

# Child Protective Services Liability: When the System Fails

Douglas J. Besharov

Over the past 30 years, substantial progress has been made in combating child abuse and neglect. Last year, over 2 million reports of suspected child abuse and neglect were received and investigated by social service and law enforcement agencies—15 times the 150,000 reported in 1963. Public child protective agencies have been established in almost every community. They supervise more than 500,000 families and provide foster care services to more than 400,000 children.<sup>1</sup>

Nevertheless, major gaps in protection remain. Twenty-five to 50 percent of deaths from child abuse involve children who were previously reported to authorities for suspected maltreatment.<sup>2</sup> Tens of thousands of other children suffer serious injuries while under the supervision of child protective agencies.

At the same time, overreaction to complaints of abuse plagues the system. Children have been removed from parental custody and placed in foster care for

weeks and months based on the most cursory investigations. Sometimes the children were removed on the basis of unvalidated complaints.

Many courts have begun to find that when child protection agency employees fail to do their jobs well, the agencies and the employees may be liable for resulting injuries. But plaintiffs have suffered some setbacks. For example, in 1989, the U.S. Supreme Court held that the failure to protect a child who had been reported to a child protective agency as in danger—and who was under the agency's supervision through home visitation—was not an actionable claim under §1983 of the Federal Civil Rights Act. The case was *DeShaney v. Winnebago County Department of Social Services*.<sup>3</sup>

Joshua DeShaney's noncustodial mother sued the county child protective agency for Joshua's permanent brain damage caused by abusive beatings while he was in his father's custody. She alleged that the agency was aware that Joshua had suffered serious injuries on a number of occasions and that for 14 months a caseworker had visited Joshua's house several times and had seen the injuries.

The Court rejected the mother's claim, finding the caseworker's knowledge of the injuries irrelevant. The Court held that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."<sup>4</sup>

In a footnote, the Court mentioned that the state *might* have the duty to protect a child from abusive foster parents.<sup>5</sup>

*DeShaney* hinged on whether a "special relationship" between the endangered child and the child protective agency had been created under federal law. Despite the Supreme Court's ruling, many state courts—before and since that case was decided—have held that a special relationship is created by state law.

## Liability for Inadequate Protection

Although a number of cases have rejected child protective agency liability for either jurisdictional, procedural, or substantive reasons, there is a reasonably well-established body of case law holding these agencies (and individual workers) liable for either inadequately protecting children or violating parental rights.

*Failure to accept a report for investigation.* Since the early 1960s, all states have passed laws that require certain professionals to report suspected child abuse and neglect to child protective agencies or, in some jurisdictions, to the police. These agencies, in turn, must accept and investigate all reports that are made to them according to these laws.

An agency can be found liable for failing to investigate a report of suspected child maltreatment. In *Mammo v. Arizona*, a noncustodial father reported that when he visited his three children he noted bruises on the two aged two and four.<sup>6</sup> He told the Arizona child welfare agency that the mother would not let

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## Protective Custody: Making Difficult Decisions

Most cases of reported child abuse require prompt and thorough investigation to determine whether they are well founded. But there are some cases when a report is so lacking in support that an investigation either should not be done or should be postponed pending receipt of additional information or evidence.

Child abuse reports should be rejected by child protective services agencies as not worthy of investigation when:

- ▶ the allegations clearly fall outside the definitions of "child abuse" and "child neglect" as they are established by state law. (Examples include cases in which the alleged victims are not children as defined by the statute and claims of family problems that do not amount to child abuse or neglect.)

- ▶ the person reporting the abuse can give no credible reason for suspecting that the child has been abused or neglected. (Although actual proof of maltreatment is not required, some evidence is.)

- ▶ there is evidence that the report is unfounded or made for malicious purposes. (Anonymous reports, reports from estranged spouses, and even previous unfounded reports from the same source should not be automatically rejected, but they need to be carefully evaluated.)

In questionable circumstances, the agency should call the person who reported the abuse before deciding to reject a report. In cases where this is appropriate, rejected reports should be referred to other agencies that can provide services that the family may need.

### Immediate Action

Sometimes, an investigation will produce evidence of danger to a child that is so severe that immediate action should be taken to remove the child from the abusive environment. Quick protective action is required when:

- ▶ the child was assaulted—hit, poisoned, or burned so severely that serious injury resulted.

