened hundreds of children are pertussis (also known as whooping cough) and measles.<sup>2</sup> In most cases the outbreaks have been traced to unvaccinated individuals who contracted the diseases abroad in countries with higher infection and lower immunization rates.<sup>3</sup> While the source of an outbreak may originate abroad, the spread of the diseases can usually be traced to American children whose parents have chosen not to have them immunized against these diseases.<sup>4</sup> The unvaccinated children have fallen sick and, in many cases, have infected other children who were either too young to have received immunizations against the disease or who contracted the disease despite having been immunized.<sup>5</sup>

There are many different reasons why a parent may choose not to vaccinate his or her child: fear that the vaccine causes autism or other illness; a desire to avoid exposure to certain chemicals contained in vaccine; allergies to components of a vaccine; medical conditions that make immunization inadvisable; religious prohibitions; belief that they are not necessary because the diseases are no longer present in the United States or in their community; or belief that children should build up their own immune systems by being exposed to illness rather than protected from it.

Some of these reasons are based upon personal beliefs, but others are the result of anti-vaccine campaigns based on widely discussed but completed discredited reports linking autism to the measles-mumps-rubella vaccine and vaccines that contained mercury.<sup>6</sup> Although no studies have ever confirmed either of those links and several have disproven any connection,

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<sup>1</sup> Centers for Disease Control and Prevention, *Measles – United States, 2011*, 61 MMWR 253-257 (2012) (“CDC, 61 MMWR”).

<sup>2</sup> *Id.*; Amanda Schaffer, *Why Are Babies Dying of Old-Fashioned Whooping Cough?* SLATE.COM [http://www.slate.com/articles/double\\_x/doublex/2012/09/why\\_babies\\_are\\_dying\\_of\\_whooping\\_cough\\_.html](http://www.slate.com/articles/double_x/doublex/2012/09/why_babies_are_dying_of_whooping_cough_.html) (last visited 3/15/2013)

<sup>3</sup> CDC, 61 MMWR at 253.

<sup>4</sup> *Id.*

<sup>5</sup> A small percentage of people receiving vaccinations will not develop immunity to the disease. Additionally, it takes time for many vaccinations to stimulate immunity; consequently, if a person is exposed to a disease soon after receiving the vaccine, they may not have sufficient immunity to fight off infection.

<sup>6</sup> Jay Winsten & Emily Serazin, *Rolling Back the War on Vaccines*, WALL STREET JOURNAL, (2/6/2013), available at <http://online.wsj.com/article/SB10001424127887324039504578260242982589914.html?KEYWORDS=rolling+bac+k+the+war+on+vaccines#articleTabs%3Darticle> (last visited on 3/15/2013).

many vaccine opponents continue to assert that vaccines are dangerous and those concerns are relayed to parents via the news media and the internet.<sup>7</sup>

In the past, the number of parents who chose not to vaccinate their children has been very small.<sup>8</sup> Because so many children were immunized, what has been referred to as “herd immunity” protected even those who were unable or unwilling to be immunized. However, because of the reports linking vaccines to autism and other diseases,<sup>9</sup> an increasing number of parents are either refusing to immunize their children or are delaying certain vaccines, resulting in longer periods of time during which their children are susceptible to illness.<sup>10</sup> While most children still receive vaccines on the timeline recommended by the Center for Disease Control and the American Pediatric Association, there are many communities in which the number of unvaccinated children is high enough to destroy herd immunity and increase the risk of outbreaks.<sup>11</sup>

Despite clear evidence of the safety and efficacy of vaccines, no state has imposed an unequivocal duty on parents to immunize their children. Although vaccines are generally required before a child can attend public school, every state allows parents to opt out of this requirement on various grounds.<sup>12</sup> Since there is no duty to immunize, failure to immunize is not a breach of any duty and no liability results, even if the child later becomes sick or dies from a disease for which a recommended vaccine exists. This result is consistent with the belief that parents should have the final say with respect to medical decisions affecting their children unless imminent death or serious illness will result from the denial of treatment. In the case of immunizations, no such imminent threat exists unless there is an outbreak and the child cannot be protected from exposure. Consequently, efforts to increase immunization rates have focused on persuasion and not coercion. It is understood that these efforts will not convince every parent that vaccinations are safe and necessary. If the number of those who remain unconvinced and whose children remain unvaccinated is high enough, outbreaks will continue. Since infection is not limited to those who choose not to be immunized (or whose parents choose not to have them immunized), one question that is raised is: whether parents whose unvaccinated children become infected with vaccine-preventable diseases, and whose unvaccinated children infect others, may be liable in tort for the injuries of those their children have infected.<sup>13</sup>

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<sup>7</sup> *Id.* “An anxious parent who Googles ‘Are vaccines dangerous?’ will find four of the top five results offering an emphatic ‘yes’—despite compelling evidence to the contrary. Such sources typically are vocal opponents of current vaccine policies who have harnessed the power of the Internet.” *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Centers for Disease Control, 2012 Yellow Book, *Perspectives: Fear of Vaccines* (available at <http://wwwnc.cdc.gov/travel/yellowbook/2012/chapter-2-the-pre-travel-consultation/perspectives-fear-of-vaccines.htm> (last visited on 3/15/2013)).

<sup>10</sup> *Id.*

<sup>11</sup> See Winsten & Serazin, *supra* note 6 “In the U.S., 15 states had coverage rates for the MMR vaccine below 90% in 2011, and only a handful had achieved 95%—the level required to protect infants too young to receive the vaccine.”

<sup>12</sup> Centers for Disease Control and Prevention, *Outbreak of Measles—San Diego, California, January-February 2008*, 57 *MMWR* 203-206 (2008).

<sup>13</sup> Many have debated and continue to debate whether immunizations should be mandatory (without exemptions for religious or personal beliefs). This Article does not enter into that debate. Nor does the Article consider whether parents can or should be charged with medical neglect or abuse if the parent refuses to immunize his or her child and

Consider the following outbreak tracked by the Center for Disease Control:

The index patient was an unvaccinated boy aged 7 years who had visited Switzerland with his family, returning to the United States on January 13, 2008. He had fever and sore throat on January 21, followed by cough, coryza, and conjunctivitis. On January 24, he attended school. On January 25, the date of his rash onset, he visited the offices of his family physician and his pediatrician. A diagnosis of scarlet fever was ruled out on the basis of a negative rapid test for streptococcus. When the boy's condition became worse on January 26, he visited a children's hospital inpatient laboratory, where blood specimens were collected for measles antibody testing; later that day, he was taken to the same hospital's emergency department because of high fever 104°F (40°C) and generalized rash. No isolation precautions were instituted at the doctors' offices or hospital facilities.

The boy's measles immunoglobulin M (IgM) positive laboratory test result was reported to the county health department on February 1, 2008. During January 31–February 19, a total of 11 additional measles cases in unvaccinated infants and children aged 10 months–9 years were identified. These 11 cases included both of the index patient's siblings (rash onset: February 3), five children in his school (rash onset: January 31–February 17), and four additional children (rash onset: February 6–10) who had been in the pediatrician's office on January 25 at the same time as the index patient. Among these latter four patients, three were infants aged <12 months. One of the three infants was hospitalized for 2 days for dehydration; another infant traveled by airplane to Hawaii on February 9 while infectious.<sup>14</sup>

The outbreak described above affected only unvaccinated children and infants too young to be immunized.<sup>15</sup>

The parents of the “index patient” presumably chose not to immunize their child and then chose to travel with him to a country where measles is still endemic.<sup>16</sup> After he was infected and symptoms of measles were present, he was taken or allowed to go to places where other vulnerable people were present and were infected. Arguably, these actions breached a duty of care that the parents owed to those persons and those infected by the boy should be allowed to recover in tort for their injuries. Given the rise of outbreaks and the potentially devastating physical and financial toll that contracting a disease such as measles or pertussis can take, it is inevitable that the courts will have to face the question of whether liability should be imposed.

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the child contracts a vaccine-preventable disease. Instead, this Article considers only whether the parent can ever be civilly liable to others who are infected by the parent's unvaccinated child.

<sup>14</sup> CDC, 57 MMWR at 203-204.

<sup>15</sup> *Id.* at 204.

<sup>16</sup> *Id.*

This issue has been debated by health care professionals and scholars, but has received scant attention in the legal literature. Some public health officials are concerned about damaging the trust and cooperation between wary parents and the government that is necessary for strong communities, while others believe that exposure to liability is the consequence of making a decision that places the health and well-being of others at risk. Legal scholars have contributed little to this debate. This Article begins to fill that hole in the legal literature.<sup>17</sup>

Part I of the Article outlines the immunization requirements and exemptions in California and Minnesota, states that have recently experienced measles outbreaks. Part II identifies possible causes of action that a victim of a vaccine-preventable illness might bring against the person (or parents of a child) that infected him or her. Part III discusses the necessity of recognizing a duty in order for tort liability to exist and examines factors courts will consider when determining whether to recognize a duty in this context. Particular attention is paid to constitutional concerns, including Substantive Due Process rights granted by the Fourteenth Amendment, rights under the Free Exercise Clause of the First Amendment, and privacy rights under various state constitutions.

Part IV of the Article considers the nature and scope of the various duties that courts might recognize and Part V discusses how those duties may be breached. Part VI addresses challenges associated with establishing that contact with a particular defendant was the proximate cause of the plaintiff's infection and identifies recent developments in science and technology that may help plaintiffs overcome those challenges. Finally, Part VII discusses how contributory negligence may diminish or prevent recovery by a plaintiff.

## I. Immunization Requirements and Exemptions

In order to understand why immunization rates have been historically high and why rates can fall quickly, it is necessary to understand the regulations in effect that “mandate” immunization and the exemptions available to those opposed to immunization. “In the United States, all states require children to be vaccinated in accordance with Advisory Committee on Immunization Practices recommendations before attending school.”<sup>18</sup> However, all states also allow medical exemptions and 48 states allow exemptions based on religious beliefs.<sup>19</sup> Moreover, 21 states allow exemptions based on personal beliefs.<sup>20</sup> Because California and Minnesota have experienced recent measles outbreaks, the regulations in those states will be examined and used as examples.

### A. California

In California, where the outbreak discussed in the Introduction occurred, children must be immunized against Poliomyelitis, Diphtheria, Pertussis, Tetanus, Measles (Rubeola), Rubella,

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<sup>17</sup> This article takes no position regarding whether States should mandate vaccinations for all citizens, eliminate exemptions allowed under current compulsory vaccination statutes, or whether mandatory vaccination laws—without any exemptions—would violate the United States Constitution. Instead, it assumes that parents are allowed to refuse to vaccinate their children and analyzes tort liability in light of that refusal.

