

# **LEGAL ASPECTS**

**of Protective  
Services for  
Abused and  
Neglected  
Children**



# **The Legal Aspects Of Protective Services For Abused And Neglected Children**

## **A Manual**

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## FOREWORD

Child abuse and neglect is a growing problem in this country—one that is of deep concern to local communities, to State legislatures and State agencies, and to the Federal Government.

The Congress showed its concern for abused and neglected children with the passage on January 31, 1975, of the Child Abuse Prevention and Treatment Act (P.L. 93-247), and child abuse and neglect has been one of the top priorities of the Department of Health, Education, and Welfare for a number of years.

State departments of public welfare carry the main responsibility for providing protection to abused and neglected children and for helping the parents of these children overcome the serious problems which lead to such abuse and neglect.

In providing protective services, State and local welfare departments encounter many legal aspects of these services. These aspects involve the agency, law enforcement officials, attorneys, and the judicial system.

Social workers providing protective services need training in these legal aspects. They need to understand the law that gives the agency the responsibility for providing these services; they need a clear understanding of parents' and children's rights, since every protective services case has a potential for court action; and they must be thoroughly familiar with due process of law.

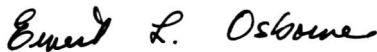
In addition, workers need help in understanding the jurisdiction and role of the court, and

in knowing how to file a petition, obtain evidence, and prepare for the delivery of testimony. And much more.

In 1975, the Administration for Public Services (then the Public Services Administration) made a grant to the law school of the University of Oregon to develop a manual on the legal aspects of protective services. This manual was to serve as a tool for protective services workers and their supervisors. Barbara A. Caulfield, Assistant Professor of Law, was the Project Director. It should be noted here that the opinions expressed in this manual are those of the author and not necessarily those of HEW.

With this manual, the Administration for Public Services (APS) adds another to its list of publications on the subject of child abuse and neglect. A list of these publications can be found at the back of the manual.

APS hopes that *The Legal Aspects of Protective Services for Abused and Neglected Children* will be of practical help to those who carry the heavy burden of protecting these children, helping their families to correct the situations that contribute to the problem, and working effectively with the courts when situations make judicial action necessary.



Ernest L. Osborne  
Commissioner  
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Services

## AUTHOR'S ACKNOWLEDGMENTS

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Barbara A. Caulfield

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## INTRODUCTION

The extent of child abuse and neglect in the United States is not well documented, although recent studies indicate that the incidence of abuse and neglect is greater than was previously believed, with reports of proven or possible child abuse and neglect being received at an increasing rate.

Testimony by Dr. C.H. Kempe and Dr. R.E. Helfer, in hearings before the Subcommittee on Children and Youth of the Senate Committee on Labor and Public Welfare, concerning the Child Abuse Prevention Act (S. 1191) of 1973, indicates that, nationally, 50,000 to 60,000 reports requiring investigation into possible child abuse are made to authorities every year.<sup>1</sup> Moreover, data from some States demonstrate that more effective administrative procedures result in higher reporting rates. Such data imply that many cases of child abuse and neglect currently go unreported and that, as more effective reporting procedures are instituted, the incidence of reports leading to investigation will increase.<sup>2</sup>

The public's growing awareness of the problem of child abuse and neglect is reflected in the existence of child abuse reporting laws in all 50 States<sup>3</sup> and in Federal action directed at the problem.

On January 31, 1974, P.L. 93-247 (42 USCA §5101 ff)—also known as the Child Abuse Prevention and Treatment Act—was approved. As a result of this act, the Secretary of Health, Education, and Welfare established the National Center on Child Abuse and Neglect. The Center was to:

- (1) compile, analyze, and publish research on child abuse and neglect;
- (2) maintain an information clearinghouse on programs showing promise

of success in preventing, treating, or identifying child abuse and neglect;

- (3) compile and publish training materials and programs for personnel engaged in child abuse and neglect work;
- (4) provide technical assistance to programs engaged in child abuse and neglect treatment, prevention, and identification;
- (5) conduct research into the causes, prevention, treatment, and identification of child abuse and neglect; and
- (6) study the national incidence of abuse and neglect, including the extent to which incidents are increasing in number or severity.

The law also provided for the development of demonstration programs and projects, the establishment of multidisciplinary centers to serve in the prevention, treatment, and identification of child abuse and neglect, and for aid to State programs. To these ends, \$15 million was appropriated for fiscal year 1974, \$20 million for fiscal year 1975, and \$25 million for fiscal years 1976 and 1977.

This manual, produced by the Administration for Public Services (HEW), was designed to assist social workers in protective service agencies, particularly State and local public welfare departments. However, the section entitled "More Advanced Legal Concepts" may be of interest to others concerned with this problem.