- ▶ the child has been systematically tortured or inhumanely punished.

(For example, the child was locked in a closet for long periods or forced to eat unpalatable substances.)

- ▶ the parent's reckless disregard for the child's safety caused serious injury or could have done so. (For example, the parent left a young child in the care of an obviously irresponsible or dangerous person.)

- ▶ the physical condition of the home is so dangerous that it poses an immediate threat of serious injury. (For instance, when exposed electrical wiring creates an extreme danger of fire.)

- ▶ the child has been sexually abused or sexually exploited.

- ▶ the parents have withheld essential food or nourishment from the child.

- ▶ the parents refuse to obtain or consent to medical or psychological care that is needed immediately for the child to prevent or treat a serious injury or disease.

- ▶ the parents appear to be suffering from mental illness, mental retardation, drug abuse, or alcohol abuse so severe they cannot provide for the child's basic needs.

- ▶ the parents have abandoned the child.

- ▶ there is reason to suspect that abusive parents may flee the area with their child. (For example, when the parents have a history of frequent moves or of hiding the child from outsiders.)

- ▶ there is specific evidence that the parents' anger and discomfort about the report and the subsequent investigation will result in retaliation against the child. (Such information could be gained through a review of the parents' past behavior toward the child, the parents' statements and behavior during the investigative interview, or reports from others who know the family.)

- ▶ the parents have been arrested (for any reason) and there is no one to care for the child.

In any of the above situations, the younger the child, the greater the need to place him or her in protective custody. □

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him see his infant child.

The agency apparently viewed the father's report as part of a custody dispute rather than as a sign of serious danger to the infant. It decided that the situation should be handled by the father's divorce attorney. Ten days later, the infant was killed by either the mother or the boyfriend. The father sued the agency, alleging that it breached its statutory duty to accept and investigate reports. The jury awarded \$300,000 in compensatory damages and \$700,000 in punitive damages. The punitive damages award was vacated by the trial judge, but the compensatory damages were affirmed on appeal.

*Inadequate investigation.* Accepting a report only fulfills the first stage of a child protective agency's legal responsibility. The report must be investigated in accordance with state law and agency regulations. Cases of outright failure to investigate are rare. More common are claims that the agency, having been given reason to suspect that a child is in danger, failed to conduct a sufficiently extensive or careful investigation.<sup>7</sup>

In a 1991 South Carolina case, *Jensen v. Anderson County Department of Social Services*, a school principal reported that a student showed signs of abuse.<sup>8</sup> An agency worker interviewed the child at school. The child had bruises on his face and said that his "father" had hit him. Over the next seven weeks, the worker made repeated but unsuccessful attempts to contact the child's mother, trying to visit the family seven times at various addresses. Numerous letters and phone calls went unanswered.

After 60 days, the department classified the case as "unfounded" and officially closed the investigation. Within a month, the mother's boyfriend had beaten to death another child living in the home. A wrongful death action was brought against the child welfare agency, the worker, and her supervisor, alleging that the defendants had negligently performed their statutory duties to investigate and intervene in child abuse cases. On appeal, the state supreme court held that the statutory requirement that caseworkers conduct "appropriate and thorough" investigations created a duty to investigate and intervene once the caseworker had seen the child's injuries.

*Failure to place a child in protective custody.* After investigating a child abuse allegation, caseworkers must decide whether the child is in such immediate danger that protective custody is needed. The

consequences of a wrong decision—either in favor of substitute care when it is not needed or against substitute care when it is—make this the hardest decision that agency workers face.

In *Turner v. District of Columbia*, a mother, who had left the family home because she was being physically abused by the father, complained to a child protective agency that the father was not properly caring for their two children, an infant and a toddler, and was abusing them as well.<sup>9</sup> She said that the father was on probation for a heroin offense, was still using drugs, had no source of income, and was facing possible eviction. The worker assigned to the case went to the family's apartment twice, but left when he found the outer door locked. He failed to get a key from the mother or to call the apartment manager's phone number, which the mother had supplied.