<sup>18</sup> CDC, 57 MMWR at 205.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* Each state defines the scope of the personal belief exemption differently. *Id.*

Haemophilus Influenzae Type B (Hib), Mumps, and Hepatitis B.<sup>21</sup> The Public Health statutes set out the timeline for the vaccinations and children must receive the required vaccines before they can be admitted<sup>22</sup> to any public or private elementary or secondary school, child care center, day nursery, nursery school, family day care home, or developmental center.<sup>23</sup>

Children who have not received the required immunizations may be admitted if they have been granted a medical exemption or a “personal belief” exemption.<sup>24</sup> A medical exemption for one or more vaccines will be granted upon presentation of a written statement from a licensed physician stating that “the physical condition of the pupil or medical circumstances relating to the pupil are such that immunization is permanently not indicated.”<sup>25</sup> The “personal belief” exemption is very broad and only requires a statement by the parent or guardian of the pupil “that such immunization is contrary to his or her beliefs.”<sup>26</sup> The statute does not limit the exemption to religious beliefs, but instead would allow for an exemption based on (among others): a belief that vaccines are unnecessary for diseases that have been eliminated in the United States; belief that the government is conspiring with pharmaceutical companies to maximize profits at the expense of children’s health or safety; belief that vaccines cause autism or other illnesses; belief that it is wrong to inject foreign substances into one’s body; or belief that a child should not have to suffer the pain or discomfort of vaccination. Moreover, there is no provision in the statute that would require or even allow inquiry into the reasonableness or sincerity of the stated beliefs. Consequently, literally every child in California is entitled receive an exemption from the immunization requirement if it is sought based on an alleged violation of a personal belief.

Notwithstanding the exemption, the local health officer has the authority to exclude a child from attending any school, child care center, day nursery, nursery school, family day care home, or development center if there is “good cause to believe” that the child has been exposed

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<sup>21</sup> 17 Ca. ADC § 6020 (2013). The table of required vaccines and the timeline for their administration is included at Appendix A. In 2011, the Public Health Code was amended to require a dose of the Tdap vaccine to be given on or after the child’s seventh birthday. This requirement was in effect from July 1, 2011 through June 30, 2012. *Id.* § 6020 Table 1 note 8.

<sup>22</sup> “‘Admission’ means a pupil’s first entry in a given public or private elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center. ‘Admission’ also denotes a pupil’s re-entry to one of these institutions after withdrawing from a previous enrollment.” *Id.* § 6000. Admission may be conditional or unconditional. *Id.* § 6000(a),(b). If admission is conditional, “[c]ontinued attendance after conditional admission is contingent upon receipt of the remaining required immunizations . . . .” *Id.* § 6000(b).

<sup>23</sup> *Id.* § 6020(a). The table of required vaccines and the timeline for their administration is included at Appendix A.

<sup>24</sup> *Id.* § 6051.

<sup>25</sup> *Id.* § 6051(a). “A physician may provide a written statement that the pupil is medically exempt from the measles (rubeola) and/or varicella (chickenpox) requirements as a result of having had measles (rubeola) and/or varicella (chickenpox) disease, respectively. A physician may provide a written statement that the pupil is medically exempt from the rubella and/or mumps requirement as a result of having had laboratory confirmed illness with the corresponding disease.” Although not expressly stated, the wording of the statute would seem to authorize a medical exemption if the physician stated that vaccines are not medically indicated because the child is allergic to one of the vaccine components or the child has a medical condition that makes vaccination inadvisable.

<sup>26</sup> “A personal beliefs exemption shall be granted upon the filing with the governing authority of a letter or affidavit from the pupil’s parent or guardian or adult who has assumed responsibility for his or her care and custody in the case of a minor, or the person seeking admission if an emancipated minor, that such immunization is contrary to his or her beliefs.” *Id.* § 6051(b).

to a communicable disease against which the child has not been completely immunized.<sup>27</sup> If the health officer determines that the pupil is at risk of developing the disease, the child may be excluded “until the completion of the incubation period and the period of communicability of the disease.”<sup>28</sup>

## B. Minnesota

Minnesota also requires immunizations for children over the age of two months who are enrolled in elementary or secondary school and children enrolled in child care facilities.<sup>29</sup> As in California, exemptions are allowed if immunizations are contraindicated for medical reasons and if the immunizations offend “the conscientiously held beliefs of the parent or guardian of the minor child or of the emancipated person.”<sup>30</sup> A child may also be granted an exemption from specific immunizations based upon the age of the child, or if the child is enrolled in online courses in which there is no contact with the instructor or other students.<sup>31</sup>

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<sup>27</sup> *Id.* § 6060. The child may be exempt or may have been conditionally admitted despite incomplete immunization. “‘Conditional admission’ is admission based upon either documentation of having received some but not all required immunizations and of not being due for any vaccine dose at the time of entry or upon documentation of a temporary medical exemption to immunization in accordance with Section 6050. Continued attendance after conditional admission is contingent upon receipt of the remaining required immunizations in accordance with Sections 6020 and 6035.” *Id.* § 6000(b).

<sup>28</sup> *Id.*

<sup>29</sup> MN Stat. Ann. § 121A.15(1):

Except as provided in subdivisions 3, 4, and 10, no person over two months old may be allowed to enroll or remain enrolled in any elementary or secondary school or child care facility in this state until the person has submitted to the administrator or other person having general control and supervision of the school or child care facility, one of the following statements:

(1) a statement from a physician or a public clinic which provides immunizations stating that the person has received immunization, consistent with medically acceptable standards, against measles after having attained the age of 12 months, rubella, diphtheria, tetanus, pertussis, polio, mumps, haemophilus influenza type b, and hepatitis B; or

(2) a statement from a physician or a public clinic which provides immunizations stating that the person has received immunizations, consistent with medically acceptable standards, against measles after having attained the age of 12 months, rubella, mumps, and haemophilus influenza type b and that the person has commenced a schedule of immunizations for diphtheria, tetanus, pertussis, polio, and hepatitis B and which indicates the month and year of each immunization received.

<sup>30</sup> *Id.* § 121A.15(3)(c)-(d). This exemption arguably requires that immunization offend a sincere belief but that belief need not be reasonable.

<sup>31</sup> *Id.* § 121A.15(3). Exemptions from immunization.

(a) If a person is at least seven years old and has not been immunized against pertussis, the person must not be required to be immunized against pertussis.

(b) If a person is at least 18 years old and has not completed a series of immunizations against poliomyelitis, the person must not be required to be immunized against poliomyelitis.

(c) If a statement, signed by a physician, is submitted to the administrator or other person having general control and supervision of the school or child care facility stating that an immunization is contraindicated for medical reasons or that laboratory confirmation of the presence of adequate immunity exists, the immunization specified in the statement need not be required.

(d) If a notarized statement signed by the minor child’s parent or guardian or by the emancipated person is submitted to the administrator or other person having general control and supervision of the school or child care facility stating that the person has not been immunized as prescribed in subdivision 1 because of the conscientiously held beliefs of the parent or guardian of the minor child or of the emancipated person, the immunizations specified in the statement shall not be



C. Sources and Progression of Outbreaks

With respect to diseases such as measles which had been eliminated<sup>32</sup> in the United States, outbreaks are almost always traced to people travelling from other countries.<sup>33</sup> In 2011, 222 measles cases were reported to the Center for Disease Control and Prevention (CDC).<sup>34</sup> Ninety percent of those cases were “associated with importations from other countries,” including 52 cases in U.S. residents returning from abroad and 20 cases were linked to foreign visitors.<sup>35</sup> Sixty-one percent were linked to importations epidemiologically, with virologic evidence suggesting recent importation, or linked to cases with virologic evidence of recent importation.<sup>36</sup> Eighty-six percent of the measles patients were unvaccinated or their vaccination status was unknown.<sup>37</sup> “Cases are considered importations if exposure to measles virus occurred outside the United States 7-21 days before rash onset and rash occurred within 21 days of entry into the United States, with no known exposure to measles in the United States during that time.”<sup>38</sup>

Of the 222 measles cases, 196 were United States residents.<sup>39</sup> One hundred sixty-six of those U.S. residents were unvaccinated or had unknown vaccination status.<sup>40</sup> Of those who were unvaccinated, 141 were eligible for the measles vaccine, 18 were too young to receive the vaccine, and seven were presumed immune because their age or prior laboratory evidence

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required. This statement must also be forwarded to the commissioner of the Department of Health.

(e) If the person is under 15 months, the person is not required to be immunized against measles, rubella, or mumps.

(f) If a person is at least five years old and has not been immunized against haemophilus influenza type b, the person is not required to be immunized against haemophilus influenza type b.

(g) If a person who is not a Minnesota resident enrolls in a Minnesota school online learning course or program that delivers instruction to the person only by computer and does not provide any teacher or instructor contact time or require classroom attendance, the person is not subject to the immunization, statement, and other requirements of this section.

<sup>32</sup> “Measles elimination” had been defined as “interruption of year-round endemic measles transmission. CDC, 61 MMWR at 253.

<sup>33</sup> *Id.*

Occasionally, measles cases are reported without apparent links to importations, but virologic evidence suggests recent importation of an undetected case or chain of cases. Given travel patterns, the highly infectious nature of measles virus, and limitations of surveillance systems, not every importation of measles virus into the United States is detected. Therefore, collection of samples for virus detection is extremely important. Genetic characterization of viruses can help to confirm or suggest the likely source of imported viruses because measles genotypes are distributed heterogeneously in regions that have not yet eliminated measles.

*Id.* at 256.

<sup>34</sup> *Id.* at 254. No deaths were reported. *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 253.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 254.

<sup>40</sup> *Id.*

indicating immunity to measles.<sup>41</sup> Fifty of the 66 patients between the ages of 16 months and 19 years “had not been vaccinated because of a philosophic, religious, or personal objection.”<sup>42</sup>

The CDC attributes increased importations to increased incidences of measles in countries visited by U.S. travelers.<sup>43</sup>

Importation of measles virus into the United States will likely continue and cause outbreaks in communities that have clusters or unvaccinated persons. Maintenance of high MMR vaccination coverage is essential to prevent measles outbreaks and sustain measles elimination in the United States. Despite the relatively small number of reported cases in the United States, the public and the health-care providers must remain vigilant. A drop in MMR vaccination coverage in a community can increase the risk for large, sustained measles outbreaks, as experienced recently in California and France, or reestablishment of endemic transmission, as experienced in the United Kingdom.<sup>44</sup>

The CDC emphasized the role that health care-providers play in encouraging immunization of all eligible patients, in maintaining awareness of measles, in immediately implementing isolation procedures when symptoms of measles are present, and in reporting suspected measles cases to local health departments.<sup>45</sup>

## II. Possible Causes of Action

If a parent chooses not to vaccinate his or her child and that child contracts a contagious, vaccine-preventable disease, it is possible that the child could infect others. This Part of the Article explores potential causes of action for those infected by the unvaccinated child.<sup>46</sup> Tort liability would most likely be premised on claims of negligence or fraudulent concealment. Under either theory, liability would exist regardless of the reason that the parent chose not to vaccinate the child.<sup>47</sup>

### A. Fraudulent concealment:

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<sup>41</sup> *Id.* Persons born before 1957 are presumed immune to measles. *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* Almost half of the U.S. measles importations were traced back to the World Health Organization European Region which documented more than 30,000 measles cases. *Id.* “Five countries (France, Italy, Romania, Spain, and Germany) accounted for more than 90% of cases reported to the European Centers for Disease Prevention and Control.” *Id.* at 255.

<sup>44</sup> *Id.* at 256.

<sup>45</sup> *Id.*

<sup>46</sup> In theory, an adult could be liable for transmitting a vaccine-preventable illness to another person. However, since the trend against vaccination is relatively new and fewer adults failed to receive the recommended vaccinations as children, there are fewer potential adult defendants liable because of their own transmission of the disease, as opposed to transmission by their unvaccinated children.

