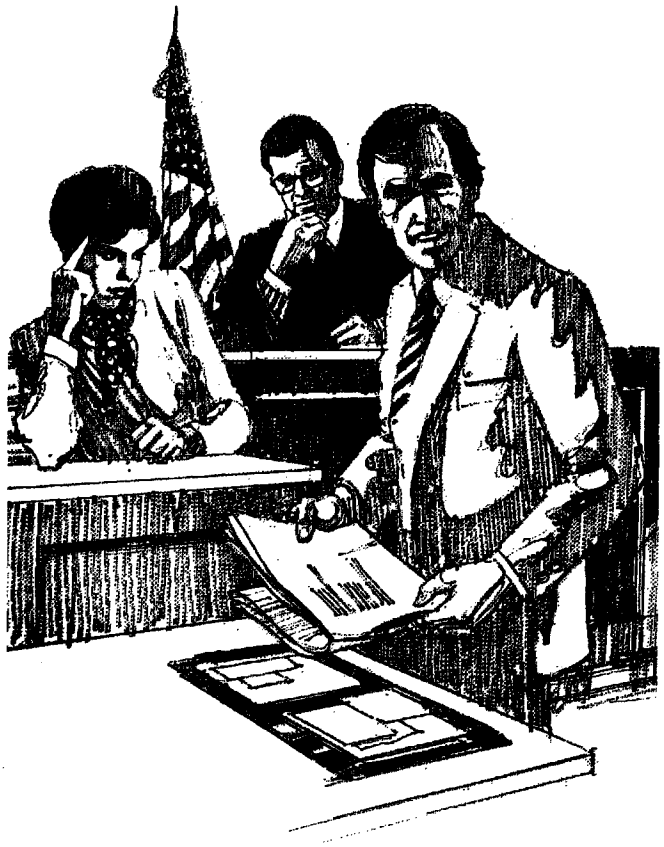
Child Welfare Liability: The Need for Immunity Legislation



by Douglas J. Besharov

You are a child protection caseworker, and you closely follow agency policy on all cases. After completing an investigation of a child reported as abused, your assessment is that the child will remain at home and service will be provided to the family. While the case is open, the child dies of injuries allegedly inflicted by a family member. You are called to testify about the case before a grand jury. The next day you are arrested and charged with criminal malfeasance of your public duties.

Potential criminal and civil liability is the newest burden placed on child welfare workers and their agencies. Across the country, workers are being given administrative reprimands, fired, downgraded, or reassigned for allegedly mishandling their cases. Hundreds of workers (and their agencies) have been charged with professional malpractice or violation of their client's rights. Clients' claims for monetary damages range anywhere from a few thousand to millions of dollars.

Criminal prosecutions, though still infrequent, are also increasing. At least a dozen social workers in various communities have been indicted for official malfeasance or negligent homicide. Many others are being brought before investigating grand juries. For example, although it decided not to indict them, one New York Grand Jury issued a report finding a group of child protective workers guilty of "neglect or nonfeasance in public office."

The cases against child welfare workers and their agencies fall within three broad categories:

1. *Inadequately protecting a child,* including liability for failing to accept a report for investigation, failing to investigate adequately, failing to place a child in protective custody, returning a child to dangerous parents, and failing to provide adequate case monitoring;

2. *Violating parental rights,* including liability for unnecessarily intrusive investigations, defamation of parents, wrongful removal (or withholding) of children, malicious prosecution, and the disclosure of confidential information;

3. *Inadequate foster care services,* including liability for dangerous foster parents, failing to meet the child's need for special care, failing to treat parents, and failing to arrange for the child's adoption.

In an article of this length, it is not possible to provide more than this kind of generalized listing. The book from which this article is

adapted, *The Vulnerable Social Worker,* contains a full discussion of the types of cases that can be and have been, brought. This article describes the need for specific legislation to provide "good faith" immunity for child welfare workers and their agencies.

Unfair Blame

Few would deny that social workers should be held accountable for careless or slothful conduct. Everyone should be deeply troubled, for example, when a child dies because a worker overlooked or ignored signals of great — and obvious — danger. Civil and criminal liability might well deter the most egregious forms of professional malpractice. But for the fear of liability to deter wrongful conduct, liability must have some reasonable relationship to culpability. The culpable must be held accountable, and the faultless protected. In the area of services for children and families, neither is happening. As a result, the deterrent impact of liability is, at best, deflected and, at worst, misdirected toward defensive social work.