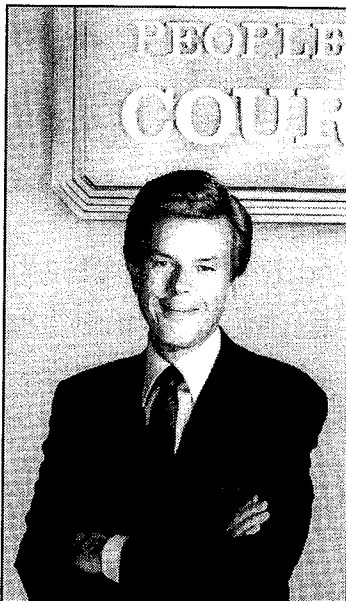
The mother continued to call the agency. A week later, the caseworker knocked on the door to the father's apartment but received no response. Although he heard a child crying inside, he left without further investigation.

The worker took no further action. A week later, the infant was found dead, and the toddler was found in a soiled and dirty apartment that had no food in it. Denying a motion to dismiss a complaint against the District of Columbia for negligence involving its failure to remove children from their abusive father, the District of Columbia Court of Appeals held that local laws governing investigations of child abuse by the child protective agency created a special relationship between the agency and abused children. That relationship, the court said, could be the basis of a claim for failing to remove children from dangerous parents.

Several situations suggest the need to place a child in protective custody (see page 32). The presence of any one of these factors clearly shows that the child faces an imminent threat of serious injury. The child should be placed in protective custody quickly, unless the child's safety can be ensured by some other means, and kept there until the home situation is safe or parental rights are permanently terminated.

#### Liability for Violating Parental Rights

Laws against child abuse and child neglect recognize that parental rights are not absolute and that society should intervene to protect endangered children.



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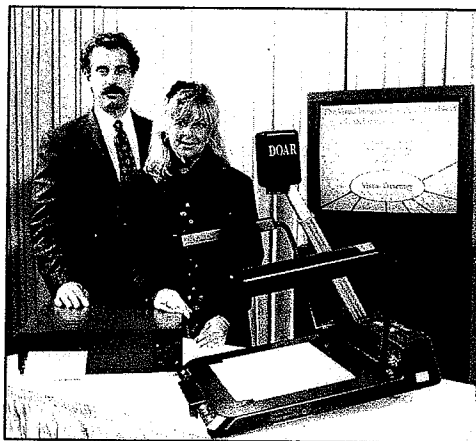
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But the need to protect does not justify violating parental rights. Several theories of liability have evolved from cases in which agency workers have been overzealous in their protective efforts.

*Unnecessarily intrusive investigations.* No reported case suggests that caseworkers should not aggressively investigate reports of suspected child maltreatment. However, caseworkers cannot use the need to investigate as an excuse to harass, threaten, or humiliate parents—or children.

Most lawsuits that concern unnecessarily intrusive investigations involve caseworker examinations of children. For example, in *Beck v. County of Westchester*, an anonymous caller reported seeing some parents at the beach using a belt to whip their three daughters.<sup>10</sup> The caller left an address and a family name. An initial investigation determined that the named family did not reside at that address and that the family that did live there had a daughter and a son, not three daughters.

Nevertheless, the caseworker went to the address. No one was home, so she went to the children's school with two police officers. There, the caseworker interrogated the two children about inti-

mate family matters. Even though both children, ages 13 and 16, denied that they had ever been mistreated by their parents, the worker insisted that they undress down to their underwear so that she could see if there was evidence of abuse. She also looked inside their underwear. The Becks sued Westchester

[REDACTED]

*Laws against child abuse and child neglect recognize that parental rights are not absolute.*

[REDACTED]

County, alleging that their constitutional rights had been violated. The trial court refused the defendants' motion for summary judgment, and the parties eventually settled. The parents received \$187,500.

Even if there is reasonable cause to suspect maltreatment, the examination must not be unnecessarily intimate or humiliating to the child.<sup>11</sup> As a general rule, intimate examinations should be performed by medical personnel.<sup>12</sup> And all examinations should be done in pri-

vate (with only necessary people present) and with great concern for the child's sensibilities. Except for very young children, the examination should be performed by a caseworker of the same sex.

*Slandorous investigation.* To determine whether a child is in danger, caseworkers must inquire into the most intimate of personal and family matters. It is often necessary to question parents and their children and friends, relatives, neighbors, schoolteachers, day care personnel, and others who know the family.