<sup>47</sup> Thus, if the child had an allergy to a particular vaccine or a medical condition that made vaccination medically inadvisable, the parent would have the same duties as a parent who chose not to vaccinate for fear that the vaccines cause or contribute to autism.

The five elements of fraudulent concealment are: “(1) the concealment of a material existing fact that in equity and good conscience should be disclosed; (2) knowledge on the part of the party against whom the claim is asserted that such a fact is being concealed; (3) ignorance of that fact on the part of the one from whom the fact is concealed; (4) the intention that the concealment be acted upon; and (5) action on the concealment resulting in damages.”<sup>48</sup>

It is possible that courts would allow a claim for fraudulent concealment of facts that led to infection of another. In the case of a vaccine-preventable disease, this cause of action would only apply in limited circumstances. The injured party would have to have relied upon the intentionally concealed. For example, a plaintiff could bring suit based upon alleged representations by a parent that his or her child was vaccinated or had not been exposed to a vaccine-preventable illness if the parent knew that those representations were false. A parent might make such a false claim in order to enroll the child in school in a state that does not allow for personal belief exemptions. If the unvaccinated child transmits a vaccine-preventable illness to another child, the second child might be able to prove all of the elements of fraudulent concealment.

Likewise, if the parent of an unvaccinated child knows that the child has been exposed to a vaccine-preventable disease and has begun showing symptoms of that disease and that parent nevertheless takes the child to a day care where he or she will be in contact with other children, or adults who care for other children, and falsely tells them that the child is healthy or has not been exposed to any contagious diseases, the parent might be liable on a fraudulent concealment theory.

Such claims have been considered in cases involving sexually transmitted diseases. Some courts have held that a person’s consent to sexual intercourse may be ineffective if his or her sexual partner conceals the risk of infection with a venereal disease.<sup>49</sup> “The basic premise underlying these old cases—consent to sexual intercourse vitiated by one partner’s fraudulent concealment of the risk of infection with venereal disease—is equally applicable today, whether or not the partners involved are married to each other.”<sup>50</sup>

While the nature of the concealed risk is obviously very different, the risks and consequences are analogous. In each case, the infected person (or the person’s parent) conceals information about a contagious disease from someone who is vulnerable to contracting the disease. Moreover, in each case, transmission could be prevented if the infected person (or their parent) disclosed the infection or risk of transmission and allowed others to avoid contact or association that could lead to infection.

#### B. Negligent transmission of contagious disease:

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<sup>48</sup> BP Am. Prod. Co. v. Patterson, 263 P.3d 103, 109 (Colo. 2011) (quoting First Interstate Bank of Fort Collins, N.A. v. Piper Aircraft Corp., 744 P.2d 1197, 1200 (Colo.1987)).

<sup>49</sup> *Kathleen K.*, 150 Cal.App.3d at 997 (citing *De Vall v. Strink*, 96 S.W.2d 245 (Tex. Civ. App. 1936); *Crowell v. Crowell*, 105 S.E. 206 (N.C. 1920); *State v. Lankford*, 102 A. 63 (Del. 1917).

<sup>50</sup> *Kathleen K.*, 150 Cal.App.3d at 997.

The more likely cause of action for someone who has been infected by an unvaccinated child is negligence. “The essential elements of a cause of action based on common law negligence may be stated briefly as follows: the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach.”<sup>51</sup> In some jurisdictions, courts have found negligence in cases in which one person contracts a contagious disease from another person.<sup>52</sup> In *Doe v. Roe*, the plaintiff and defendant were involved in a sexual relationship.<sup>53</sup> Plaintiff contracted herpes from the defendant and sued him, alleging negligence and fraud.<sup>54</sup> The defendant was found negligent for failing to “disclos[e] that he was infected with herpes or taking precautions such as the use of a condom, to prevent its transmission.”<sup>55</sup>

While transmission from an unvaccinated child does not involve the same intimate contact as in cases of sexually transmitted diseases, the same general negligence principles apply. If a parent fails to disclose that his or her child is unvaccinated and at risk of contracting or transmitting a vaccine-preventable disease and fails to take steps to avoid putting others at risk of infection, that parent may be held to have breached a duty to those that are infected by the unvaccinated child.<sup>56</sup> However, the public policy issues raised by unvaccinated children vary in important respects from those raised by intimate contact between consenting adults.

### III. Recognizing a duty

Regardless of which tort theory is pursued, no liability can be imposed absent a recognized duty of care.<sup>57</sup>

In determining whether a duty should be imposed, the courts are guided by the basic principle . . . that everyone is responsible for injury occasioned to another by his own want of ordinary care or skill. Departures from this rule are warranted only by balancing a number of policy considerations, including the foreseeability of the harm suffered, the degree of certainty the plaintiff suffered injury, the closeness of the connection between defendant’s conduct and the injury suffered,

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<sup>51</sup> *Ward v. Kmart Corp.*, 136 Ill.2d 132, 140 (Ill. 1990); *see also, e.g., Domagala v. Rolland*, 805 N.W.2d 14 (Minn. 2011) (“To recover for a claim of negligence, a plaintiff must prove (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty of care was a proximate cause of the injury.”),

<sup>52</sup> *See, e.g., Doe v. Roe*, 218 Cal.App.3d 1538 (1990) (finding defendant liable for negligent transmission of genital herpes); *C.A.U. v. R.L.*, 438 N.W.2d 441 (Minn. App. 1989) (citing cases involving brucellosis, scarlet fever, and genital herpes).

<sup>53</sup> *Doe*, 218 Cal.App.3d at 1542.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> It is important to emphasize that this Article does not consider whether parents can be liable (to the state or to their children) simply for refusing to vaccinate their children. This Article argues only that a failure to prevent the unvaccinated child from transmitting diseases to others can be a potential breach of a duty of care.

<sup>57</sup> “Whether a duty exists is a question of law for the court.” *Texas Home Management Inc. v. Peavy*, 89 S.W.3d 30, 33-34 (Tex. 2002) (citing *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex.1990); *see also Graff v. Beard*, 858 S.W.2d 918, 920 (Tex.1993); *Otis Eng’g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex.1983)).

the moral blame attached to the defendant’s conduct and the consequences to the community of imposing a duty to exercise care.<sup>58</sup>

A. Public policy considerations

This is by far the most complicated component. There are several aspects of public policy that must be considered.

1. Alienating concerned parents

Some have argued that imposing liability on parents who refuse to vaccinate their children will further alienate them from the medical establishment and possibly further jeopardize their children’s health:

As a strategy to maintain high vaccination rates and preserve herd immunity, talk of holding parents of unvaccinated children liable to those whom they infect is woefully shortsighted. Putting aside the scientific challenges of identifying with precision the specific source of an infection, such a policy would only add to the antagonism between supporters of vaccination and what, despite appearances to the contrary, remains a small opposition movement.<sup>59</sup>

Instead of imposing liability, critics have suggested focusing on research and education to emphasize the reasons why the vast majority of parents justifiably support vaccination.<sup>60</sup>

While greater education and outreach are undeniably useful, such efforts have not had much success in some communities, particularly those who believe that the government and pharmaceutical companies are conspiring to cover-up the risks of vaccines. In communities with a large number parents refusing to vaccinate their children, there is a greater risk of an outbreak which can endanger those who are unable to receive vaccines due to age or medical conditions. Those who cannot protect themselves arguably should be able to receive compensation from those who could protect themselves (and thereby protect others) *and* who do not exercise due care to prevent the spread of contagious diseases.

2. Liability as Infringement on parents’ federal Constitutional rights

Some may argue that imposing liability on parents who choose not to vaccinate their children infringes on their constitutionally protected rights. Addressing this argument requires

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<sup>58</sup> *Doe*, 218 Cal.App.3d at 1543-44 (1990) (citing *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 434, 131 Cal.Rptr. 14, 551 P.2d 334) (internal citation omitted). *See also Texas Home Management*, 89 S.W.3d at 34 (“The question of legal duty is a multifaceted issue requiring us to balance a number of factors such as the risk and foreseeability of injury, the social utility of the actor’s conduct, the consequences of imposing the burden on the actor, and any other relevant competing individual and social interests implicated by the facts of the case.”); *Ward*, 0136 Ill.2d at 140-41 (“The ‘reasonable foreseeability’ of injury is one important concern, but this court has recognized that foreseeability alone provides an inadequate foundation upon which to base the existence of a legal duty. Other considerations include the likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant.”).

<sup>59</sup> Jason L. Schwartz, Commentary, *Unintended Consequences: The Primacy of Public Trust in Vaccination*, 107 MICH. L. REV. FIRST IMPRESSIONS 100, 103-104 (2009).

<sup>60</sup> *Id.* at 104.

consideration of the various rights that have been recognized by the Supreme Court and the effect that potential tort liability could have on those rights.

### Substantive Due Process Rights

The Supreme Court has long recognized a right to personal liberty under the Fourteenth Amendment's Due Process Clause.<sup>61</sup> However, that liberty is subject to reasonable regulation by the state when necessary to promote the common good.<sup>62</sup> State or municipal regulations mandating immunizations have been upheld on this basis.<sup>63</sup> In 1902 the city of Cambridge, Massachusetts passed a law requiring all citizens to be vaccinated against smallpox.<sup>64</sup> At the time the law was passed, smallpox was prevalent in the city and the number of infected persons was increasing.<sup>65</sup> Mr. Jacobson was prosecuted and convicted of violating the law by refusing to be vaccinated.<sup>66</sup> Jacobson appealed his conviction, claiming that the law violated his rights under the United States Constitution, including his rights under the Due Process Clause of the Fourteenth Amendment.<sup>67</sup> He argued that compulsory vaccination was "hostile to the inherent right of every freeman to care for his own body and . . . nothing short of an assault upon his person."<sup>68</sup>

The Court acknowledged the personal liberty rights granted by the Constitution, but noted that personal liberty must be subject to reasonable restraints necessary to protect the safety and general health of the general public.<sup>69</sup>

There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.<sup>70</sup>

The Court concluded that the regulation did not violate the Federal Constitution and affirmed the judgment of the court below.<sup>71</sup>

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<sup>61</sup> See *Jacobson v. Massachusetts*, 25 S.Ct. 358, 361 (1905).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 359. The vaccines were offered to Jacobson free of charge. *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* The defendant offered testimony and evidence of medical professionals who claimed that the smallpox vaccine did not prevent the disease and caused other diseases. *Id.* at 363. The Supreme Court stated that it must assume that the legislature was aware of the conflicting opinions regarding the efficacy of vaccination and chose to believe those who supported use of the vaccine as a method of preventing spread of the disease. *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 361.

<sup>69</sup> *Id.* at 363. "Even liberty itself . . . is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others." *Id.* at 361.

<sup>70</sup> *Id.* at 363.

<sup>71</sup> *Id.* at 366.

