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OPINION	:	No. 85-208
of	:	<u>SEPTEMBER 17, 1985</u>
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THE HONORABLE LEROY F. GREENE, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

Does a registered engineer retained to investigate the integrity of a building who determines, based on structural deficiencies in violation of applicable building standards, that there is an imminent risk of serious injury to the occupants thereof, and who is advised by the owner that no disclosure or remedial action is intended and that such determinations are to remain confidential, have a duty to warn the occupants or to notify the local building officials of such determinations?

CONCLUSION

A registered engineer retained to investigate the integrity of a building who determines, based on structural deficiencies in violation of applicable building standards, that there is an imminent risk of serious injury to the occupants thereof, and who is advised

by the owner that no disclosure or remedial action is intended and that such determinations are to remain confidential, has a duty to warn the identifiable occupants or, if not feasible, to notify the local building officials or other appropriate authority of such determinations.

ANALYSIS

A registered civil or structural engineer may be privately retained on occasional instances to investigate the integrity of a structure. The examination might reveal such defects in design, construction, alteration, or deterioration as are in noncompliance with applicable statutory standards. (See Earthquake Protection Law, Health & Saf. Code, §§ 19000-19183; State Building Standards Law, Health & Saf. Code, §§ 18901-18949; State Housing Law, Health & Saf. Code, § 17910-17995.5.) Further, such defects may pose an imminent risk of serious injury as, for example, the result of collapse during a seismic occurrence or under anticipated vertical loading. The present inquiry is whether the engineer in such a case, being directed by the client to hold these findings in confidence, has a duty to warn the occupants or to report such deficiencies to the local building official where no such disclosure or remedial action will otherwise be taken.

We are asked whether a registered civil or structural engineer has a "duty" to warn or to report a statutory violation. "Duty" is a term of variable significance. (67 Ops.Cal.Atty.Gen. 331, 332-333 (1984).) We do not consider for purposes of this discussion any nonenforceable notion of good citizenship. (See, e.g., *Barela v. Superior Court* (1981) 30 Cal.3d 244, 253—"Citizens have a right and a duty to report violations of the law to the authorities"; *People v. Cohn* (1973) 30 Cal.App.3d 738, n. 9—"Citizens have the duty to report unlawful activities to the proper authorities"; 67 Ops.Cal.Atty.Gen., *supra*, 333.) It has been said that the duty to assist police authorities which goes back hundreds of years to the common law (and see Gov. Code, § 26604; Pen. Code, § 150) includes, at least by implication, the furnishing on request of information about crimes to the public authorities. (*People v. Ford* (1965) 234 Cal.App.2d 480, 487-488; see also *Miller v. Fano* (1901) 134 Cal. 103, 106-107; *Mackie v. Ambassador Hotel etc. Corp.* (1932) 123 Cal.App. 215, 221.) Certain violations of statutory building standards may constitute a crime. (E.g., Health & Saf. Code, § 19170.) The present inquiry does not, in any event, contemplate any official request for information.

The term "duty" as we understand and employ it in present context has reference to an enforceable legal obligation arising from the organic, positive, or common law of this state. The obligation would arise if at all as (1) a specific statutory mandate to report certain occurrences, the breach of which would give rise to prescribed statutory sanctions, (2) from specified statutory prohibitions, the violation of which would result in criminal prosecution, (3) from the particular obligations attendant upon registration as a

civil or structural engineer the breach of which may result in a disciplinary action against the certificate of a person so registered, or (4) from the duty of reasonable care under the circumstances one person may owe to another, the breach of which would give rise to civil liability.

With respect to specific statutory mandates, there are numerous instances in which a designated class of persons are compelled to report to appropriate authority certain occurrences or observations. (E.g., Pen. Code, §§ 11165-11174 (reporting victims of child abuse); Veh. Code, § 410 (reporting persons with "blackout" disorders); see 67 Ops.Cal.Atty.Gen., *supra*, 332.) No such statute has been found, however, with regard to the knowledge or awareness of a civil or structural engineer of structural insufficiencies in the context of the situation presented.

The practice of civil engineering is defined in section 6731:¹

"Civil engineering embraces the following studies or activities in connection with fixed works for irrigation, drainage, waterpower, water supply, flood control, inland waterways, harbors, municipal improvements, railroads, highways, tunnels, airports and airways, purification of water, sewerage, refuse disposal, foundations, framed and homogeneous structures, buildings, or bridges:

"(a) The economics of, the use and design of, materials of construction and the determination of their physical qualities.