## REFERENCES

- 1 March 26, 27, 31, and April 24, 1973.
- 2 Gil, David G., *Violence Against Children*. Sub-

mitted March 26, 1973, as written testimony to the Subcommittee on Children and Youth of the United States Senate Committee on Labor and Public Welfare concerning the Child Abuse Prevention Act (S.1191). This paper was based upon the author's book *Violence Against Children: Physical Child Abuse in the United States*.

Cambridge, Mass.: Harvard University Press, 1970.

- 3 De Francis, Vincent, "The Status of Child Protective Services." In *Helping The Battered Child and His Family*. C. Harry Kempe and Ray E. Helfer; Eds. Philadelphia, Pa.: J.B. Lippincott Co., 1972.

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# WORKING DEFINITIONS OF CHILD ABUSE AND NEGLECT

## General Definitions

One common definition states that child abuse occurs when a parent or caretaker takes action which causes injury to the child. This can be any act of **commission**, such as an actual physical attack or the purposeful withholding of food.

Neglect is commonly defined as an act of **omission** which causes injury to the child. If the parents did not provide adequate care for their child because they were unable to do so, did not understand the need for the care, or did not have the parenting skills necessary to provide it, this could be termed "neglect."<sup>1</sup>

Many definitions, such as the following one, combine abuse and neglect into one definition:

**Child abuse and neglect can be broadly defined as those situations (non-accidental) in which a child suffers physical trauma, deprivation of basic physical and developmental needs or mental injury, as a result of an act of omission by a parent, caretaker or legal guardian.<sup>2</sup>**

Both of the general definitions given here are intended to include sexual and emotional abuse or neglect. The definitions used by the courts and statutes may vary from these "working" definitions, and often they may not coincide with social work concepts of abuse and neglect.

## Sexual abuse

Sexual abuse is actually a subcategory of physical abuse and could be defined as "... utilization of the child for sexual gratification or an adult's permitting another person to so use the child."<sup>3</sup>

## Emotional abuse and neglect

Emotional neglect is defined by the American Humane Association as the deprivation suffered by children when their parents do not provide opportunities for the normal experiences producing feelings of being loved and wanted, secure and worthy, which result in the ability to form healthy object relationships (with other people).<sup>4</sup>

Another definition developed by the Child Advocate Association of Chicago defines emotional abuse as "mental injury" and gives the following two examples for purposes of definition:

- (1) parent's refusal to recognize and take action to ameliorate a child's emotional disturbance;
- (2) gross failure of the parents to meet the emotional needs of the child necessary for normal development (emotional deprivation) often seen along with nutritional neglect.<sup>5</sup>

If a social worker is considering court action for an emotional abuse or neglect case, an analysis of the following four factors may be important before such action is taken:

1. Do the parents demonstrate easily identifiable behaviors that create an environment harmful to the child?
2. Do the child's actions or physical health show observable or measurable effects related to the parents' behavior?
3. If there are effects on the child's actions or physical health, will they create or lead to future serious emotional harm if not treated?

4. Is treatment available to the family from the protective services agency or from the court which could remove, alleviate, or mitigate the emotional harm manifested by the child.

### **Other categories**

Several other special categories fall under abuse and neglect. Some of these are:

**Institutional abuse or neglect**—abuse or neglect that occurs when institutions or agencies take improper action, or fail to take proper action, with the end result being injury to the child.

**Abandonment**—when the child's caretaker deserts the child or leaves him or her alone for long periods of time. Such failure to provide adequate care is most often included in the general "neglect" definition.

**"Best interest of the child"**—when courts remove children or order treatment under the

general concept of providing care that is in the "best interest of the child," without using the label of abuse or neglect.

### **REFERENCES**

- 1 See generally Gil, David G., "A Sociocultural Perspective on Physical Child Abuse." *Child Welfare*, L, 7, 389-395, 1971.
- 2 Child Advocate Association of Chicago, *Hospital Guidelines for the Management of Suspected Child Abuse and Neglect Cases* (p. 2) (prepublication as of September 1977).
- 3 Walters, David R., *The Physical and Sexual Abuse of Children: Causes and Treatment*. Bloomington, Ind.: Indiana University Press, 1975.
- 4 Mulford, Robert M., *Emotional Neglect of Children*. Denver, Colo.: American Humane Association, 1958.
- 5 Child Advocate Association of Chicago, *op. cit.*

# LEGAL LIABILITIES OF SOCIAL WORKERS UNDER REPORTING LAWS

## Reporting Laws

Every State now has a child abuse reporting law, although the law varies from State to State. In most jurisdictions, reports from social workers are required: 32 States specifically include social workers among the classes of professionals who must report cases of suspected abuse—often without indicating what persons are encompassed in that term—and 7 other States require mandatory reports from any person who encounters suspected abuse.