The court felt it necessary to note that if the state exercises its authority in a way that is arbitrary or oppressive, the courts may intervene.<sup>72</sup> “It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body would be cruel and inhuman to the last degree.”<sup>73</sup> Under those circumstances the courts would have authority to protect that individual,<sup>74</sup> but the defendant in *Jacobson* did not assert any such facts, nor was it established that the statute would require vaccination on those facts.<sup>75</sup>

In addition to the personal liberty interest that allows adults to make decisions regarding their own health and medical treatment, the Supreme Court has recognized that parents have broad discretion in the upbringing of their children:

The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.<sup>76</sup>

Among the sources for parents’ rights is the Due Process Clause of the Fourteenth Amendment to the United States Constitution.<sup>77</sup> This includes making medical decisions affecting the child.<sup>78</sup> Indeed, the parent’s decision in this respect may even overrule the desires or judgment of the child.<sup>79</sup> “Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.”<sup>80</sup>

While it is well-established that parents have enforceable rights with respect to raising their children, the scope of those rights is less clear. In *P.J. ex. rel. Jensen v. Wagner*,<sup>81</sup> P.J. (a minor), and his parents, the Jensens, brought suit against various state actors alleging violation of their substantive due process right to direct their child’s medical care and their substantive due

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<sup>72</sup> *Id.* at 366.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* “It will always . . . be presumed that the legislature intended exceptions to its language which would avoid results of this character.” *Id.*

<sup>76</sup> *Parham v. J. R.*, 442 U.S. 584, 602 (1979). Obviously, some parents are guilty of neglect and abuse. *Id.* at 602 (“As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this.”). But “[t]he statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.” *Id.* at 603.

<sup>77</sup> “[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

<sup>78</sup> See *Jensen*, 603 F.3d at 1197 (“we do not doubt that a parent’s general right to make decisions concerning the care of her child includes, to some extent, a more specific right to make decisions about the child’s medical care”) (citing *Parham v. J.R.*, 442 U.S. 584, 603 (1979)).

<sup>79</sup> See *Parham*, 442 U.S. at 620 (holding that allowing parents or guardians to commit children to state mental hospitals without prior hearing does not violate the due process rights of the children).

<sup>80</sup> *Id.* at 603.

<sup>81</sup> *Jensen*, 603 F.3d at 1187.

process right to familial association. They further alleged that the state violated their procedural due process rights by failing to conduct an independent investigation before filing for custody of P.J. in juvenile court.<sup>82</sup>

P.J. had a growth removed from the floor of his mouth by an oral surgeon.<sup>83</sup> After pathology testing, P.J. was diagnosed with Ewing's sarcoma, a rare form of cancer.<sup>84</sup> A second pathologist concurred in the report.<sup>85</sup> The <sup>86</sup>Jensens then met with Dr. Wagner, a pediatric oncologist. Dr. Wagner informed the Jensens that P.J.'s disease was life-threatening and that Dr. Wagner believed chemotherapy was required to save P.J.'s life.<sup>87</sup> The Jensens requested an alternative treatment but after conducting his own investigation, Dr. Wagner informed them that he felt it was not a viable treatment option. At that time he also informed them that he would have to report the case to DCFS if he felt P.J.'s best medical interests were not being addressed.<sup>88</sup> Eleven days later Dr. Wagner formally referred the case to DCFS and Ms. Cunningham was assigned to the case.

Ms. Cunningham, without conducting any further independent investigation or contacting the Jensens, filed a Verified Petition and a Motion to Transfer Custody and Guardianship in the Utah juvenile court.<sup>89</sup> After receiving notice of the verified petition, the Jensens had further tissue testing done at a second hospital and received confirmation of Ewing's sarcoma and further recommendation for chemotherapy.<sup>90</sup> During the course of the subsequent hearings, the Jensens contacted five other doctors for further testing and diagnosis.<sup>91</sup> All either confirmed the diagnosis and recommended chemotherapy or were rejected by the court due to lack of board certification in pediatric oncology.<sup>92</sup> The court ordered that P.J. begin chemotherapy.<sup>93</sup> P.J. was never given chemotherapy and the Jensens once took P.J. out of the state against court orders and were charged with misdemeanor custodial interference and felony kidnapping.<sup>94</sup>

After resolution of the criminal charges, the state concluded that forcing P.J. to undergo chemotherapy was no longer in the state's interest and the case was dismissed.<sup>95</sup> The Jensens subsequently filed a § 1983 civil suit claiming violations of their substantive and procedural due process rights. The District Court concluded that some of the appellees were absolutely immune from suit, that the Jensens failed to overcome the remaining defendants' claims of qualified immunity, and ultimately granted all five defendants summary judgment.<sup>96</sup>

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<sup>82</sup> *Id.* at 1200.

<sup>83</sup> *Id.* at 1187.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1187.

<sup>87</sup> *Id.* at 1188.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1189.

<sup>91</sup> *Id.* at 1189-92.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1190.

<sup>94</sup> *Id.* at 1191.

<sup>95</sup> *Id.* at 1192.

<sup>96</sup> *Id.*



On appeal, the Tenth Circuit first addressed the alleged violation of the Jensens' substantive due process right to direct P.J.'s medical care.<sup>97</sup> The district court had analyzed their right under the first prong of the qualified immunity analysis and concluded that their rights were not violated, but the Tenth Circuit considered whether any such right was clearly established.<sup>98</sup> The court stated that it did "not doubt that a parent's general right to make decisions concerning the care of her child includes, to some extent, a more specific right to make decisions about the child's medical care."<sup>99</sup> However, "the Supreme Court has long recognized ... that parental rights, including any right to direct a child's medical care, are not absolute."<sup>100</sup>

The Tenth Circuit further stated that when a child's life or health is endangered by her parents' decisions, the state may intervene in some circumstances without violating the parents' constitutional rights.<sup>101</sup>

Furthermore, when a child's life is under immediate threat, a state's interest in protecting the child is at its zenith, and a state has broad authority to intervene in parental decisionmaking that produces the threat to the child's life. . . . Here, the state was endowed with this broad authority, and the Jensens do not direct us to a clearly established constitutional line that defines what a state can and cannot do to protect a child whose life is compromised by his parents' refusal to obtain medical care. Certainly, the Jensens do not assert any factual allegation that is substantially supported in the record which would constitute state action that is clearly outside the state's "wide range of power."<sup>102</sup>

Consequently, the Tenth Circuit held that whatever substantive due process right the Jensens had to direct P.J.'s care, that right had not been clearly established at the time the alleged violation occurred.<sup>103</sup>

The court next addressed the Jensens' alleged substantive due process right to familial association.<sup>104</sup> In determining whether a plaintiff's right to familial association has been infringed, the court applies a balancing test.<sup>105</sup> "Under this test [the court] balance[s] the individual's interest in liberty against the State's asserted reasons for restraining individual liberty."<sup>106</sup> The court concluded that the record demonstrated that the actual burden on the Jensens' right to associate with P.J. was minimal.<sup>107</sup> P.J. was never physically removed from the Jensens' custody and the state afforded them many opportunities to obtain treatment before even

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<sup>97</sup> *Id.* at 1197.

<sup>98</sup> *Id.* "When a defendant pleads qualified immunity, the plaintiff has the heavy burden of establishing: (1) that the defendant's actions violated a federal constitutional or statutory right; and (2) that the right violated was clearly established at the time of defendant's actions." *Id.* at 1196.

<sup>99</sup> *Id.* "The Supreme Court has . . . alluded to, but never specifically defined the scope of a parent's right to direct her child's medical care." *Id.* at 1197.

<sup>100</sup> *Id.* at 1197-98.

<sup>101</sup> *Id.* at 1198.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1199.

<sup>106</sup> *Id.* at 1199

<sup>107</sup> *Id.*

attempting to remove P.J. from their custody.<sup>108</sup> The court concluded that the Jensens failed to show that their associational rights were violated.<sup>109</sup>

As the foregoing discussion makes clear, parents have wide latitude in making decisions regarding their children, but that right may be overridden by the state's interest in protecting the health and well-being of others. With respect to immunizations, the boundaries of parents' substantive due process rights are especially blurry. In most cases, the refusal to immunize does not pose any immediate or substantial threat to their child's health or the health of others. Thus, even in light of the Supreme Court's holding in *Jacobson*, it is doubtful that the state would have the right to compel immunization when there is little or no risk that the child will become infected with a disease or infect others. Moreover, if the parent invokes a valid exemption to compulsory immunization laws, the choice is presumptively valid and state-approved.

Despite the protections of Due Process clause, the Supreme Court's holding in *Jacobson* supports an inference that if an outbreak of a vaccine-preventable disease occurs or a specific and significant risk is identified, states can mandate vaccination even in the face of religious or personal belief objections.<sup>110</sup> Allowing liability for parents who choose not to vaccinate their children is even less likely to fail on substantive due process grounds, primarily because liability is not based solely on the decision not to vaccinate. The choice not to vaccinate will only result in liability if—in addition to refusing to vaccinate his or her children—a parent fails to exercise due care in a way that harms others. Parents whose children do not contract vaccine-preventable diseases or who contract diseases but do not infect others will not face any liability.

#### First Amendment Free Exercise Clause

To the extent that the decision not to vaccinate is made for religious reasons, parents are protected by the Free Exercise Clause of the First Amendment. Imposing liability might be seen as infringing on that right. However, this argument is unconvincing for two reasons: first, parents are not punished for exercising this fundamental right. The decision not to vaccinate a child has no negative legal consequences unless, in addition, the parent fails to exercise due care and that failure proximately causes harm to a third person. Second, the right to practice one's religion is not absolute. "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."<sup>111</sup>

One of the earliest Supreme Court cases defining the right of parents to direct the religious upbringing of their children is *Prince v. Massachusetts*.<sup>112</sup> In that case Sarah Prince appealed a conviction for violating state child labor laws by "furnishing [a minor] with magazines, knowing she was to sell them unlawfully ... on the street, and, as her custodian, permitting her to work contrary to law."<sup>113</sup> The child, her niece Betty, had accompanied Mrs. Prince on several occasions to a street corner where they sold religious literature to the public as

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Jacobson v. Massachusetts*, 25 S.Ct. 358 (1905) (the only exempt citizens were children who had been certified by a physician as unfit for vaccination).

<sup>111</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 159.

part of their religious practices as Jehovah's Witnesses. Mrs. Prince had previously been warned against doing so by a public official.<sup>114</sup> Appellant admitted to supplying Betty with the magazines but claimed that enforcement of the law infringed upon Betty's freedom of religion under the First Amendment and further upon her parental rights as custodian under the Due Process Clause of the Fourteenth Amendment.<sup>115</sup>

In addressing Mrs. Prince's rights as Betty's guardian, the Court acknowledged that parents have broad rights to provide their children with religious education and children are given freedom to exercise their religion.<sup>116</sup> Specifically, the Court stated that, "It is cardinal with us that custody, care and nurture of the child reside first in the parents."<sup>117</sup> However, the Court qualified its statement by noting "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."<sup>118</sup> In the case at bar, the Court concluded that the challenged regulation did not cross the boundary from reasonable exercise of power into a constitutional violation.<sup>119</sup>

Although *Prince* did not concern medical decisions, the language in that case has been relied upon by courts in cases involving parents who refuse medical treatments for their children that violate their religious beliefs.<sup>120</sup> Moreover, while the Supreme Court has never directly ruled on cases involving court-ordered treatment over the religious objections of a parent, the Court has affirmed a district court ruling approving of such orders.<sup>121</sup> In *Jehovah's Witnesses in the State of Washington v. King County Hospital Unit No. 1 (Harborview)*, the plaintiffs were members of the Jehovah's Witnesses religious group who sought a permanent injunction to prevent state judges, Juvenile Court employees, hospitals, hospital personnel, and all physicians in the State of Washington from administering blood transfusions to Jehovah's Witnesses.<sup>122</sup> Members of the Jehovah's Witnesses faith oppose blood transfusions on religious grounds, even when such transfusions are deemed necessary to save the person's life.<sup>123</sup>

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<sup>114</sup> *Id.* at 161-62. Massachusetts' child labor law stated in relevant part that, "Whoever furnishes or sells to any minor any article ... with the knowledge that the minor intends to sell such article in violation of sections 69 to 73, inclusive, or after having received written notice to this effect from any officer charged with the enforcement thereof, or knowingly procures or encourages any minor to violate any provisions of said sections, shall be punished ..."<sup>114</sup> *Id.* at 161.

