

# Malpractice in Child Placement: Civil Liability for Inadequate Foster Care Services

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*The author examines cases in which agencies and workers were held liable for malpractice, as well as the bases for the liability. Several cases specifically concern permanency planning issues.*

Civil liability for professional malpractice has become a major concern of child welfare workers and their agencies. For example, the 1982 Annual Meeting of the American Humane Association focused its agenda on caseworker liability. Also, the National Association of Social Workers has formed a special ad hoc group on caseworker liability, started publishing materials on the subject, and encouraged its members to take out insurance to protect themselves from lawsuits. And, finally, more articles on liability are being published—a sure sign of interest and concern [1].

Most attention, however, has focused on the civil (and criminal) liability of

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child protective workers: (1) for inadequately protecting a child or (2) for violating parental rights [2]. This article draws attention to an area of equally serious liability: civil liability for inadequate foster care services.

### **The Basis of Liability**

At any one time, over 500,000 children are in foster care [3]. This is a sharp increase from 1960, when about 100,000 children were placed outside their homes [4]. Many children must be placed in foster care to protect them from serious injury. And many children benefit from foster care [5]. But foster care has well-known hazards. Some children are actually abused or neglected by their foster parents. Others are placed in homes unable to meet their needs for special physical or emotional care. And many, perhaps as many as a quarter of the children in foster care, are lost in the limbo between removal from parental custody and a permanent, or at least long-term, plan for their futures.

The liability of child welfare agencies and individual workers for these problems is grounded on general state tort law rules as well as a number of federal statutes. Courts usually hold that, by assuming custody of a child—either pursuant to a court order or with the parents' consent—and by making decisions about the child's care, the agency and the caseworker accept a certain degree of legal responsibility for the child's health, safety, and well-being [6].

The imposition of liability is not automatic, though. Courts require evidence that the agency or worker has violated a specific duty of care toward the child. Nevertheless, as the following discussion demonstrates, courts have found such violations (whether intentional or not) in a wide variety of circumstances.

### **Dangerous Foster Parents**

More often than we would like to admit, children are abused or neglected while in foster homes, shelters, or residential institutions [7]. Courts do not hesitate to hold agencies and workers liable when their negligence results in the abuse or neglect of children at the hands of their foster parents [8]. As far back as 1894, county directors of the poor were criminally prosecuted for binding a youthful pauper child to the service of a master whom they knew to be cruel, and for continuing the child in the placement, where he eventually died [9]. Thus, in *Vonner v. State* [10], the Louisiana Supreme Court allowed a lawsuit against a placing agency to proceed on the basis of allegations that—

3½ months before a 5-year-old was beaten to death by his foster mother—the child's two older siblings ran away from the foster home and told the agency that they and their siblings were being beaten. Instead of investigating these allegations, the agency placed the two children who had run away in a detention facility.

One federal court went so far as to elevate the foster child's right to a safe placement to a constitutional right:

A child who is in the custody of the state and placed in foster care has a constitutional right to at least humane custodial care. . . . It would be ludicrous if the state, through its agents, could perpetrate the same evil the [foster care] sought to prevent. [11]

For liability to attach, however, the agency (or the worker) must have been negligent in the selection of foster parents or in the supervision of the placement. That is, the child's abuse or neglect must have been the reasonably foreseeable consequence of conditions the agency knew about or should have known about.

To avoid liability, child welfare agencies must be extremely careful in selecting foster parents. For example, one New York court explained that

If, as has been asserted, the [county child welfare agency] knew of the incompetence of the foster parents or the indifferent discharge by them of their duties, [it] might be held liable for an ensuing injury to the child, dependent on the evidence at the trial. [12]

Child welfare agencies also must monitor the quality of care provided to children by their foster parents. Agencies have an affirmative obligation to supervise placements and remove children from unsuitable or dangerous environments [13]. Adequate supervision of placements requires periodic medical examinations of the children [14]. It also requires that the agency be aware of and responsive to reports or other indications of possible abuse in the foster home [15]. (In *Bradford v. Davis*, for example, the plaintiff, a foster child, received \$90,000 in settlement from the state of Oregon after alleging that the Children's Services Division negligently failed to supervise, screen, and monitor his placement. One of the allegations was that the department failed to investigate reports by neighbors that the child was being beaten [16].) Finally, courts often use the failure to follow written agency procedures for the supervision of placements as the basis of agency or worker liability [17].