Some lawsuits involve shockingly poor casework practices and no one should attempt to defend the reckless and insensitive conduct of some social workers and their agencies. But this sad truth should not obscure the larger reality. In most of the cases, the workers were blamed for situations simply beyond their control, for performing their professional and official responsibilities under the most difficult conditions. And, in some cases, the workers were being scapegoated for failures at higher levels of government.

First, child maltreatment is inherently difficult to detect or predict. In many cases, no one is at fault. No one, not even the most dedicated and competent caseworker, could have prevented the child's subsequent maltreatment. Child protective decisions must often be based on incomplete and misleading information as important facts are undiscovered, forgotten, concealed or distorted. Child maltreatment usually occurs in the privacy of the home. Unless the child is old enough (and not too frightened) to speak out, or unless a family member steps forward, it is often impossible to know what really happened.

In addition, some home situations deteriorate sharply and without warning. It is easy to see the need for protective intervention if the child has already suffered serious injury. Often, however, a decision must be made before serious injury has been inflicted. Under such circumstances, assessing the degree of danger to a child requires workers to predict the parents' future conduct. The worker must predict that the parent will engage in abusive or neglectful behavior and that the child will suffer serious injury as a result. The unvarnished truth is that there is no way of predicting, with any degree of certainty, whether a particular parent will become abusive or neglectful. Even setting aside the limitations imposed by large caseloads and poorly trained staff, such sophisticated psychological predictions are simply beyond our reach.

Moreover, sometimes no decision is clearly correct. "There will always be borderline cases . . ."[1] . . ." As long as child protective decisions must be made by human beings, the chances for human error will always be present. Thus, social workers and agencies cannot guarantee the safety of all children known to them. Even if workers placed into protective custody all children who appeared to be in possible danger — a degree of overintervention that few would support — some children would continue to suffer further injury and even death, because the danger they face would go undetected or unpredicted.

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Second, many child protective tragedies are

the inevitable result of inadequate funding. There is not enough money to attract the most qualified workers; preservice and inservice training is largely nonexistent or superficial; the size of investigative staffs does not keep pace with the rapid and continuing increase in reported cases; and there is a chronic shortage of the mental health and social services needed to treat both parents and children.

With more cases than they can handle, poorly trained caseworkers do not have enough time to give individual cases the attention required. In the rush to clear cases, many key facts go undiscovered as workers are forced to perform abbreviated investigations. Moreover, protective agencies are rarely able to monitor dangerous home situations with sufficient intensity and duration to ensure a child's safety. The average family under home supervision receives about five visits over a six-month period, after which the case is closed or forgotten in the press of other business.[2]

Blaming social workers for conditions beyond their control is simply unfair. In child protective work, most workers "are just government employees doing a difficult, often unpleasant job, and because they deal with volatile, unpredictable family situations, injuries are sometimes unavoidable."[3] Unjustified criticism of social workers is also deeply unfair to the children and families in the child protective system because it leads to defensive social work.

The Costs of "Winning"

Even when child welfare workers win in court, they lose. Legal vindication comes at a high price. Newspapers carry stories about the suit (usually focusing on the untested allegations), about the pretrial maneuvering, and about the trial testimony. Workers are often suspended, placed on administrative leave, or transferred, pending resolution of the case. A trial — and all that goes with it — is confusing, stressful, and time-consuming.

Whether or not a social worker is ultimately found liable, the time spent in preparation of pleadings, depositions, interrogatories, briefs, and courtroom testimony can be both financially and emotionally taxing. . .[T]ime lost can never be regained.[4]

Legal fees have to be paid, whether one wins or loses. Lawyers' bills can range from $5,000 (when the case is dismissed quickly) to over

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$50,000 (when a trial and appeal are necessary). In one El Paso criminal prosecution, for example, before the charges were dropped, the indicted child protective workers incurred legal fees of $15,000 — for which they were solely responsible. Rarely are unsuccessful plaintiffs required to reimburse the innocent defendant for the costs, although the worker's agency or an insurance policy may do so. And, for long after, friends, colleagues, and clients remember that the social worker's conduct, judgment, and ability were challenged in court.