<sup>115</sup> *Id.* at 164.

<sup>116</sup> *Id.* at 166.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 167.

<sup>119</sup> *Id.* at 170.

<sup>120</sup> *See, e.g., Jehovah's Witnesses in the State of Washington v. King County Hospital Unit No. 1 (Harborview)*, 390 U.S. 598 (1968) (per curiam) aff'g 278 F.Supp. 488 (W.D. Wash. 1967).

<sup>121</sup> *Id.* (one sentence opinion citing Prince).

<sup>122</sup> 278 F.Supp. at 491.

<sup>123</sup> *Id.*

Plaintiffs believe and accept as authoritative and binding upon them the admonition of Almighty God Jehovah found in the Holy Bible commanding Christians to 'abstain from blood.' Their belief places a positive religious duty on the father in particular to provide for his children and to apply their religious views, including abstinence from blood, in the family circle. In this connection, it is the responsibility of the father see that no member of his family receives a blood transfusion, and no court or other official body can relieve him of that responsibility. If a plaintiff receives a blood transfusion, this could, in the view of the plaintiffs, mean permanent spiritual harm to both the child and parent or adult.

The plaintiffs argued that the state statutes allowing judges to remove children from their parents and declare the children wards of the state for the purpose of permitting blood transfusions to be given to the children over the objection of their parents were unconstitutional.<sup>124</sup> Specifically, they claimed that the statutes “facilitate[d] state impairment of plaintiffs’ religious freedom, contrary to the First and Fourteenth Amendments, and plaintiffs’ parental rights as guaranteed by the Due Process Clause of the Fourteenth Amendment.”<sup>125</sup>

In rejecting these claims, the District Court concluded that it was bound by the Supreme Court’s decision in *Prince*. While the District Court acknowledged that the Supreme Court did not intend for *Prince* to “lay the foundation for every state intervention in the indoctrination and participation of children in religion which may be done in the name of their health and welfare”<sup>126</sup> the District Court believed that *Prince* was controlling in the case before it.<sup>127</sup> “As stated in *Prince*, ‘The right to practice religious freely does not include liberty to expose . . . the child . . . to ill health or death.’”<sup>128</sup>

Refusing to vaccinate a child could be interpreted as exposing a child to “ill health” if the child is likely to be exposed to the disease. However, in most circumstances, the child is unlikely to suffer any negative health consequences as a result of the parent refusing to have the child vaccinated, at least with respect to those diseases which have been mostly or completely eradicated in the area in which the child resides. Assuming that the decision not to vaccinate has no immediate (and, perhaps, no long term) negative consequences, the language in *Prince* and subsequent cases affirming parents’ right to make decisions regarding the health and well-being of their children is more appropriate:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.<sup>129</sup>

While tort liability would not prohibit parents from refusing to immunize their children (and, thus, would presumably not violate parents’ First or Fourteenth Amendment rights), some might argue that the potential for liability and the fear of liability imposes an unconstitutional burden on the free exercise of religion. This argument is likely to fail because the potential for liability exists regardless of the parents’ motivation for refusing to immunize.<sup>130</sup> Thus, there is no law that targets parents’ religious beliefs or practices. At most, it imposes a duty of care on

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*Id.* at 502. The plaintiffs also submitted evidence that blood transfusions are risky, of limited value, and never necessary. *Id.* at 503.

<sup>124</sup> *Id.* at 503-04.

<sup>125</sup> *Id.* at 504.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (quoting *Prince*, 321 U.S. at 166) (internal citations omitted).

<sup>129</sup> *Prince*, 321 U.S. at 166. Moreover, any law that inhibits or restricts religious practices “because of their religious motivation” is subject to strict scrutiny and is invalid unless it serves a compelling government interest and is narrowly tailored to that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

<sup>130</sup> See *Employment Div. Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), *superceded by statute as stated in United States v. Jim*, 888 F.Supp. 1058 (D. Or. 1995).

parents who choose not to vaccinate, regardless of the motivation. This is unlikely to be considered a substantial burden on the free exercise of religion. Even if a court concludes that imposing a duty of care on parents substantially burdens their constitutional rights, protecting the health and well-being of citizens is a compelling interest and allowing (but not mandating) liability when parents fail to exercise due care which results in harm to others may satisfy even strict scrutiny.<sup>131</sup>

### 3. Privacy rights granted by States

Many states recognize privacy rights under their state constitutions or statutes.<sup>132</sup> However, no state has allowed parents to refuse life-saving treatment for their children on religious grounds.<sup>133</sup> California courts have held that the right of privacy is subordinate in cases involving “forcible and consensual sex acts, registration of convicted sex offenders,” statutes prohibiting spousal rape, and in paternity cases.<sup>134</sup> The list of exceptions to the right of privacy was expanded in *Barbara A. v. John G.*,<sup>135</sup> in which the court imposed liability on a “one sexual partner who by intentionally tortious conduct causes physical injury to another.”<sup>136</sup>

The right of privacy could be implicated if parents are liable for negligent transmission of a vaccine-preventable disease. While physicians are required to report cases of measles, pertussis, and other contagious diseases to local health authorities, the identities of patients is not disclosed to the general public. If a victim/plaintiff is allowed to discover the identity of those who have contracted a disease in order to identify a potential defendant, that disclosure would represent a serious infringement on privacy rights and likely a violation of medical privacy laws.<sup>137</sup> However, if the identity is obtained through other means (which may occur when a person is infected by someone they know at school, day care, or in a pediatrician’s office) a diagnosis may be confirmed through discovery without violating a right of privacy.<sup>138</sup>

In *John B. v. Superior Court*, the plaintiff, Bridget, was the ex-wife of the defendant, John. Shortly after their marriage, Bridget tested positive for the HIV virus.<sup>139</sup> John was then tested and was also diagnosed with the HIV virus. Initially, Bridget believed that she had

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<sup>131</sup> See *Church of Lukumi Babalu Aye*, 508 U.S. at 533.

<sup>132</sup> See, e.g., AK CONST. ART. 1, § 22 (“The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.”); CA CONST. ART. I, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”); HI CONST. ART. 1, § 6 (“The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.”); MT CONST. ART. 2, § 10 (“The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”).

<sup>133</sup> “The right of privacy is not absolute, and in some cases is subordinate to the state’s fundamental right to enact laws which promote public health, welfare and safety, even though such laws may invade the offender’s right of privacy.” *Kathleen K. v. Robert B.*, 150 Cal.App.3d 992, 996 (1984).

<sup>134</sup> *Id.*

<sup>135</sup> 145 Cal. App. 3d 369 (1983),

<sup>136</sup> *Id.* at 381.

<sup>137</sup> See, e.g., *John B. v. Superior Ct*, 137 P.3d 163, 166-67 (Cal. 2006) (noting that the right to privacy under the California Constitution protects medical records).

<sup>138</sup> See *John B.*, 137 P.3d at 167 (Cal. 2006) (compelling discovery of defendant’s medical records in case alleging negligent failure to warn that the defendant was HIV positive).

<sup>139</sup> *Id.* at 155.

infected John, but she later became convinced that John infected her.<sup>140</sup> Her conclusion was based, in part, on the speed with which John developed AIDS and John’s admission that he had sexual encounters with men he met via the internet before their marriage.<sup>141</sup> Bridget filed suit against John asserting several claims, including a claim for negligence.<sup>142</sup> She alleged that John owed her a duty to disclose his HIV positive status and that he breached that duty by failing to disclose that fact, and his failure led to him infecting her with HIV.<sup>143</sup>

During the discovery process, Bridget served John with interrogatories and requests for admissions regarding his sexual and medical history, to which he objected. She also subpoenaed his medical records and John moved to quash the subpoenas. After hearings on the discovery requests, the court overruled John’s objections and denied his motions to quash.<sup>144</sup> On appeal, John argued that the discovery requests violated his right to privacy under the California Constitution.<sup>145</sup> The right of privacy had been held to include sexual relations and medical records.<sup>146</sup> In addition, California statutes protected the identity of persons who test HIV positive.<sup>147</sup> The California Supreme Court held that John waived his rights under the statute because he accused Bridget of infecting him and submitted evidence that he had previously tested negative for HIV.<sup>148</sup>

With respect to his claims under the state constitution, the court acknowledged John’s constitutional right to privacy, but held that this right must be balanced against the right of a civil litigant to obtain evidence relevant to their legal claims.<sup>149</sup> Moreover, the court considered the state’s compelling interest in preventing the spread of HIV and AIDS.<sup>150</sup>

In balancing these competing concerns, we note at the outset that this is not a case in which a plaintiff seeks discovery to obtain information from a defendant whose HIV status is unknown. Both parties have admitted they are HIV positive, informally and in court filings. John thus has a diminished privacy interest in his HIV status. . . . Moreover, not only does the complaint allege sufficient facts to permit the inference that John infected Bridget with HIV, but John has alleged that Bridget infected *him*. By thus putting his own medical condition at issue, John has “substantially lowered” his expectation of privacy even further.

The court concluded that on those facts, the balance of interests favored allowing Bridget to conduct discovery regarding John’s sexual history and HIV status.<sup>151</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 156.

<sup>142</sup> *Id.* Bridget also claimed intentional infliction of emotional distress, negligent infliction of emotional distress, and fraud.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* The court appointed a discovery referee to hear the motions and the court adopted the referee’s recommendations ruling in Bridget’s favor.

<sup>145</sup> *Id.* at 166.

<sup>146</sup> *Id.* at 166-67.

<sup>147</sup> *Id.* at 166.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 167.

<sup>150</sup> *Id.* (citing provisions of the Penal Code making it a felony to intentionally infect another with HIV, and providing sentencing enhancement for certain crimes if the perpetrator knows he or she is HIV positive).