"(b) The supervision of the construction of engineering structures.

"(c) The investigation of the laws, phenomena and forces of nature.

"(d) Appraisals or valuations.

"(e) The preparation or submission of designs, plans and specifications and engineering reports.

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The title "structural engineer" is an identification of competence and specialization in a subspecialty of civil engineering and necessitates qualifications in addition to those

¹ All undesignated section references are to the Business and Professions Code.

required for registration as a civil engineer. (§ 6763.) A civil engineer is required to be registered with the State Board of Registration for Professional Engineers. (§ 6730.)

Section 6787 prescribes the acts which constitute a *misdemeanor*:

"Every person is guilty of a misdemeanor and for each offense of which he is convicted is punishable by a fine of not more than one thousand dollars (\$1,000) or by imprisonment not to exceed three months, or by both fine and imprisonment:

"(a) Who, unless he is exempt from registration under this chapter, practices or offers to practice civil, electrical or mechanical engineering in this state according to the provisions of this chapter without legal authorization.

"(b) Who presents or attempts to file as his own the certificate of registration of another.

"(c) Who gives false evidence of any kind to the board, or to any member thereof, in obtaining a certificate of registration.

"(d) Who impersonates or uses the seal of any other practitioner.

"(e) Who uses an expired or revoked certificate of registration.

"(f) Who shall represent himself as, or use the title of, registered civil, electrical or mechanical engineer, or any other title whereby such person could be considered as practicing or offering to practice civil, electrical or mechanical engineering in any of its branches, unless he is correspondingly qualified by registration as a civil, electrical or mechanical engineer under this chapter.

"(g) Who, unless appropriately registered, manages, or conducts as manager, proprietor, or agent, any place of business from which civil, electrical or mechanical engineering work is solicited, performed or practiced.

"(h) Who uses the title, or any combination of such title, of 'professional engineer,' 'registered engineer,' 'chemical engineer,' 'civil engineer,' 'electrical engineer,' 'industrial engineer,' 'mechanical engineer,' 'metallurgical engineer,' 'petroleum engineer,' 'structural engineer,' 'soil

engineer,' or 'engineer-in-training,' or the titles of such other branches as the board may establish, or who makes use of any abbreviation of such title which might lead to the belief that he is a registered engineer, without being registered as required by this act.

"(i) Who uses the title 'consulting engineer' without being registered as required by this act or without being authorized to use such title pursuant to legislation enacted at the 1963, 1965 or 1968 Regular Session.

"(j) Who violates any provision of this chapter."

Section 6775 prescribes the grounds for which a *disciplinary action* may lie against the certificate of a registered engineer:

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"By a majority vote, the board may reprove, privately or publicly, or may suspend for a period not to exceed two years, or may revoke the certificate of any professional engineer registered hereunder:

"(a) Who has been convicted of a crime substantially related to the qualifications, functions and duties of a registered professional engineer, in which case the certified record of conviction shall be conclusive evidence thereof.

"(b) Who has been found guilty by the board of any deceit, misrepresentation, violation of contract, fraud, negligence or incompetency in his practice.

"(c) Who has been found guilty of any fraud or deceit in obtaining his certificate.

"(d) Who aids or abets any person in the violation of any provisions of this chapter.

"(e) Who violates any provision of this chapter."

The failure to report structural deficiencies for which the engineer is not responsible does not violate "any provision of this chapter" within the meaning of sections 6775, subdivision (e), and 6787, subdivision (j). With the possible exceptions of

subdivisions (b) and (d) of section 6775, which are reserved for further discussion, such failure does not violate any of the other specifications of those sections.