Only 11 States and the District of Columbia do not require mandatory reports from social workers, but 3 of this group have statutes allowing voluntary reporting by social workers.<sup>1</sup> One writer recently noted that the current trend is to expand the scope of persons required to report child abuse and neglect, not to narrow the field.<sup>2</sup>

Social workers may encounter occasional difficulties with their legal liability under the reporting laws. This is discussed in the section that follows.

## REFERENCES

1 See chart on page 8 of manual; Helfer, Ray E. and Kempe, C. Henry, *The Battered Child*, 2nd ed. (Chicago, Ill.: Univ. of Chicago Press, 1974) Appendix; De Francis, Vincent and Lucht, Carol, *Child Abuse Legislation in the 1970's*, Rev. ed. (Denver, Colo.: American Humane Society, 1974) for a summary of the statutory provisions on the reporting of child abuse. Such information, however, should not be relied upon without additional legal advice from a proper source.

2 Sussman, "Reporting Child Abuse: A Review of the Literature," 8 *Fam. L. Q.* 245, 272 (1974). (Hereafter cited in references as *Sussman*.)

## Liability for Reporting

Legislatures have sought to reduce liability of reporters by granting immunity (a protection from legal liability, either total or qualified) to those required to report (see "Immunity" below) and by requiring waiver of any privilege of confidentiality that might exist between the reporter and the client. Persons reporting may have a suit filed against them; but the chances that a suit will result in a decision against a professional making a report are small if the person is immune under a State statute. Some statutes do not even allow the filing of the lawsuit.

The possible lawsuits against a reporting professional are civil suits for defamation of character, invasion of privacy, malicious prosecution, and breach of confidence—and criminal prosecution for defamation of character.<sup>1</sup> The risks of being held liable in these actions are slim, however, since, in each of the above legal actions, the person bringing the lawsuit must prove that the reporter acted with malice, or perhaps with extreme negligence.<sup>2</sup> Malice has been defined as a "sense of spite or an improper motive"<sup>3</sup> and it is a specific intent (state of mind) that is difficult to prove.

## Immunity

All States provide some sort of immunity for persons who file reports, and the immunity usually applies to "anyone participating in the filing of a report. . . ."<sup>4</sup> This is true even if the report is not required under the reporting law. It is important for a reporter to note the type of protection available in the State in which the report is filed.

To date, nine of the States that require reporting by social workers have granted them unqualified immunity; thus, a social worker *cannot be sued at all* for the reporting act or for the contents of the report.<sup>5</sup> Washington State has granted total immunity only from civil actions.

In the rest of the States that require reporting, social workers enjoy a qualified immunity. The most common qualification—found in 23 States—is that the reporter must be acting in good faith.<sup>6</sup> (“Good faith” is a legal concept; see Glossary.) In order to have good faith, the reporter is not required to believe personally beyond a doubt that abuse or neglect has occurred so long as there are reasonable grounds to support a belief that the child has been abused.<sup>7</sup>

A few States require that the reporter act “without malice”<sup>8</sup> rather than in “good faith.” This “malice” or “bad faith” standard<sup>9</sup> is a subjective test. The reporter must not use malice or act in bad faith in making the report.

Many States that require “good faith” reporting grant a statutory presumption that the reporter is acting in good faith. A presumption is a legal term used primarily in trials to decide which party has to prove which facts. The exact effect of the presumption will vary from State to State and may be conclusive or rebuttable in nature,<sup>10</sup> but it is always an advantage to have the presumption in your favor. If the presumption is rebuttable, a reporter will be presumed to be acting in good faith until the opposing side in a trial proves otherwise. If the opposing side does not prove that the reporter acted other than in good faith, the reporter wins the case. A conclusive presumption would not leave room for rebuttal at all.

### **Breach of confidentiality**

A breach of confidentiality suit will be unlikely to succeed when the State requires the report by its mandatory reporting law.<sup>11</sup> Recognition of a legal social worker/client privilege for protective service workers is not wide-spread, but, where the privilege against

disclosure exists, a specific exception is generally made to allow the disclosure of communications of child abuse and neglect. Therefore, the social worker need entertain few fears of being sued for breach of confidentiality in a State where, by statute, the reporting of child abuse or neglect is either allowed or mandated.