The best way to protect social workers from the high costs of unwarranted litigation would be to reform the entire tort system, because many other professions also face problems similar to those plaguing social work. Real reform would mean a comprehensive reformulation of the rules concerning attorneys' fees, standards of liability, court procedures, evidence, and so forth. However, such extensive changes are, for the present, not realistically contemplated. The complexity of the issues and strong objection of entrenched interests require a much more intensive and broadly based effort than has heretofore been made.

Defensive Social Work

The harmful effects of unfairly blaming social workers go far beyond the individuals

blamed. These cases are well known in the field. They — and the media coverage that surrounds them — have convinced social workers that the imposition of liability is a haphazard and unpredictable lottery having little to do with individual culpability. Ordinarily, the deterrent impact of civil and criminal liability might improve child protective practices. In the present atmosphere, however, with workers and agencies being unfairly blamed, the prospect of such liability worsens practices, because it causes defensive social work.

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The first manifestation of defensive social work is overintervention. Workers feel that they will be blamed if there was any reason, however minor, for thinking that the child was in danger. Hence, they are under great pressure to take no chances, and to intervene whenever they might be criticized for not doing so. The dynamic is simple enough. Negative media publicity and a lawsuit are always possible if the child is subsequently killed or injured. But there will be no critical publicity if it turns out that intervention was unneeded, and much less chance of a lawsuit. Joanne Selinske, formerly director of the American Public Welfare Association's child abuse project, characterized this approach as the " 'better safe than sorry' attitude that permeates the child protection system."[5]

A fair analogy to this process is the defensive medicine practiced by many physicians these days. The ease with which former patients seem to be able to win large cash judgments makes most physicians fearful of malpractice lawsuits. To minimize the possibility of a subsequent lawsuit, many physicians routinely order more medical procedures, x-rays, and other tests than are reasonably needed.

As in the case of defensive medicine, no one knows exactly how much defensive social work goes on. There is no denying, however, that it affects all aspects of child protective decision making. Many of the great number of unfounded reports now flooding the system, for example, reflect the "better safe than sorry" syndrome. Educational materials that emphasize liability for failure to report, as well as immunity for incorrect reporting, foster this process.

Removal decisions are also distorted by liability concerns. Most observers would agree with Yale Law School Professor Peter Schuck that: "Social workers may more quickly — but prematurely — remove children from troubled families rather than risk being sued on behalf of an abused child."[6] Schultz found in his survey of child protective workers at least one worker who "tries to get state custody of all suspected abused children just to protect herself from liability."[7] In another state, a program director described what happened after he was indicted for "allowing" a child to be killed:

Upon learning of the indictment, caseworkers, and their supervisors became aware of their own vulnerability. As a result, paperwork increased to account for everyone's actions and for a while more children were removed from their homes. Supervisors told me that these removals seemed unnecessary but that caseworkers were afraid.[8]

"Good Faith" Immunity

Nevertheless, for child welfare workers, protection is possible through more modest reform. They should be given immunity for their good faith efforts to serve children and families. The *Restatement of Torts* describes good faith immunity as meaning that "the officer is not liable if he made his determination and took the action that harmed the other party. . .in an honest effort to do what he thought the exigencies before him required."[9]

Reflecting the need to protect public officials who must exercise their best judgment in performing their duties, state and federal law grants public officials good faith immunity for their "discretionary" actions.[10] Some court decisions go further and grant public officials absolute immunity.[11] But these cases are decidedly in the minority, and they seem to go too far. Absolute immunity precludes liability even when the official's misconduct results from actual malice or a reckless disregard of legal requirements. As previously noted, there are times when civil and even criminal liability may be justified.

