

# Child Welfare Liability:

## The Need for Immunity Legislation

by Douglas J. Besharov

**Y**ou 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.<sup>1</sup>

In all parts of the country, social workers are being given administrative reprimands and are being 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 clients' 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.

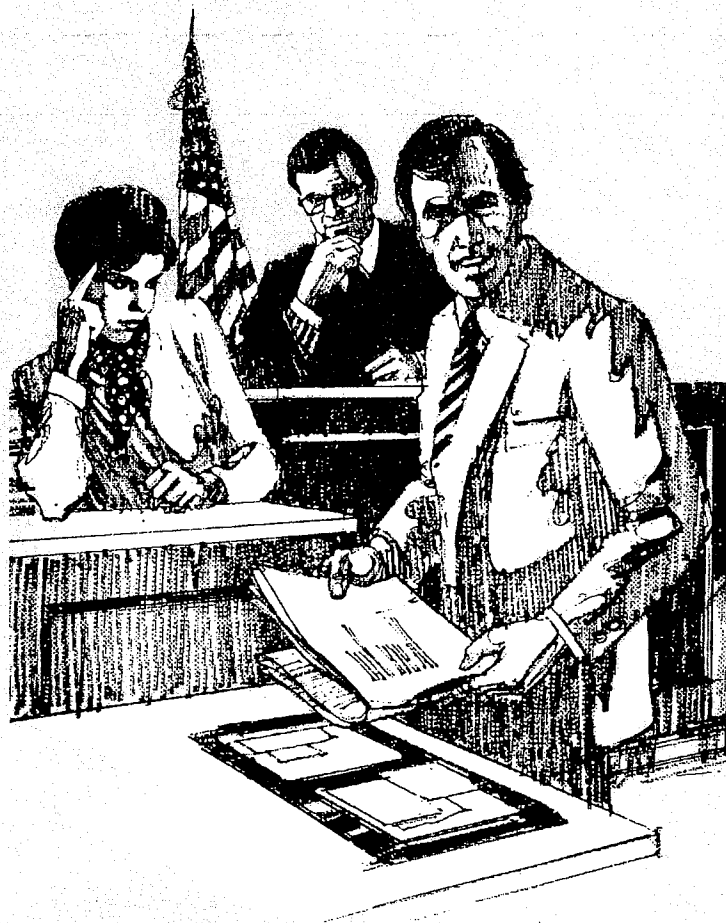
While it is not possible here to discuss all the types of cases that can be, and have been, brought against child welfare workers, they fall within three broad categories:

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

**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; and

**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.

With these and similar cases in mind, this article focuses on 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.

However, in most cases, the workers were being 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.

In a 1980 El Paso, Texas, case, for example, a child protective worker, the worker's supervisor and the agency director were charged with criminal negligence for failing to remove a child from the home. The agency had become involved with the family when a hospital reported that a 9-month-old child had severe scald burns on the lower back and buttocks. The agency decided that the child could remain home while the parents received counseling. Ten months later the child died of apparent asphyxiation. Although the medical examiner did not attribute the child's death to child abuse, the three were indicted. One month before their trial was to begin, the judge dismissed the indictment on the ground that no indictable offense had been charged.

**B**laming social workers for conditions beyond their control is simply unfair. In child protective work, most workers, R. Horowitz notes, "are just government em-

ployees doing a difficult, often unpleasant job, and because they deal with volatile, unpredictable family situations, injuries are sometimes unavoidable."<sup>2</sup> 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 go undiscovered or are 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 parent's 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.<sup>3</sup> 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.

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 6-month period, after which the case is closed or forgotten in the press of other business.<sup>4</sup>

## The Cost 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); 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.

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 \$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 victorious defendants reimbursed for these 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.

## Defensive Social Work

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

**D**efensive social work leads to 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."<sup>5</sup>

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, especially removal decisions. Most observers would agree with Yale Law School Professor Peter Schuck, who states: "Social workers may more quickly—but prematurely—remove children from troubled families rather than risk being sued on behalf of an abused child."<sup>6</sup> L. Schultz, a social work professor in West Virginia, 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."<sup>7</sup>

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."<sup>8</sup>

Ironically, this kind of defensive decision making is breeding further litigation as parents have begun to sue workers and their agencies for violating their civil rights. One Minnesota case was settled for \$15,000; a Virginia case for \$4,000. In several pending cases, much larger settlements—up to a million dollars—are in prospect.

## "Good Faith" Immunity

Protection for workers is possible through a simple reform: They should be given immunity for their good faith efforts to serve children and families. The *Second Restatement of Torts* (American Law Institute, 1979) 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."

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.<sup>9</sup> Some court decisions go further and grant public officials absolute immunity.<sup>10</sup> 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 judgement which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result."<sup>11</sup>

**I**f the existence of immunity were solely determined by applying such word formulations, all child welfare decisions would be protected. 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 . . . .”<sup>12</sup> 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 . . . .”

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 decision making.”<sup>13</sup> 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, and the decision to place a child with particular foster parents.

## 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.<sup>14</sup> All states should do the same. In fact, similar laws should be passed to protect all child welfare workers. The following statutory language for such a law is suggested:

### Recommended Immunity Legislation

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.

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

## Judicial Action

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. 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,<sup>15</sup> and that state court judges, in jurisdictions that do not adopt immunity legislation, will do the same. ■

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<sup>1</sup> W. Griffin and J. Kalinowski, “Approach to Liability Concerns: Standards for Practice,” *Family Life Developments*, April/May 1981.

<sup>2</sup> R. Horowitz, “Improving the Legal Bases in Child Protection Work—Let the Worker Beware,” in W. Holder and K. Hayes (Eds.), *Malpractice and Liability in Child Protective Services*, Longmont, Colo., Bookmakers Guild, 1984.

<sup>3</sup> J. Giovannoni and R. Becerra, *Defining Child Abuse*, New York, The Free Press, 1979.

<sup>4</sup> 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.

<sup>5</sup> J. Selinske, “Protecting CPS Clients and Workers,” *Public Welfare*, Summer 1983.

<sup>6</sup> P. Schuck, *Suing Government: Citizen Remedies for Official Wrongs*, New Haven, Conn., Yale University Press, 1982.

<sup>7</sup> L. Schultz, *Malpractice and Liability in West Virginia’s Child Protective Services: A Social Policy Analysis*, Morgantown, West Virginia University School of Social Work, 1981.

<sup>8</sup> 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 Conference on Child Abuse and Neglect*, Madison, University of Wisconsin School of Social Work, 1982.

<sup>9</sup> See *Prosser and Keeton on Torts*, 5th Ed., St. Paul, Minn., West Publishing Co., 1984.

<sup>10</sup> 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).

<sup>11</sup> *Tango v. Tulevech*, op. cit.

<sup>12</sup> *Elton v. County of Orange*, 3 Cal. App. 3d 1053, 84 Cal. 27, 29 (Ct. App. 1970).

<sup>13</sup> Schuck, op. cit.

<sup>14</sup> The nine states are Florida, Illinois, Minnesota, Missouri, New York, North Carolina, North Dakota, South Dakota and Wyoming.

Absolute immunity, however, is too strong a remedy. It precludes liability even when the official’s misconduct results from actual malice or a reckless disregard of legal requirements. As many cases sadly demonstrate, there are times when civil and even criminal liability may be justified.

<sup>15</sup> See, for example, *Whelehan v. County of Monroe*, op. cit.