Because these interviews are an inherent aspect of protective investigations, a worker must overstep the bounds of necessity to be liable for slanderous investigation. In *Hale v. City of Virginia Beach*, a father alleged that caseworkers "maliciously and falsely addressed remarks to third persons, the substance of which were that the plaintiff was an alcoholic; that the plaintiff was mentally unstable and was a very sick man; that he was guilty of child molestation; that they were going to take his child or children away from him; and that he would be prosecuted criminally."<sup>13</sup> The case was settled when the city, although denying that the workers acted inappropriately, agreed to pay the parents \$4,000.

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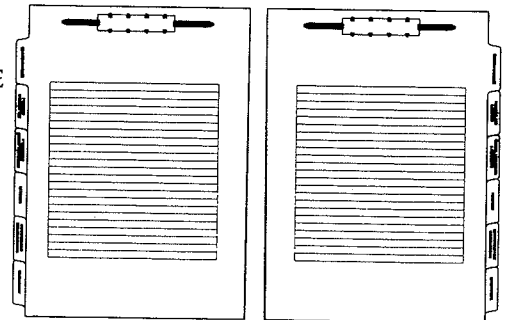
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*Wrongful removal of children.* Most maltreated children need not be removed from parental custody—especially not on an emergency basis. Less than 15 percent of all substantiated reports result in a child's placement in foster care.<sup>14</sup>

Most courts have concluded that a decision to remove is akin to a decision to arrest, not prosecute, so caseworkers have only qualified immunity from liability for a wrong decision.<sup>15</sup> Clearly, actual malice or bad faith can be the basis of liability, but these claims are rare. More common is a claim that a child was removed without adherence to formal statutory requirements or before an adequate investigation determined removal was necessary.<sup>16</sup>

Hard as it is to believe, children are sometimes removed from their homes before any investigation has been conducted. For example, in *Fanning v. Montgomery County Children and Youth Services*, a child welfare agency received a report of possible child abuse from a minister.<sup>17</sup> Responding to the report, a caseworker picked up a 10-year-old child at school and kept the child in custody until a hearing could take place the next day. The child was then placed in foster care before eventually being returned to the parents.

The parents filed a civil rights action against the worker and the agency, alleging that their substantive due process rights to familial integrity had been violated. The court allowed the case to proceed because of the allegation that the worker never conducted an investigation before removing the child.

Even if a removal is valid, the failure to obey a statute mandating court approval of a child's continued placement in foster care results in potential liability unless the parents have consented to the placement.<sup>18</sup>

*Malicious prosecution.* A lawsuit for malicious prosecution is unlikely unless there are sufficient allegations that an agency's decision to file a court action was made recklessly or in bad faith. Moreover, caseworkers are often granted absolute immunity for these decisions because they are considered part of the workers' prosecutorial function. But some courts have treated caseworkers more like complaining witnesses than prosecutors, and in these cases the workers have been found to not have absolute immunity.<sup>19</sup>

Under what conditions would it be possible to prove that a decision to prosecute was made recklessly or in bad faith?

The allegations in the case of *Doe v. County of Suffolk* have an all-too-familiar ring to them.<sup>20</sup>

A mother sued the worker and the agency, alleging that a caseworker had filed a petition against both parents after the mother called and told the police that her husband had sexually abused their child. Apparently, there was no reason to suspect the mother had been abusive or neglectful, and the county attorney withdrew the petition against her before the trial. The court allowed the mother's lawsuit to continue.

*Disclosure of confidential information.* Child protective agency records contain

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*As a general rule, intimate examinations should be performed by medical personnel.*

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information about the most private aspects of personal and family life. Whether or not the information is true, its improper disclosure can violate the sensibilities of all those involved and can be deeply stigmatizing. All states have laws making these records confidential, and most have enacted specific provisions making unauthorized disclosures of information a crime. Some states also impose civil liability for unauthorized disclosures.

Not many lawsuits seem to be based on improper disclosure of confidential information. *Martin v. Weld* is an example of one that is.<sup>21</sup> A father accused of sexually abusing his 13-year-old daughter "alleged that defendants intentionally leaked information about the case to the county commissioners, with whom [the father], as a member of the county council, regularly met, and also to the press. . . ."<sup>22</sup> The court held that this was an actionable claim. At trial, however, the parents were unable to prove their claim. In fact, they were ultimately required to pay attorneys' fees and court costs.