For either good faith or absolute immunity to be granted, the official's act must have been "discretionary." All other acts are "ministerial," for which there is no immunity. A description of the difference between the two was given by the New York Court of Appeals: "Discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result."[12]

If the existence of immunity were solely determined by applying such word formulations, all child welfare workers would be protected, because no one could reasonably disagree with the description of child protective work provided by James Cameron, executive director of the New York State Federation on Child Abuse and Neglect:

> "Protective workers are called upon to make extremely difficult decisions which can have an enormous impact in often unpredictable ways upon the welfare of children and the continued viability of a family unit. Field workers must examine their best judgment in each case."[13]

Most courts, however, refuse to apply the discretionary-ministerial dichotomy mechanically, because they realize that if they did so, it "could be invoked to establish immunity from liability for every act or omission of public employees . . ."[14] In most jurisdictions, deciding whether an act is "discretionary" or "ministerial" is, as the *Restatement of Torts* explains, "a legal conclusion whose purport is only somewhat incidentally related to the definitions of the two words composing it. Instead of looking at a dictionary, therefore, the court must weigh numerous factors and make a measured decision . . . "[15] The *Restatement* goes on to list the factors that are considered:

1. The nature and importance of the function that the officer is performing . . .
2. The extent to which passing judgment on the exercise of discretion by the officer will amount necessarily to passing judgment by the court on the conduct of a coordinate branch of government. . .
3. The extent to which the imposition of liability would impair the free exercise of his discretion by the officer . . .
4. The extent to which the ultimate financial responsibility will fall on the officer. . .
5. The likelihood that harm will result to members of the public if the action is taken. . .
6. The nature and seriousness of the type of harm that may be produced. . .
7. The availability to the injured party of other remedies and other forms of relief. . .[16]

Judicial Decision Making

Whatever their theoretical validity, these factors are inherently subjective and invite idiosyncratic application. As a result, for all forms of official conduct, judicial decision making is confused and unpredictable.[17] In regard to various aspects of child welfare work some courts have held that decision making is "discretionary"; others have concluded that it is "ministerial." People familiar with child welfare services but unfamiliar with how judges reason, will be surprised to learn that some courts have found no discretion involved in the decision to accept a report for investigation, the decision to initiate court action, or the decision to place a child with particular foster parents.

To be fair, certain child welfare decisions are, in fact, "ministerial." No real discretion is needed, for example, to decide that an appar-

ently abandoned infant should be placed in protective custody. In addition, courts are sometimes misled by the overambitious mandates of statutes, agency policies, and professional standards. Mandates to "investigate immediately," "protect endangered children," and "supervise foster care" are taken as literal absolutes, rather than as general descriptions of programmatic responsibility. Moreover, the truth is that many of these court decisions are outcome-oriented. That is, the judge, believing that there should be liability, decides that the activity was "ministerial." Unfortunately, certain extreme cases get translated into a general rule of no good faith immunity. Thus, to create liability for placing a child with foster parents known to be dangerous, courts have labeled the placement decision itself "ministerial," rather than more accurately holding that the particular decision was unreasonably careless.

Case-by-case granting of immunity is supposed to lead to decisions more precisely tailored to the situations before the court. But such fine tuning is really not possible. As Schuck has convincingly shown, court rulings are usually made "on the basis of distinctions that bear little relationship to protecting vigorous decisionmaking."[18] Moreover, because these distinctions do not lead to predictable results, no one knows which adjectives will be granted immunity and which will not. This increases litigation against workers as lawyers test the outer bounds of liability. This constant testing tends to wear down judicial reluctance to impose liability. Even when such suits are ultimately unsuccessful, they increase workers' fears about their legal vulnerability. These are legitimate fears because, as described above, "defending any suit, even those that predictably will fail, is costly and subject to outcome-uncertainty."[19]

Immunity Statutes

Dissatisfaction with the case-by-case approach has already led nine states, Puerto Rico, and the Virgin Islands to pass legislation granting child protective workers blanket good faith immunity for all their official actions. These states include: Florida, Illinois, Minnesota, Missouri, New York, North Carolina, North Dakota, South Dakota, and Wyoming. All states should do the same.