Under the provisions of subdivision (d) of section 6775, the State Board of Registration for Professional Engineers may reprove, suspend, or revoke the certificate of any registered engineer "[w]ho aids or abets any person in the violation of any provisions of this chapter." In the realm of criminal law, an aider and abettor must act with *knowledge* of the criminal purpose of the perpetrator and with an *intent* or purpose either of committing, or of encouraging or facilitating commission of, the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

The word "aid" means to assist, to help, or to supplement the efforts of another. (*People v. Etie* (1953) 119 Cal.App.2d 23, 28; *People v. Ellhamer* (1962) 199 Cal.App.2d 777.) The word "abet" includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime. (*People v. Beeman, supra*, 35 Cal.3d at 556.) Thus, it is error in a criminal case to instruct a jury that one may be found guilty as a principal if one aided *or* abetted. (*Id.*)

Nevertheless, those terms appear in section 6775, subdivision (d), in the disjunctive. Literally construed, therefore, disciplinary action may be brought against a registered engineer for any act which assisted the commission of a "violation of any provisions of this chapter" without regard to knowledge or intent. We are satisfied that the mere failure to report the structural deficiencies in the situation presented would not amount to counsel and encouragement. We do not reach, however, the questions whether the Legislature intended the words "aid" and "abet" to operate independently² and, if so, whether the conduct at issue would aid *or* abet the owner's continued noncompliance with statutory building standards, inasmuch as such noncompliance does not constitute a violation of "*this* chapter" (i.e., ch. 7 of div. 3, commencing with 6700, consisting of the Professional Engineers Act) within the purview of section 6775, subdivision (d).

Under the provisions of subdivision (b) of section 6775, an action may be initiated against the certificate of any registered engineer "[w]ho has been found guilty by the board of any deceit, misrepresentation, violation of contract, fraud, *negligence* or incompetency in his practice." (Emphasis added.) Presumably, in the absence of any indication to the contrary, the word "negligence" has the same meaning as defined in the law of tort, but pertaining specifically to conduct which falls within the scope of the practice of engineering. While the employment, investigation, and determinations of the engineer in the situation presented were undertaken and performed by virtue of his certificate to engage in such activity, it is doubtful whether the failure to warn or notify

² Compare title 16, California Administrative Code, section 416—"aid and abet."

falls within the scope of certification or registration so as to constitute a violation of his duty as a registered engineer imposed under section 6775, subdivision (b). Nothing in the definition of "civil engineering" (see § 6731, *supra*) suggests such a duty.

Finally, we proceed to the question of civil liability in tort based on negligence. Generally, negligence involves a breach of the duty of reasonable care. (*Peter W. v. San Francisco Unif. Sch. Dist.* (1976) 60 Cal.App.3d 814, 821.) We examine those cases in which liability has been predicated upon nonfeasance, in order to determine whether the failure to notify, even by way of a single telephone call, to avert a human catastrophe, would constitute a breach of the duty of reasonable care owed by the engineer as an individual human being under the circumstances presented.

To begin such an analysis, it is first necessary to focus on the concept of duty. Generally, speaking, one has no duty to come to the aid of or to protect an individual from being harmed by conduct of a third person. (See *Morgan v. County of Yuba* (1964) 230 Cal.App.2d 938, 943.) Furthermore, "A person who has not created peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act." (*Williams v. State* (1983) 34 Cal.3d 18, 19.) Thus, unless a special relationship can be said to exist between the engineer and the owner of the building, the engineer owes no duty to the occupants and there would be no liability.

The special relationship doctrine has been utilized in two different types of cases in order to establish a duty of care. First is a group of cases which will be characterized as "police cases."³ In this line of cases, generally the injury results from reliance on statements or conduct of a police officer which have induced a false sense of security and thereby worsened the position of said party. For example, in *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 259, the court found such a special relationship and thus a duty where an officer stated to the plaintiff while investigating an accident either "come show me the skids," or "come show me the point of impact." The plaintiff was subsequently hit and seriously injured by another vehicle. It was held that once the plaintiff relied on the statement of the officer and was put thereby in a position of danger, the officer owed the plaintiff a duty to protect him from foreseeable harm.

³ Generally, these cases involve police officers in the performance of their duty; however, the principles apply to a much broader class of persons: ". . . the volunteer who, having no initial duty to do so, undertakes to come to the aid of another . . . is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." (*Williams, supra*, 34 Cal.3d at 23.)