<sup>151</sup> *Id.*

While the court allowed discovery, it emphasized the limited extent of discovery that would be permitted.<sup>152</sup> In cases in which the constitutional right of privacy is invaded during discovery, the court must take care to narrowly tailor the ordered disclosure to the allegations of the complaint in order to maintain a maximum level of protection of the privacy interests.<sup>153</sup> The court further noted that the court had tools available—such as the right to order *in camera* review, protective orders, and orders to seal—to protect the confidentiality of materials produced.<sup>154</sup> Finally, the court held that the physician-patient privilege did not protect John’s medical records since the relevant statute did not prevent compelled production of those records if the party seeking production established “good cause” for disclosure.<sup>155</sup> The superior court held that Bridget met this standard and the California Supreme Court found that the holding was not an abuse of the superior court’s discretion.<sup>156</sup>

In states which recognize a right to privacy in their constitution or statutes, imposing liability for negligent transmission would implicate some of the same privacy rights addressed in *John B.* However, it would also raise the same compelling state interest in protecting the health and safety of its citizens. Just as the California Supreme Court had to balance the privacy interests of the defendant accused of transmitting a disease against the right of the plaintiff to obtain information relevant to the negligence claim, a court in a case alleging negligent transmission of the vaccine-preventable disease would have to balance the interests of both parties in light of the state’s interest in preventing the spread of contagious diseases.

#### 4. On balance, public policy favors liability

While experts are rightly concerned about the impact of allowing injured persons to pursue claims against parents who fail to vaccinate their children, balancing all of the relevant interests leads to the conclusion that such claims should be allowed. As discussed above, parents have privacy rights protected by the United States Constitution which grant them broad discretion with respect to medical decisions concerning their children. These rights are not absolute, but to the extent that parents have no legal obligation to vaccinate their children, imposing liability for the failure to do so arguably violates public policy. Courts could also refuse to recognize a duty to avoid encouraging people to scapegoat unvaccinated children for disease outbreaks. Instead of tracing infection sources for medical and public health purposes, the searches could turn into witch hunts or attempts to find a litigation target. Instead of fostering cooperation it would become adversarial and perhaps even dangerous for the families of unvaccinated children.

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 167-68 “Thus, where a plaintiff seeks discovery from a defendant concerning sexual matters protected by the constitutional right of privacy, the ‘intrusion upon sexual privacy may only be done on the basis of “practical necessity . . . .”” *Id.* at 167 (citing *Fults v. Superior Court*, 88 Cal. App. 3d 899, 904-05 (1979)).

<sup>154</sup> *Id.* at 169. The court had not been asked to rule on what measures would be appropriate in that case and expressed not opinion in that regard. *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* The superior court relied on Bridget’s evidence showing that her recent HIV positive diagnosis, John’s HIV positive diagnosis, John’s relatively rapid progression to full-blown AIDS, and the fact that “during the two-years preceding Bridget’s diagnosis, she was dating John, engaged to him, and married to him; and the couple engaged in unprotected sex during that period.” *Id.*

In the absence of countervailing considerations, these arguments would likely carry the day. However, states have the a responsibility to protect the health and safety of their citizens and to the extent that imposing liability encourages parents to vaccinate their children or zealously protect against infection of their unvaccinated children and those with whom those children come in contact, public policy favors imposing liability. Moreover, the very real financial burden that accompanies illness for many in this country (both insured and uninsured) weighs in favor of finding a duty. Those who find themselves with thousands of dollars in medical bills due to an illness contracted because of contact with an unvaccinated child are forced to bear the cost of another parent’s decision. Allowing liability if the illness is due to carelessness or recklessness simply places the financial burden on the shoulders of the morally responsible party.<sup>157</sup> In any event, it does not violate public policy because it does not infringe on a parent’s right to make medical decisions for his or her child. Instead, it merely imposes consequences when that decision, coupled with a lack of due care, negatively affects the health of others.

#### B. Relationship between the parties.

Negligence cases often distinguish between a general duty to exercise ordinary care and a duty to act based upon a special relationship between the parties.<sup>158</sup> “Inaction by a defendant—such as a failure to warn—constitutes negligence only when the defendant has a duty to act for the protection of others.”<sup>159</sup> A duty to act exists: (1) if the defendant’s actions create a foreseeable risk of harm to others; or (2) if the plaintiff and defendant have a special relationship and a third party creates a foreseeable risk of harm to the plaintiff.<sup>160</sup>

While there is no general duty to control the acts of others, when there is a “special relationship” between two parties, the law may impose a duty on one to control the act of the other.<sup>161</sup> “To reach the conclusion that a special relationship exists, it must be assumed that the harm to be prevented by the defendant is one that the defendant is in a position to protect against

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<sup>157</sup> It is notable that those who choose not to vaccinate are more likely to be well educated and have above-average incomes.

<sup>158</sup> *Domagala*, 805 N.W.2d at 22 (clarifying the distinction between the specific duty to warn that arises when the parties stand in a special relationship and the duty to warn that constitutes an exercise of the general duty of reasonable care).

<sup>159</sup> *Id.* at 23.

<sup>160</sup> *Id.* Courts have found special relationships on the part of “common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection.” *Donaldson v. Young Women’s Christian Ass’n of Duluth*, 539 N.W.2d 789 (Minn. 1995). *See also* Restatement (Second) of Torts § 314A (2012):

- (1) A common carrier is under a duty to its passengers to take reasonable action
  - (a) to protect them against unreasonable risk of physical harm, and
  - (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
- (2) An innkeeper is under a similar duty to his guests.
- (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
- (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

<sup>161</sup> *Texas Home Management*, 89 S.W.3d at 34.



and should be expected to protect against.”<sup>162</sup> In the case of parents, a special relationship undoubtedly exists and in the context of transmission of vaccine-preventable diseases, any tort duty will be that of the parent and not the child. In other words, if the parent fails to exercise due care and allows the unvaccinated child to transmit a disease to others, the parent may be liable. The fact that the child is the one to transmit the disease does not shift liability from the parent to the child.

In cases finding liability when one party infects the other with a disease, the parties are often people who have been sexually intimate.<sup>163</sup> In *Doe v. Roe*, the plaintiff contracted herpes from the defendant during the course of their sexual relationship and the plaintiff sued the defendant for negligence.<sup>164</sup> The trial court found that the defendant owed the plaintiff a duty “to warn those with whom he is intimate of the existence of his infectious condition or at least take precautions against spreading it.”<sup>165</sup> In *John B. v. Superior Court*, the plaintiff and defendant were former spouses, each of whom accused the other of infecting them with the HIV virus.<sup>166</sup> The court held that a person who knows or has reason to know that he or she is HIV positive can be liable for negligent transmission of the virus.<sup>167</sup> The court limited its holding to the facts of the case: “a couple who were engaged and subsequently married; a defendant who falsely represented himself as monogamous and disease-free and insisted that the couple stop using condoms; and a plaintiff who agreed to stop using condoms in reliance on those false representations.”<sup>168</sup> The court expressed no opinion regarding “the existence or scope of a duty” for persons engaged in a casual or one-time sexual encounter, couples who are not monogamous, who have not claimed to be free from disease, or who did not insist on using condoms.<sup>169</sup>

In the context of a person infected by an unvaccinated child, the relevant relationship is that between the parent of the unvaccinated child and the person who contracts a vaccine-preventable illness from that child. The victim/plaintiff may have no relationship with the unvaccinated child and the contact may be casual and brief, such as when an unvaccinated child transmits the disease to another patient in the physician’s waiting room. On the other hand, the children may be classmates who are in close contact on a regular, even daily, basis. Even family members might find themselves on opposite sides of a case. A court is unlikely to find a special relationship in any of these cases. Consequently, any duty will be premised upon a finding that the parent’s actions created a foreseeable risk of harm to others.

A parent’s choice not to immunize his or her children does not usually, without more, create a foreseeable risk of harm. However, there are circumstances that create a foreseeable risk of harm. For example, if the parent takes the child to a country or area in which vaccine-preventable diseases are common, or if the child shows symptoms of a contagious disease, and the parent takes the child to places where he or she is in contact with others, those actions taken

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<sup>162</sup> *Donaldson*, 539 N.W.2d at 792.

<sup>163</sup> *See, e.g., Doe*, 218 Cal. App. 3d at 1542 (negligence case between former sexual partners).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1544. The court assessed damages at \$200,000 but reduced the award by 25 percent because it found the plaintiff contributorily negligent. *Id.* at 1542-43.

<sup>166</sup> 137 P.3d 153 (Cal. 2006).

<sup>167</sup> *Id.* at 161.

<sup>168</sup> *Id.* at 162-63.

<sup>169</sup> *Id.* at 163.

together can give rise to a duty to warn or otherwise act for the protection of others. That duty might extend only to those with whom the child came in contact or it might require disclosure to public health officials who are better trained to assess the risk of transmission to others and can be on alert for possible cases of infection.

C. Foreseeability of harm.

To determine whether the injury was foreseeable, courts look at the defendant's conduct and ask whether "it was objectively reasonable to expect the specific danger causing the plaintiff's injury."<sup>170</sup> In the case of transmission of vaccine-preventable diseases, the issue is whether it is objectively reasonable to expect transmission of a contagious disease in light of the parent's conduct. The answer to this question will require consideration of more than the parent's decision not to immunize a child. The court will need to look at all of the parent's actions that led to the unvaccinated child contracting the disease and transmitting the disease to the plaintiff. The court must consider whether the parent took steps to protect the unvaccinated child from being exposed to vaccine-preventable diseases, whether the parent was or should have been aware of the methods by which such diseases are spread, whether the parent realized or should have realized that the child was exhibiting symptoms of a contagious disease, and any actions taken by the parent to avoid spread of the disease to others.

In the case of a sexually transmitted disease, one court held the defendant liable on a negligence theory when the defendant knew he had herpes and that it could be transmitted to others through sexual contact but did not warn his sexual partner about his infection or take any precautions to prevent transmission to her.<sup>171</sup> "Under these facts, the record supports the court's implied finding that the risk of harm was foreseeable and that defendant unreasonably failed to exercise due care to guard against this risk."<sup>172</sup> Thus, establishing foreseeability would be easier if there is evidence that a parent knew that his or her unvaccinated child had been exposed to a contagious disease and knowingly exposed the child to others.

If the child is not showing symptoms of illness or if the symptoms could be attributed to a non-contagious illness, it may be more difficult to prove that a risk of harm was foreseeable. Ironically, it is the effectiveness of vaccines which has made it easier for parents to discount their importance.<sup>173</sup> Due to the development and widespread use of vaccines in the mid-twentieth century, many diseases for which children are currently immunized have been virtually eliminated in the United States. Thus, parents may not have ever heard of anyone contracting the disease and may feel that immunizing their children is unnecessary.<sup>174</sup> Moreover, it may be

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<sup>170</sup> *Domagala*, 805 N.W.2d at 27. "To determine whether risk of injury from the defendant's conduct is foreseeable we 'look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.'" (citing *Foss v. Kincade*, 766 N.W.2d 317, 322 (Minn. 2009)).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1545.

<sup>173</sup> See *Winsten & Serazin*, *supra* note 6.

<sup>174</sup> *Id.* This situation is analogous to a case finding that a person infected with the HIV virus in the early 1980's was not negligent for failing to warn his sexual partners that he was infected because the virus was only recently discovered and the methods of infection and transmission were not well understood at that time. C.A.U., 438 N.W.2d at 443. "Based on the affidavits submitted by respondent's physicians, and the information available to the

completely unthinkable that their child could infect others. Even parents who immunize their children may believe that the risk of anyone (immunized or not) contracting diseases which were nearly eradicated is very small.