### **Dangerous Children**

Agencies and workers also often are sued for the harm caused by the children

they have placed. For example, in *Snyder v. Mouser* [18], the foster mother sued to recover for the death of her husband, who was killed by a child placed in their home. The Supreme Court of Indiana allowed the suit to proceed because the agency failed to warn the foster parents of the child's known homicidal tendencies. Lawsuits involving less serious assaults of foster parents and others are relatively common [19]. There also are cases in which the foster child has damaged or destroyed the property of the foster parents or some other person—usually by setting fire to it [20].

The child need not be violent or misbehaving to pose an actionable danger to the foster parents. Thus, in *Vaugh v. North Carolina Department of Human Resources* [21], liability was imposed for the placement of a child in the home of a woman by an agency which knew that she intended to become pregnant, and also knew that the foster child suffered from a cytomegalovirus, a disease which was likely to cause birth defects. The foster mother sued because she was forced to have an abortion after contracting the virus.

As the foregoing cases suggest, for liability to attach, the agency or worker must have been negligent in the placement process. They must have known (or had sufficient reason to know) that the child posed a danger to the foster parents (or others) and yet have taken no action to protect or warn the foster parents.

### **Failure to Meet the Child's Needs for Special Care**

While in foster care, children are supposed to receive the treatment services that they may need to remedy the effects of past maltreatment or other special problems. Courts, however, seem to be reluctant to translate this basic need into a constitutional right. In *Sinhogar v. Parry*, for example, a New York appeals court distinguished the rights of foster children from those of juvenile delinquents and persons in need of supervision who, because they are deprived of their liberty, have a right to treatment. According to this decision, foster children "do not have a constitutional right to a particular kind of care from the state and what rights they do have are limited by the facilities and funds made available by the legislature" [22]. Similarly, a California court refused to allow a complaint that alleged an agency's mistaken—and negligent—diagnosis of a foster child's mental retardation, which resulted in the child's placement in classes for the mentally retarded [23].

One federal court decision suggests that there may be an alternate ground for liability, notwithstanding this hesitancy to recognize the foster child's "right to treatment." In *Patton v. Dumpson*, the court dismissed claims of liability under Section 1983 of the Federal Civil Rights Act. However, it

allowed claims to stand under Section 504 of the Federal Rehabilitation Act, which provides, in part:

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. [24]

The court explained that, under this provision, "the plaintiff, a handicapped child, is seeking to hold public and private agencies liable for damages for discrimination against him because of his handicap. The complaint alleges that, due to the plaintiff's physical and mental handicaps, agency employees denied him the benefit of educational services [while he was in foster care]" [25].

### **Failure to Arrange the Child's Adoption**

In theory, foster care is supposed to be a short-term remedy to protect children from harm while parents have time to respond to treatment or until the child can be freed for adoption. But the reality is far different. More than 50% of the children in foster care are in this "temporary" status for over 2 years; over 30% are away from their parents for over 6 years [26].

Some children cannot be returned to their parents, either because their parents do not want them or because their parents cannot care properly for them. The inability to identify such children and to move promptly to arrange for the child's adoption is a major reason why children remain in foster care [27]. Up to now, at least, courts have been unwilling to hold that children in foster care have a constitutional right to be adopted [28]. Hence, a claim under the Federal Civil Rights Act for failure to free a child for adoption is unlikely to succeed.

However, potential liability may arise if there is negligence (as defined by state law). In *Bradford v. Davis*, a 17-year-old child filed suit, claiming that "the agency had failed to take reasonable actions to find [him] an adoptive home" [29]. The child had been placed in foster care shortly before his fourth birthday, and his parents had signed an adoptive release form when he was 8. The Oregon court allowed the case to proceed to trial. Before the trial, the case was settled for \$90,000 [30].