Substantial precedent for overruling the judicial, case-by-case application of good faith immunity exists in other areas of the law. For example, there are laws giving good faith immunity to guardians ad litem who appear in child protective proceedings, to psychiatrists who institutionalize patients, and to public officers who release dangerous individuals from custody. Similar laws should be passed to protect all child welfare workers. The following statutory language is recommended:

> *All employees of the [insert name of public agency here] required or authorized by the laws of this state to perform child protective or child welfare functions shall, if acting in good faith, be immune from any civil or criminal liability that might otherwise result from the performance of their official duties.*

Not An Absolute Bar

Good faith immunity does not give child welfare workers *carte blanche* to act wrongfully. They are still subject to liability when they act in callous or reckless disregard of their official duties. Some courts also hold that the unreasonable failure to follow legal mandates is a form of bad faith. For claims under the federal Civil Rights Act, the U.S. Supreme Court has held that a claim of good faith is defeated if the defendant "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . ."[20]

Thus, good faith immunity does not prevent the filing of lawsuits. The plaintiff can always allege bad faith, so long as there is a sufficient basis for doing so. But good faith immunity does make groundless or unwarranted suits much less likely and much more easily dis-

missed at an early stage. The establishment of good faith immunity would, thus, be a major reform.

Judicial Action Also Necessary

State immunity legislation does not affect lawsuits under the federal Civil Rights Act or other federal statutes — major avenues of litigation against child welfare workers. Therefore, barring congressional action, which is unlikely, federal courts will continue to determine whether worker activities are "discretionary" on a case-by-case basis.[21] One can only hope that federal judges will become more aware of the realities of child welfare work and, hence, be more willing to grant workers good faith immunity, and that state court judges, in jurisdictions that do not adopt immunity legislation, will do the same.

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Footnotes

1 J. Giovannoni and R. Becerra, *Defining Child Abuse* (New York: Free Press, 1979), p. 260.
2 *See* U.S. General Accounting Office, *Increased Federal Efforts Needed to Better Identify, Treat and Prevent Child Abuse and Neglect* (Washington, D.C.: U.S. Government Printing Office, 1980), pp. 39-40.
3 R. Horowitz, "Improving the Legal Bases in Child Protection Work — Let the Worker Beware," in Holder and Hayes, ed., *Malpractice and Liability in Child Protective Services*, pp. 17, 24.
4 G. Sharwell, "Learn 'Em Good: The Threat of Malpractice," *Journal of Social Welfare* (Fall-Winter, 1979-1980), p. 46.
5 J. Selinske, "Protecting CPS Clients and Workers," *Public Welfare*, 41 (Summer 1983), p. 31.
6 P. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven: Yale University Press, 1983), p. 75.
7 L. Schultz, "Preface," *Malpractice and Liability in West Virginia's Child Protective Services: A Social Policy Analysis* (Morgantown: West Virginia University School of Social Work, 1981), Preface.
8 C. Gembinski, M. Casper, and E. Hutchinson, "Worker Liability: Who's Really Liable?" in C. Washburne, ed., *Looking Back, Looking Ahead: Selections from the Fifth National Conferences on Child Abuse and Neglect* — (Madison: University of Wisconsin School of Social Work, 1982), p. 118.
9 *Second Restatement of Torts* (Philadelphia: American Law Institute, 1979), p. 414.
10 *See Prosser and Keeton on Torts*, p. 1059 ff.
11 *See,* for example, *Whelehan v. County of Monroe,* 558 F. Supp. 1093 (W.D.N.Y. 1983); *Bauer v. Brown,* Civ. No. 82-0076-L (U.S. D.Ct. W.D. Vir., 30 August 1983); cf *Tango v. Tulevech,* 61 N.Y.2d 34, 471 N.Y.S.2d 73, 459 N.E.2d 182 (1983).
12 *Tango v. Tulevech*, 471 N.Y.S.2d 77.
13 Letter from J. Cameron to A. Campriello, 31 January 1985, p. 2.
14 *Elton v. County of Orange*, 3 Cal. App. 3d 1053, 84 Cal. 27, 29 (Ct. App. 1970).
15 American Law Institute, *Second Restatement of Torts*, p. 416.
16 *Ibid.*, pp. 416-417.
17 *See*, for example, L. Jaffe, "Suits Against Governments and Officers: Sovereign Immunity," *Harvard Law Review*, 77 (1963), pp. 1, 218.
18 Schuck, *Suing Government*, p. 89, *supra note 6.*
19 *"Suing Government," Book Review, Michigan Law Review,* 82 (1984), pp. 1036, 1037-1038.
20. *Harlow v. Fitzgerald,* 457 U.S. 800, 815 (1982), quoting *Wood v. Strickland,* 420 U.S. 308, 322 (1975). Emphasis added.
21. *See,* for example, *Whelehan v. County of Monroe, supra note* 11.