However, it seems clear that parents cannot be willfully ignorant or rely on beliefs that are contrary to all medical evidence. In *Doe*, the court held that the defendant was negligent even though he did not believe that he was placing the plaintiff at risk of contracting herpes”<sup>175</sup>

No one, much less a physician, told plaintiff that he could not transmit herpes as long as he did not have lesions; defendant simply made up his mind that such was the case. Dr. Norman, whom defendant consulted . . . testified that . . . he believed that asymptomatic transmission was *improbable*, not impossible; moreover, [the defendant] did not hear this as a medical opinion until after he was served with the lawsuit. On the other hand, there was evidence at trial that the phenomenon of asymptomatic transmission was not only known in the medical community but reported in lay literature long before defendant commenced his affair with plaintiff. . . . Having discovered that he had a venereal disease, defendant did nothing. He sought no information either from his physicians or any other source about how to avoid transmitting the disease or whether it was advisable to disclose its existence to those with whom he had sexual relations.<sup>176</sup>

Similarly, courts may find that given the overwhelming evidence and medical agreement that vaccines are necessary, safe, and effective, the risk of harm to others is foreseeable in certain circumstances despite a parent’s subjective belief that immunizations are dangerous or unnecessary.

While foreseeability is generally a question of fact,<sup>177</sup> in the context of analyzing the existence or scope of a duty, foreseeability is a question of law to be decided by the court.<sup>178</sup> Moreover, the degree of foreseeability varies based upon the facts of each case.<sup>179</sup>

The degree of foreseeability necessary to warrant the finding of a duty will thus vary from case to case. For example, in cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.<sup>180</sup>

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general public through the time the parties ended their sexual contact, it was not reasonable for respondent to have constructive knowledge he might have AIDS, or that he was capable of transmitting the disease to appellant.” *Id.*

<sup>175</sup> *Id.* at 1545.

<sup>176</sup> *Id.* at 1545.

<sup>177</sup> *Doe*, 218 Cal. App. 3d at 1544.

<sup>178</sup> *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993) *disapproved of by Reid v. Google, Inc.*, 235 P.3d 988 (Cal. 2010).

<sup>179</sup> *Gomez v. Ticor*, 145 Cal. App. 3d 622, 629-30, 193 Cal. Rptr. 600 (Ct. App. 1983) *abrogated by Sharon P. v. Arman, Ltd.*, 989 P.2d 121 (Cal. 1999) (internal citations omitted).

<sup>180</sup> *Id.*

In the context of immunizations, there are strong policy reasons for preventing the spread of contagious diseases. Moreover, the harm can usually be prevented by simple means: immunization. Consequently, a lesser degree of foreseeability may be required.<sup>181</sup>

Since immunizations are not strictly mandatory, parents who choose not to immunize their children could argue that the burden of preventing the harm is great. They must either abandon their strongly held beliefs and immunize their children or go to great lengths to avoid situations in which the unvaccinated child is likely to contract a disease or transmit it to others. If the court accepts this argument, then it could hold that a high degree of foreseeability is required. Opponents may also argue that articles and even celebrities touting the dangers of vaccines have been at least as well publicized as the studies establishing their safety. In that context, it is likely that many parents do not have access to information necessary to make an informed choice. Thus, whether harm is foreseeable may depend, in part, on the steps they took to educate themselves about the vaccines and the risks and methods of transmitting vaccine-preventable diseases to others.<sup>182</sup>

The CDC has stressed the significance of health care providers in spreading the message about the importance of immunization.<sup>183</sup> A parent whose physician has educated the parent regarding the benefits of vaccination and the low risk of a negative outcome, has explained that alleged links between conditions such as autism and vaccines have been disproved, and explained the risks of infection without vaccination, may be held to have foreseen the possibility of his or her child contracting a disease and transmitting it to another. On the contrary, a parent whose either does not have access to such information (perhaps because his or her medical provider does not believe in vaccinations and counseled against them or who is from a country in which immunizations are not available or required) may be less likely to be liable. Likewise, a parent who intends to vaccinate but failed to follow the recommended schedule may not be held to have foreseen the harm that would occur because of that delay.

The potential for liability may increase as outbreaks increase in size or frequency. If there has been an outbreak or incidence of a disease in an area, and that incident has been publicized, and a parent takes his or her unvaccinated child to the place or area where the disease has been found, it is more likely that the harm will be foreseeable and that parent is more likely to be found negligent if his or her child is infected and infects someone else.

#### IV. Potential Duties:

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<sup>181</sup> See *Doe*, 218 Cal. App. 3d at 1544. In *Doe*, the court held that “it is beyond question that our state’s policy of preventing the spread of venereal disease is great and that the burden of warning a prospective sex partner is small. Thus, only slight degree of foreseeability was needed to warrant the imposition of a duty of due care in the present case.” *Id.*

<sup>182</sup> In *Doe*, the court faulted the defendant for failing to seek information from his doctors about how to avoid transmitting herpes to other and whether he should inform his sexual partners that he was infected. *Id.* at 1546. “Both experts at trial agreed that at the time in question it was sound medical advice to inform a patient who has herpes to disclose such fact to any prospective sexual partner.” *Id.*

<sup>183</sup> CDC, 61 MMWR at 257. “Health-care providers should encourage vaccination of all eligible patients, including children and adults. . . . In addition, providers should remind their patients who plan to travel internationally of the increased risk for measles and potential exposures during bus, train, or air travel and at large international events or gatherings (e.g., Euro 2012 and the 2012 Summer Olympics) and the importance of vaccination.” *Id.*

Deciding that duty exists addresses only part of the issue. Courts must also decide the nature and scope of the duty. Options include: a duty to vaccinate; a duty to avoid contact with vulnerable persons if the unvaccinated child presents a risk to others; a duty to warn others that a child is unvaccinated and has been or may have been exposed to a vaccine-preventable illness; a duty to be informed of the places where vaccine-preventable illnesses are still present, how those diseases are transmitted, how to identify symptoms of those illnesses in the unvaccinated child, and how to protect the unvaccinated child and others from transmission of disease.

A. Duty to vaccinate

Currently, no state has imposed an absolute duty to vaccinate one's children. While all states have compulsory vaccination laws, all states also have exemptions. Imposing a duty to vaccinate may seem contrary to the states' decisions and perhaps implicate preemption or separation of powers concerns. A contingent duty may avoid these obstacles. For instance, consistent with *Jacobson*, courts could find that a duty to vaccinate exists if there has been a publicized outbreak of a vaccine-preventable disease and the unvaccinated child is in regular contact with others. An example would be a child who regularly attends a playgroup, school, or frequents a playground where others are present. This duty would apply to children who had been exempted from vaccination mandates based upon personal or religious beliefs. Those who are exempt because of medical conditions would not be liable for failure to vaccinate if vaccination would cause serious physical harm, but they might have a duty to avoid contact with others during the outbreak. A duty to vaccinate may also exist for people of all ages who travel to countries where the diseases are still common or where there is an outbreak.

B. Duty to warn

If a parent chooses not to vaccinate his or her child, the courts could impose a duty to warn others who may be vulnerable to the disease if it is possible that the child is carrying the disease. An example would be a parent whose unvaccinated child exhibits symptoms of a vaccine-preventable disease who then takes the child to the doctor's office or clinic or to some other place where vulnerable children may be present. The parent could be required to contact medical personnel before entering the office to notify them that the child is unvaccinated so that quarantine or isolation procedures can be implemented. It might also motivate the medical staff to test for diseases that they might not otherwise expect to see.<sup>184</sup>

A parent might also be required to warn school officials if the unvaccinated child has traveled to a country where vaccine-preventable diseases are still common or if the child has come in contact with foreign visitors from such a country, particularly if the child or visitors have shown signs of illness. The court would have to decide whether the duty is triggered merely by the possibility of exposure or if there must be some evidence that the unvaccinated child poses a specific risk to others.

C. Duty to avoid contact with vulnerable persons

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<sup>184</sup> For example, a doctor who has not seen any cases of measles in the office in several years might suspect the disease in an unvaccinated child even though it would not be suspected in a fully immunized child.

This may include an obligation to know the symptoms of the vaccine-preventable diseases and a duty to avoid taking the child to places where they are likely to come into contact with vulnerable persons if those symptoms are present. A clear example would be the pediatrician's office. The pediatrician's waiting room is likely to have children who are sick—and therefore more vulnerable than healthy children whose immune systems are not compromised—and children who are too young to be fully or even partially vaccinated. Schools are also likely to contain children who could not be vaccinated for medical reasons or who did not develop immunity despite receiving vaccinations.

It is notable that even adults may be vulnerable if they were unable to be vaccinated because of allergies to components of the vaccine or because of other medical conditions. There is also a small percentage of the vaccinated population that will remain susceptible to disease despite the vaccination. Since there is no way to know who falls into one of these categories of vulnerable persons, an argument could be made that parents have a duty to avoid contact with *anyone* if their unvaccinated child has been exposed to a vaccine-preventable disease or is showing symptoms of such a disease.

#### D. Duty to be informed

This duty is a part of all of the above-referenced duties. A parent who chooses not to immunize his or her child could be found to have a duty to learn the symptoms of the vaccine-preventable diseases and take precautions to avoid infecting others if the unvaccinated child develops symptoms of those diseases. This duty may be fulfilled through consultation with the child's pediatrician or family practitioner. The parent may also contact government agencies such as the Centers for Disease Control to track outbreaks of various diseases as well as to obtain information about methods of transmission and early symptoms. The duty would likely require parents to consult reasonably reliable sources of information.<sup>185</sup>

This duty may also require parents who choose not to vaccinate to be more vigilant when their children are ill. Symptoms that might be attributed to common colds or other minor illnesses may also be early symptoms of serious vaccine-preventable illnesses. Parents of unvaccinated children need to be aware and perhaps be more willing to keep their children away from others who exhibit these symptoms and, if their children display those symptoms, keep the children away from others who could be infected.

This duty is clearest in places and at times where an outbreak has occurred. Once a vaccine-preventable disease has been diagnosed and publicized in a community, parents of unvaccinated children may be held to have a duty to track the outbreak and monitor their children's potential contact with other infected individuals.

#### V. Breach of Duty

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<sup>185</sup> A fact issue may often exist with respect to whether reliance upon particular sources was reasonable. Internet searches are likely to direct the searcher to a fair number of vaccine-opponent sites that may contain information that is contrary to the vast majority of the medical community. *See* Winsten & Serazin, *supra* note 6. A parent who finds and relies on those sources may be held to have breached their duty to be informed.

Refusal to vaccinate would not be an automatic breach of any duty except the duty to vaccinate (which, as discussed above) is unlikely to be imposed by courts. Any other duty would only be breached by failure to exercise reasonable care. What constitutes a breach will necessarily depend upon the precise duty defined by the courts; but in all cases, the plaintiff will have to establish that the defendant failed to take some action that a reasonable person would have taken. Those who act reasonably will not be liable.

For example, a court could find that parents have a duty to be informed and to avoid contact with vulnerable persons if their unvaccinated child shows symptoms of a contagious vaccine-preventable illness. Imagine a parent who is informed about the symptoms of the diseases the vaccines prevent and the most likely ways and places the child can contract the disease. The parent carefully monitors his or her child's health, avoids travel to countries where the diseases are common, and pays attention to news reports of outbreaks to avoid communities that are experiencing or have recently experienced outbreaks. Unknown to the parent, the unvaccinated child has been exposed to measles by the relative of a family friend who has recently traveled abroad. Before the child shows any obvious signs of illness, the parent takes the child to the pediatrician's office for a routine check-up where the child infects a six month old infant who is too young to have received the measles vaccine. On these facts, a court could find as a matter of law that the parent has not breached his or her duty of care.