In a similar situation, though, a California court dismissed the lawsuit. In *Smith v. Alameda County Social Services Agency*, another 17-year-old sought damages from a public child welfare agency for its failure to take reasonable

actions to bring about his adoption. This child had been in custody since shortly after his birth—at which time “his mother relinquished him to the custody of the agency for the purpose of adoption” [31]. The court held that no actionable neglect had been alleged because, among other things, the failure to arrange for the child’s adoption did not create a reasonable foreseeable harm. In a passage that many might find to be an incorrect description of foster care realities, the court states:

We may take it for granted that, other things being equal, adoption is a desirable goal and it is preferable to have a child reared by a single set of parents rather than a succession of foster parents. But it does not follow that a foster child will probably or necessarily suffer greater emotional or developmental or other damage than an adopted one. This is especially so where a child receives competent and stable foster care. (A claim of inadequate foster care would present different problems not embraced by this litigation.) [32]

*Joseph and Josephine A. v. New Mexico Department of Social Service* suggests that the absence of periodic case reviews and other administrative safeguards required by Titles IV and XX of the Federal Social Security Act may open another line of potential liability for failure to arrange for an adoption. The plaintiffs “alleged that the defendants have failed and refused to establish procedures to determine whether children should continue in foster care, whether the rights of the biological parents should be terminated or whether a child should be placed for adoption. It [was] also alleged that the Department [did] not even have an accurate count of the children in their custody” [33]. The court allowed the case to proceed to trial on the basis of a possible violation of the Federal Social Security Act.

### **Failure to Treat Parents**

The lack of intensive treatment for parents is widely cited as another reason why children remain in foster care [34]. However, a lawsuit for the failure to provide adequate treatment services is unlikely to succeed because the courts refuse to find that parents have a constitutional right to treatment [35].

In *Dixey v. Jewish Child Care Association*, for example, a mother sought money damages for the agency’s failure to provide treatment. She claimed that the “family was deprived unlawfully of its constitutional right to remain together as a result of the defendant’s failure to make diligent efforts to assist, develop and encourage a meaningful relationship between plaintiff and her child as required by New York law” [36]. Indeed, as quoted by the federal court, the family court judge had found that: “Although several caseworkers

were involved with this mother, there was a total lack of coordination in their efforts. Hardly the kind of diligent effort that the Agency is legally required to make in order to promote the parent-child relationship" [37]. Nevertheless, the federal court refused to allow the parents to proceed with their lawsuit. First, it found that "deliberate indifference to the plaintiffs' constitutional rights" had not been alleged [38]. Second, the court held that, even if agency actions contributed to the child's remaining in foster care, parents "do not have a constitutional right to rely on an agency to strengthen and reunite their families even if that agency has a statutory duty to do so" [39].

Such decisions probably reflect an underlying judicial recognition that funds for treatment services are limited, and that the major expansion of services needed to implement a parent's "right to treatment" is simply unattainable.

Judges, however, respond differently when they conclude that the failure to provide appropriate treatment services was caused by poor judgment or negligent administration rather than lack of funds. This seems to have been what happened in *Cameron v. Montgomery County Child Welfare Services* [40]. The foster child, as plaintiff, alleged that "the agency which placed the child in foster care pursuant to a [court's] dependency finding had: prevented parental visitation; failed to provide any services to the mother which were designed to facilitate the child's speedy return home; transferred the child to another foster home fifty miles from the mother's residence; and had not informed the child of his right to counsel or to a placement review" [41]. After the federal court refused to dismiss the suit, the case was settled when the defendants agreed to pay \$5,000.

Similarly, in *Burgos v. Department of Children and Family Services*, Spanish-speaking parents (with limited ability to speak English) claimed that their constitutional rights were violated by the agency's failure to have Spanish-speaking caseworkers and foster parents. It is hard to see how any treatment could be provided if agency personnel could not even communicate with their clients. After the federal court recognized the potential validity of the parents' claim, the case was settled out of court based on a "consent order setting forth specific timeframes in which the state was to review each Hispanic case to insure that each such child's and family's rights were protected" [42].