Recently, in *Williams*, the Supreme Court enunciated the requirements necessary to find a special relationship in the "police cases." The factors the court examined were:

"The officers did not create the peril in which plaintiff found herself; they took no affirmative action which contributed to, increased, or changed the risk that would have otherwise existed; there is no indication that they voluntarily assumed any responsibility to protect plaintiff's prospects for recovery by civil litigation; and there are no allegations of the requisite factors to a finding of special relationship, namely detrimental reliance by the plaintiff on the officers' conduct, statements made by them which induced a false sense of security and thereby worsened her position." (34 Cal.3d at 27-28; fn. omitted.)

The fact pattern under discussion here would result in no duty of care under the "police cases," because none of the factors discussed in *Williams* are present.

The second line of special relationship cases could well result in the finding of a special relationship and therefore a duty of care on the part of the engineer. This line of cases began with *Johnson v. State of California* (1968) 69 Cal.2d 782, in which the state was held liable for personal injury damages where an employee of the Youth Authority placed a youth with homicidal tendencies in a foster home without giving notice of his dangerous propensities. This case and others cited therein impose a duty upon those who create a foreseeable peril, not readily discoverable by endangered persons, to warn them of such potential peril. (*Id.*, at 786.) In *Tarasoff v. The Regents of the University of California* (1976) 17 Cal.3d 425, a publicly employed psychotherapist was held liable for wrongful death where he had failed to warn of his patient's expressed intention to kill the decedent. Neither the psychotherapist nor the registered engineer in the situation here considered created the peril. Nevertheless, a duty to warn those endangered by the conduct of another arises where the actor stands in some special relationship to the dangerous person or to his foreseeable victim. (*Id.*, at 435.) Thus, the court stated (*id.*, at 431):

"When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to

take whatever other steps are reasonably necessary under the circumstances."

The Supreme Court in *Tarasoff* and more recently in *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, pointed to factors to consider, first enunciated in *Rowland v. Christian* (1968) 69 Cal.2d 108, 113, as useful in analyzing the existence of "duty." The court in *Thompson* quoting from *Rowland*, said:

"In determining the existence of a duty of care in a given case, pertinent factors to consider include the 'foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.'" (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113.)

Thus, in *Tarasoff*, the Supreme Court has enunciated another test for special relationship. In the *Tarasoff* context the duty on the part of the psychotherapist to warn the intended victim arose from the fact that the psychotherapist knew that his patient intended to kill a specifically identifiable individual.

The issue presented herein is analogous to *Tarasoff*. Here, the engineer, like the psychotherapist in *Tarasoff*, has specific knowledge that there is an imminent risk of serious injury and he would therefore have a duty to warn those endangered. Although, in *Tarasoff*, the opinion was limited to a situation wherein the psychotherapist knew only about one *specific* person, language in *Thompson* indicates that the duty may run to a large group of people. In *Thompson*, the plaintiffs lived near the residence of the mother of James F., a juvenile offender. Prior to the incident, James had been confined to a county institution because he had extremely dangerous and violent propensities with regard to young children. Further, the county was aware that James had said that he would kill a young child in the neighborhood if released. However, he did not name a particular victim. Within 24 hours of his release, James killed the plaintiff's son.

The court found no duty on the part of the county to warn because unlike *Tarasoff*, there was no "foreseeable or readily identifiable target of the juvenile offender's threats." (*Thompson, supra*, 27 Cal.3d at 753.) However, the court did indicate that situations may arise where a duty to warn is apparent even if the threat of imminent harm

could result in injury to more than one particular identifiable individual. The court stated in this regard:

"In those instances in which the released offender poses a predictable threat of harm to a named or *readily identifiable victim or group of victims* who can be effectively warned of the danger, a releasing agent may well be liable for failure to warn such persons. (*Thompson, supra*, 27 Cal.3d at 758; emphasis added.)

It is our opinion that the occupants of an apartment building constitute such a "readily identifiable" group of victims who could easily be warned of the potential hazards. That coupled with the opinion of the engineer that there is an imminent risk of serious injury establishes a duty to warn. In other words, under the facts suggested, a special relationship exists between the engineer and the owner requiring the engineer to warn of foreseeable consequences.

It is our opinion that a registered engineer retained to investigate the integrity of a building who determines, based on structural deficiencies in violation of applicable building standards, that there is an imminent risk of serious injury to the occupants therein, and who is advised by the owner that no disclosure or remedial action is intended and that such determinations are to remain confidential, has a duty to warn the identifiable occupants or, if not feasible, to notify the local building officials or other appropriate authority of such determinations.