### Disheartening Statistics

Despite a major setback in the *DeShaney* case, the case law supporting liability claims for inadequate or incompetent child protective services has strengthened in recent decades. Sadly, the increase in successful lawsuits also reflects the continuing inadequacies of the child protective system. This should dishearten us all. □

ective system. This should dishearten us all. □

### Notes

- 1 See generally DOUGLAS J. BESHAROV, *RECOGNIZING CHILD ABUSE: A GUIDE FOR THE CONCERNED* (1990).
- 2 Jose Alfaro, *What Can We Learn from Child Abuse Fatalities: A Synthesis of Nine Studies*, in DOUGLAS J. BESHAROV, *PROTECTING CHILDREN FROM ABUSE AND NEGLECT* 219 (1988).
- 3 489 U.S. 189 (1989).
- 4 *Id.* at 196.
- 5 *Id.* at 194-97, n.9.
- 6 675 P.2d 1347 (Ariz. Ct. App. 1983). See also 24 ATLA L. REP. 76 (1981).
- 7 See, e.g., *Nelson v. Missouri Div. of Family Servs.*, 706 F.2d 276 (8th Cir. 1983); *Brasel v. Children's Servs. Div.*, 642 P.2d 696 (Or. Ct. App. 1982).
- 8 403 S.E.2d 615 (S.C. 1991). Earlier litigation between the same parties resulted in the dismissal of the plaintiff's claim of violation of §1983 of the Federal Civil Rights Act. *Jensen v. Conrad*, 747 F.2d 185, 188 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).
- 9 32 A.2d 662 (D.C. 1987).
- 10 No. 89CIV1131 (S.D.N.Y. 1991); see also William Glaberson, *Family Nightmare: A False Report of Child Abuse*, N.Y. TIMES, Dec. 4, 1990, at B1.
- 11 Cf. *Darryl H. v. Coler*, 585 F. Supp. 383 (N.D. Ill. 1984) (rejecting a family's claim of constitutional violations of the right to privacy and the Fourth Amendment by a state agency's investigation of child abuse).
- 12 See, e.g., ILLINOIS DEPT' OF CHILDREN AND FAMILY SERVS., *CHILD ABUSE AND NEGLECT INVESTIGATION DECISIONS HANDBOOK* 66 (1982).
- 13 Complaint at para. 9, No. SO-151-N (E.D. Va. 1980).
- 14 See generally AMERICAN HUMANE ASSOC., *TRENDS IN CHILD ABUSE AND NEGLECT: A PERSPECTIVE* 41 (1984).
- 15 See generally *Czikall v. Malloy*, 649 F. Supp. 1212 (D. Colo. 1986); *McCrum v. Elkhart County Dep't of Pub. Welfare*, 806 F. Supp. 203 (N.D. Ind. 1992).
- 16 See, e.g., *McGhee v. Moyer*, 60 F.R.D. 578, 584 (W.D. Va. 1973).
- 17 702 F. Supp. 1184 (E.D. Pa. 1988).
- 18 *Weller v. Department of Social Servs. for Baltimore*, 901 F.2d 387 (4th Cir. 1990). See also *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977); *Perez v. Sugarman*, 499 F.2d 761, 764 n.9 (2d Cir. 1974) (an earlier decision in the same litigation).
- 19 See, e.g., *Doc v. Hennepin County*, No. 483 733, 1984 WL 29 (D. Minn. June 27, 1984); *Roman v. Appleby*, 558 F. Supp. 449 (E.D. Pa. 1983); *Dick v. Watonwan County*, 562 F. Supp. 1083 (D. Minn. 1983), *rev'd on other grounds*, 738 F.2d 939 (8th Cir. 1984); *Anthony v. White*, 376 F. Supp. 567, 572 (D. Del. 1974); cf. *Madison v. Gerstein*, 440 F.2d 338 (5th Cir. 1971) (holding that a sheriff is not cloaked with prosecutorial immunity); *Angel v. Kasson*, 581 F. Supp. 170 (N.D.N.Y. 1983) (noting that police officers are not liable for malicious prosecution if they are acting in good faith).
- 20 *Doe v. County of Suffolk*, 494 F. Supp. 179, 182 (E.D.N.Y. 1980).
- 21 598 P.2d 532, 535 (Colo. Ct. App. 1979).
- 22 *Id.*