A recent class action in a Massachusetts federal court suggests another approach that future suits for money damages may follow. In *Lynch v. King*, a group of parents and foster parents alleged that the Massachusetts Department of Social Services had violated their right to family integrity in its administration of the state's child protective system. In what many predict could be an opinion of far-reaching consequences, the district court recently

issued a preliminary injunction in this case, requiring that in order for the Massachusetts Department of Social Services to receive federal funds under Title IV-E of the Social Security Act, it must, among other things:

- provide written case plans for children in care within 60 days of assuming responsibility for providing services or placing the child;
- provide a periodic review meeting for each child in care; and
- limit the social workers' caseloads so that they can "fulfill their obligations, . . . to provide case plans and periodic reviews" [43]

### Conclusion

Recent years have seen a substantial increase in the number of lawsuits seeking money damages from child welfare agencies and workers, who, it is claimed, were responsible for the serious harm suffered by a child, a birth parent, or a foster parent. There is strong reason to believe that this trend will continue, and that it will grow in momentum, as foster care services are subjected to greater public and professional scrutiny and, perhaps more importantly, as more parents and children are represented by independent legal counsel.

Many child welfare professionals understandably find the increased possibility of being sued deeply troubling. However, unless one is against all liability as a matter of principle, it is difficult to quarrel with the outcome of the cases described in this article. At least up until now, courts have imposed liability only when given evidence of clear worker negligence or gross agency mismanagement. ♦

### Notes

1. For a comprehensive listing of these articles, see Besharov, D. Criminal and Civil Liability in Child Welfare Work: The Growing Trend. Appendix B. American Bar Association, National Legal Resource Center on Child Advocacy and Protection, 1800 M Street, N.W., Washington, DC 20036, February 1983.
2. For an extensive discussion of these cases, see Besharov, *supra* n. 1.
3. U.S. Children's Bureau. National Study of Social Services to Children and Their Families. Washington, DC: DHEW, 1978, 109, 117, table 5-3.
4. U.S. Children's Bureau. Juvenile Court Statistics, 1966, 13.
5. See, e.g., Fanshel, D., and Shinn, E. Children in Foster Care. New York, NY: Columbia University Press, 1978.
6. See generally Annotation, "Government Tort Liability for Social Service Agency's

Negligence in Placement, or Supervision After Placement, of Children." American Law Reports 90, 3d (1979): 1314.