## VI. Proximate Cause

Even if courts find that parents have a duty and that the duty is breached in some way, a plaintiff will have to prove that his or her injury (infection with a vaccine-preventable disease) was proximately caused by that breach.<sup>186</sup> Proving that a particular child transmitted a disease to another and caused harm can be a difficult and, in some cases, impossible task. It is this requirement, however, that ensures that parents are not held liable (and thereby punished) simply for choosing not to vaccinate their children. It is only when the choice not to vaccinate results in harm to others that liability may be imposed.

Plaintiffs in cases involving transmission of vaccine-preventable diseases will face several hurdles. The largest hurdle will be identifying the proper defendant. One who is diagnosed with a disease may have no idea when, how, or by whom they were infected. While it may be easy to identify a potential defendant if a friend or close family member has also been diagnosed with a disease, if there are no obvious sources the potential plaintiff may not have access to the information necessary to identify the person who infected him or her.

There may be potential plaintiffs who do have access to the information necessary to establish causation. When a patient is diagnosed with measles, pertussis, or one of many other vaccine-preventable diseases, doctors are required to notify local health officials. Local officials are required to notify the Center for Disease Control and Prevention.<sup>187</sup> The CDC may take steps

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<sup>186</sup> Ward v. Kmart Corp., 136 Ill.2d 132, 140 (1990) (“The essential elements of a cause of action based on common law negligence may be stated briefly as follows: the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach.”).

<sup>187</sup> CDC, 61 MMWR at 253.

to track the spread of the disease and to identify the various links in the chain of transmission.<sup>188</sup> However, the purpose of this tracking is not to establish legal liability, so it is unclear whether the conclusions of the CDC or public health officials would be sufficient to prove proximate cause in a negligence case. Additionally, privacy laws likely prevent the CDC, local health officials, or personnel at the plaintiff's doctor's office from disclosing the identity of people who have been diagnosed with the same illness or who might have infected the plaintiff.<sup>189</sup>

While daunting, these hurdles are not insurmountable. Since transmission requires close contact, the plaintiff may be able to narrow down possible sources of infection and, with some deductive reasoning (and, perhaps, a lot of luck) a likely source can be identified. Discovery requests can then be used to fill in some of the gaps. If the plaintiff can identify the source of his or her infection (or suspected source) recent advances in science and medicine may enable the plaintiff to establish causation in ways that were unavailable even a few years ago.<sup>190</sup>

Perhaps as troubling as an inability to find a single contact that might have led to infection is the possibility of contact with several sources, any of whom could have transmitted the virus. Because the initial source of infection in a community is likely to have contact with several people in that community, it may be difficult to determine who infected whom. If the plaintiff cannot establish that the defendant is the one who infected the plaintiff<sup>191</sup> then the plaintiff may not be able to recover from the plaintiff, even if it is established that both carry the same strain of the bacteria or virus or that their infection can be traced to a common source.

The plaintiff may also have to prove that intervening factors do not sever the chain of liability. For example, with respect to pertussis, in addition to unvaccinated children, it has been discovered that the vaccine given in recent years does not last as long as previous versions and may result in diminished immunity before the recommended booster at age 13.<sup>192</sup> The vaccine that has been given since the late 1990's (DTap) had fewer side effects than the prior version (DTP), but researchers now suspect that it does not work for as long as the prior version.<sup>193</sup> Consequently, during an outbreak of pertussis in 2010, a surprising number of victims were 7-10 year old kids who had received all of the recommended DTap shots.<sup>194</sup>

A plaintiff who contracted pertussis from an unvaccinated child might have difficulty proving that contact with the unvaccinated child was the proximate cause of the plaintiff's infection. Depending on the age of the unvaccinated child, the defendant could argue that even if the child had been immunized, the child might have contracted pertussis due to the diminishing

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<sup>188</sup> For example, “[g]enetic characterization of the viruses can help to confirm or suggest the likely source of imported viruses because measles genotypes are distributed heterogeneously in regions that have not yet eliminated measles.” *Id.* at 256.

<sup>189</sup> *See, e.g., John B.*, 137 P.3d at 166, 169.

<sup>190</sup> *See, e.g.,* [http://www.cbsnews.com/8301-504763\\_162-57498490-10391704/how-scientists-stopped-superbug-that-killed-6-by-using-dna-to-track-its-source/](http://www.cbsnews.com/8301-504763_162-57498490-10391704/how-scientists-stopped-superbug-that-killed-6-by-using-dna-to-track-its-source/) (describing DNA sequencing of drug resistant *Klebsiella pneumoniae* bacteria that allowed NIH researchers to track the source of an outbreak at a leading research hospital); <http://www.firstcoastnews.com/topstories/article/272911/483/Man-sentenced-to-30-years-for-infecting-five-people-with-Hepatitis-C> (noting that medical advances led to the source of patient's Hepatitis C infection).

<sup>191</sup> The standard of proof in civil cases is a preponderance of the evidence.

<sup>192</sup> *See Schaeffer, supra* note 2.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*



effectiveness of the DTap shot. Causation will be especially difficult to establish in the wake of a pertussis outbreak since so many people who received the DTap vaccine may be vulnerable to the virus, thus enabling it to spread quickly through communities, even if only a few are unvaccinated.

Acts of third parties may also intervene. In some cases, patients in physician waiting rooms have contracted contagious diseases from other patients. If the physician or the physician's staff was aware that an unvaccinated child was exhibiting symptoms that could indicate a contagious disease and failed to notify the parent of that possibility or isolate the child from other patients, that physician's actions could be a superseding cause of the second patient's infection.

## VII. Contributory Negligence

Liability may be reduced or eliminated if the plaintiff is guilty of contributory negligence. For example, a plaintiff who chose not to be vaccinated because of personal beliefs or simple inattention may not be able to recover if the jury or judge finds that the proximate cause of the plaintiff's infection was (in whole or in part) the plaintiff's own actions. Likewise, if the plaintiff could not be vaccinated because of a medical condition or if the plaintiff is otherwise aware that he or she has no immunity to certain diseases, that plaintiff must take precautions to avoid situations in which he or she is likely to come in contact with the disease. If, for example, the plaintiff knows that there is an outbreak of a disease to which he or she is susceptible in a particular school, the plaintiff would may not be able to recover if he or she chooses to spend time in that school without taking any precautions to protect himself or herself.

## Conclusion

Parents have the right under current state and federal law to choose not to immunize their children. Their choice to exercise this right should not expose them to tort liability. However, their choice, and the constitutional and privacy rights implicated by the choice, do not absolve them of their duty to exercise ordinary care to prevent causing harm to others. Allowing those who have been infected by unvaccinated children to pursue tort claims merely recognizes this duty. While courts have not addressed tort claims or duties in this precise context, holdings in other cases involving negligent transmission of contagious diseases support the conclusion that public policy favors tort liability. It promotes the compelling state interest in preventing the spread of disease without unduly infringing on the right of parents to direct the care and upbringing of their children. For these reasons, tort liability should be available against parents who choose not to immunize their children and who fail to use due care to prevent those children from contracting harmful diseases and infecting others.

APPENDIX A

Table 1: California Immunization Requirements

<i>Institution</i>	<i>Age</i>	<i>Vaccine</i>	<i>Total Doses Received</i>
Child care center, day nursery, nursery school, family day care home, development center	Less than 2 months	None	
Same as above	2-3 months	1. Polio <sup>1</sup> ..... 2. DTP..... 3. Hib..... 4. Hepatitis B.....	1 dose 1 dose 1 dose 1 dose
Same as above	4-5 months	1. Polio <sup>1</sup> ..... 2. DTP, or combination of DTP and diphtheria-tetanus toxoids..... 3. Hib..... 4. Hepatitis B.....	2 doses 2 doses 2 doses 2 doses
Same as above	6-14 months	1. Polio <sup>1</sup> ..... 2. DTP, or combination of DTP and diphtheria-tetanus toxoids.....	2 doses 3 doses

3. Hib..... 2 doses

4. Hepatitis B..... 2 doses

.....

Same as above

15-17 months

1. Polio<sup>1</sup> ..... 3 doses

2. DTP, or combination of  
DTP and diphtheria-  
tetanus

toxoids..... 3 doses

3. Measles, rubella, and 1 dose of each separately  
mumps.....

or combined on or after  
the

1st birthday

4. Hib..... 1 dose on or after the

1st birthday

5. Hepatitis B..... 2 doses

.....

Same as above

18 months-5 years

1. Polio<sup>1</sup> ..... 3 doses

2. DTP, or combination of  
DTP and diphtheria-  
tetanus

toxoids..... 4 doses

3. Measles, rubella, and 1 dose of each separately  
mumps.....

or combined on or after  
the

1st birthday

4. Hib<sup>3</sup> ..... 1 dose on or after the

1st birthday

5. Hepatitis B<sup>2</sup>..... 3 doses

6. Varicella ..... 1 dose

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Elementary school at 4-6 years  
kindergarten level and  
above

1. Polio<sup>1</sup> ..... 4 doses, except that a total of  
3 doses is acceptable if at  
least one dose was given  
on  
or after the 4th birthday

2. DTP, or combination of  
DTP and diphtheria-  
tetanus

toxoids..... 5 doses, except that a total  
of  
4 doses is acceptable if at  
least one dose was given  
on  
or after the 4th birthday.

3. Measles, rubella, and 1 dose of each, separately  
mumps.....

or combined, on or after  
the  
1st birthday. Pupils  
entering  
a kindergarten (or first  
grade  
if kindergarten skipped)  
are  
required to have 2 doses  
of  
measles-containing  
vaccine, both given on or  
after the first birthday

4. Hepatitis B<sup>2</sup> ..... 3 doses

5. Varicella ..... 1 dose

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Elementary school, 7-17 years  
secondary school

1. Polio<sup>1</sup> ..... 4 doses, except that a total of

3 doses is acceptable if at  
least one dose was given  
on  
or after the 2nd birthday

2. Diphtheria and tetanus  
toxoids and pertussis  
vaccine

given as DTP, DT, Td, or Tdap ..... At least 3 doses. One  
more

dose is required if the  
last dose was given before  
the 2nd birthday.

3. Measles and rubella 1 dose of each, separately  
(mumps not required) .....

or combined, on or after  
the  
1st birthday. (See below  
for

additional requirements  
for

7th grade enrollment,

effective 7/1/99.)

4. Varicella<sup>5</sup> ..... 1 dose aged 7 through 12

years for students not  
admitted to California

schools before July 1, 2001.

2 doses for students aged 13

through 17 years not

admitted to California

schools before July 1, 2001.

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Seventh Grade

Any

1. Tdap<sup>6,7</sup> .....

1 dose on or after the 7th

birthday

2. Measles<sup>4</sup> .....

2 doses of measles

-containing vaccine, both

given on or after the first

birthday.

.....

Eighth through Twelfth

Any pupil under 18 years

1. Tdap<sup>6,7</sup> .....

1 dose on or after the 7th

Grades<sup>8</sup>

birthday

.....

Any

18 years and older

None