7. See, e.g., U.S. National Center on Child Abuse and Neglect. Preventing Child Abuse and Neglect: A Guide for Staff in Residential Institutions, Washington, DC, 1980; Child Abuse and Neglect in Residential Institutions: Selected Readings on Prevention, Investigation and Correction, Washington, DC: U.S. National Center on Child Abuse and Neglect, 1978.
8. See, e.g., Doe v. New York City Department of Social Services, 649 F. 2d 134 (2nd Cir. 1981); Brooks v. Richardson, 478 F. Supp. 793 (S.D.N.Y., 1979); National Bank of South Dakota v. Leir, 9 Family Law Reporter 2105 (S.D. Sup. Ct. 11/3/82); Andrews v. Courts of Ostego, 446 N.Y.S. 2d 169 (Sup. Ct. Ostego Co. 1982); Bradford v. Davis, 290 Or. 855, 629 P. 2d 1376 (1981); Bartels v. County of Westchester, 76 A.D. 2d 517, 429 N.Y.S. 2d 906 (2nd Dept. 1980); Koepf v. County of York, 198 Neb. 67, 251 N.W. 2d 866 (1977); Vonner v. State, 273 So. 2d 252 (La. 1973); Hanson v. Rowe, 18 Ariz. App. 131, 500 P 2d 916 (1972); Elton v. County of Orange, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970); Fox v. Mission of Immaculate Virgin for Protection of Homeless and Destitute Children, 202 Misc. 478, 119 N.Y.S. 2d 14 (Supp. Ct. Kings Co. 1952), aff'd 280 App. Div. 993, 117 N.Y.S. 2d 14 (Supp. Ct. Kings Co. 1952), aff'd 280 App. Div. 993, 117 N.Y.S. 14 (Supp. Ct. Kings Co. 1952), aff'd 280 App. Div. 993, 117 N.Y.S. 2d 477 (2nd Dept. 1952); cf. Parker v. St. Christopher's Home, 77 A.D. 2d 110 (2nd Dept. 1980); Pickett v. Washington County, 31 Or. App. 1263, 572 P. 2d 1070 (1977).
9. Commonwealth v. Coyle, 160 Pa. 36, 28 A. 634 (1894).
10. Supra n. 8.
11. Brooks v. Richardson, 478 F. Supp. 793, 795-796 (S.D.N.Y. 1979).
12. Bartels v. County of Westchester, supra n. 8, 429 N.Y.S. 2d at 909.
13. See, e.g., Gill v. Smith, 86 Misc. 2d 428, 382 N.Y.S. 2d 626 (Sup. Ct. N.Y. Co. 1976); In the Matter of Adoption of Doe, 444 P. 2d 800 (Wash. 1968).
14. See, e.g., Vonner v. State, supra n. 8.
15. See, e.g., Doe v. New York City Department of Social Services, supra n. 8.
16. For a review of this case see National Center for Youth Law, Youth Law News 2:6-5 (1982) and 15 *Clearinghouse Review* 288 (July 1981).
17. See, e.g., Doe v. New York City Department of Social Services, supra n. 8; Vonner v. State, supra n. 8; Elton v. County of Orange, supra n. 8.
18. 149 Ind. App. 334, 272 N.E. 2d 627 (1971).
19. See, e.g., Struck v. County of Ostego, 285 App. Div. 476, 138 N.Y.S. 2d 385 (1955).
20. See, e.g., Seavy v. State, 21 A.D. 2d 445, 250 N.Y.S. 2d 877, aff'd 17 N.Y. 2d 675, 269 N.Y.S. 2d 455, 216 N.E. 2d 613 (1964).
21. 296 N.C. 683, 252 S.E. 2d 792 (1979).
22. 74 A.D. 2d 204, 427 N.Y.S. 2d 216 (1st Dept. 1980), aff'd 53 N.Y. 2d 424, 442 N.Y.S. 2d 423, 425 N.E. 2 826 (1981), 427 N.Y.S. 2d at 223, citing, inter alia, Black v. Beame, 419 F. Supp. 599 (S.D.N.Y. 1976) and Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976).
23. Smith v. Alameda County Social Services Agency, 90 Cal. App. 3rd 929, 153 Cal. Rptr. 712, 718 (1st Dist. Ct. of App. 1979).
24. 29 U.S.C. Section 794.
25. Patton v. Dumpson, 498 F. Supp. 933, 936 (S.D.N.Y. 1980).
26. National Study of Social Services to Children and Their Families, supra n. 3, at p. 120.

27. See, e.g., Children's Defense Fund, Children Without Homes, Washington, DC: Children's Defense Fund, 1978.
28. See, e.g., *Child v. Beame*, 412 F. Supp. 593 (S.D.N.Y. 1976).
29. 290 Or. 855, 626 P. 2d 1376, 1378 (1981).
30. Walker. "Abused Foster Child Sues State Agency, Obtains Damages." *Youth Law News* 2, 5 (October 1982).
31. 90 Cal. App. 929, 153 Cal. Rptr. 712, 714 (1st Dist., Ct. of App. 1979).
32. 153 Cal. Rptr. at 716.
33. *Family Law Reporter* 8:2188, 2190, 2/2/82 (U.S. Dist. Ct., N.M. 1982).
34. See generally Children's Defense Fund, *supra* n. 27.
35. See, e.g., *Black v. Beame*, 419 F. Supp. 599 (S.D.N.Y. 1976). But see *McTeague v. Sosnowski*, 617 F. 2d 1016 (3rd Cir. 1980).
36. 522 F. Supp. 913, 915 (S.D.N.Y. 1981).
37. *Id.*
38. *Id.* at 915-916.
39. *Id.* at 916.
40. 471 F. Supp. 761 (E.D. Pa. 1979).
41. Horowitz and Davidson. "Improving the Legal Response of Child Protective Agencies." *Vermont Law Review* 6:381, 388 (1981).
42. 75 C3974 (N.D. Ill. 1976), described in: Leahy and Barnes. "Private Social Welfare Agencies: Legal Liabilities Facing Employees." *Public Welfare* (Fall 1977).
43. *Lynch v. King*, CA No. 78-2152-K (D. Mass., opinion of June 9, 1981). See also *Lipp v. Henry*, CA No. F. 80-245 (N.D. Indiana, opinion of May 28, 1981) (class of foster children is certified with respect to the claim that defendant child welfare agency failed to develop "written standards for the creation of individual service plans").

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