## **REFERENCES**

- 1 Sussman at 293.
- 2 Paulsen, “Child Abuse Reporting Laws: The Shape of the Legislation,” 67 *Colum. L. Rev.* 1, 31ff (1967). (Hereafter cited in references as Paulsen.)
- 3 Prosser, W. L., *Handbook of the Law of Torts*, 771-772 (4th ed. 1971). (Hereafter cited in references as Prosser.)
- 4 Helfer and Kempe, *supra*. See, for example, ORS 146.760 and ORS 418.762.
- 5 Alabama, California, Colorado, Idaho, Illinois, Montana, New York, North Carolina, and Ohio. (See chart on p. 8.)
- 6 Alaska, Connecticut, Delaware, Florida, Georgia, Hawaii, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.
- 7 Paulsen at 13.
- 8 Indiana, Kansas, North Carolina, and Texas.
- 9 North Carolina.
- 10 McCormick on Evidence 802-832 (2nd ed. 1972). (Hereafter cited in references as McCormick.)
- 11 *Simson v. Swenson*, 104 Neb. 224, 177 NW 831 (1920), as discussed in Paulsen at 32-33.

## **Liability for Not Reporting**

What are the consequences of not reporting a case of suspected abuse or neglect? In 26 States, a person who suspects abuse or neglect but does not report, it may be prosecuted for the failure (see chart on p. 8). The punishment for conviction ranges from a \$25 minimum fine in New Mexico<sup>1</sup> to a \$500 fine and/or 6 months in jail in Alabama<sup>2</sup> and Louisiana.<sup>3</sup>

In Alabama and Washington, the State must

prove that the defendant social worker knew that a report should have been made in order to convict. In a few other jurisdictions, the State must prove that the failure to report was both "knowing and willful;" that is, that the social worker knew that there was a case of abuse or neglect, knew he or she was required to report it, yet deliberately refused to file a report.<sup>4</sup> In 18 States, a social worker who encounters a reportable case of abuse or neglect may be convicted for not reporting it, whether or not the worker knew a report was required and regardless of whether the failure was deliberate or a case of negligence.<sup>5</sup>

The social worker who fails to report a case of suspected child abuse or neglect may also be personally liable in a civil suit for further injury occurring after the report should have been made.

The social worker employed by a governmental subdivision or government agency is in a peculiar position. The worker may be sued personally for failure to perform a legal duty—in this case, the reporting of suspected child abuse or neglect as required by statute—and yet be unable to rely on his/her employer for indemnity (i.e., payment of the judgment against the worker) in those States where the Doctrine of Sovereign Immunity is still alive.

Under the Doctrine of Sovereign Immunity, neither the State nor any of its agencies may be sued, but an employee or public officer of the State or any of its agencies can be sued as an individual. In some States where the government agency is immune, the State may be permitted to carry liability insurance, and, if it does carry insurance, it can be sued. For example, Arkansas, Colorado, and Kansas allow insurance to modify the immunity law.<sup>6</sup> In Kentucky, Connecticut, and other States, a commission has been established to settle or reject claims made against the State.<sup>7</sup>

Many States have waived their immunity by authorizing negligence suits. As a practical matter, in any State which allows a governmental body to be sued, an injured person can file a complaint suing the employing agency, in addition to the employee.

It is a well-settled legal doctrine that an employer is liable for the negligence of its employee, so long as the employee is acting within the scope of employment. Therefore, the employer is indirectly liable, even for an employee's failure to make a report expressly required by statute as long as the State is not immune from suit under the law.

Where the employing agency is held liable, it must pay the amount of the judgment. Some States authorize an agency which does pay to seek reimbursement from the negligent employee, although this rarely occurs.<sup>8</sup> The social worker may also be entitled to seek reimbursement from his/her employer if he or she loses a suit.<sup>9</sup> Reimbursement from the agency is not available where the State can neither be sued nor consent to a suit.

In States without laws requiring reports by certain persons, a plaintiff would have to show that the social worker had a **duty** to report that was breached in order to win a suit. The legal duty might arise from general professional responsibility, or it might derive from the social worker's actions. For instance, if the social worker abandoned a family in which abuse or neglect had been recognized, there may be liability for violation of a duty to continue professional assistance once it was begun. The possibility of the person suing a social worker for breach of duty for abandonment and winning the suit is slight.<sup>10</sup>

In States that have mandatory reporting laws, the failure to report may be viewed as raising a presumption of negligence or even as conclusively proving negligence.<sup>11</sup> Once negligence is proven, the case may be lost by the professional who neglected to report. The only issues remaining are whether the failure to report caused the injury and the damages allowed. Therefore, a suit against a worker who did not report would have a greater chance of success in States that impose a statutory reporting duty. However, only two lawsuits of this type have been filed, neither of which was against a social worker and one of which was settled out of court.<sup>12</sup> Therefore, the law has not been tested.



New York State is an exception to the foregoing general discussion. New York provides, by statute, for civil liability for damages caused by the knowing and willful failure to file a report.<sup>13</sup> Where the legislature states a basis for the recovery of damages, courts strictly apply the standard.

## REFERENCES

- 1 N.M. Stats. Annot. 13-14-14.1 (1976).
- 2 Ala. Code, Tit. 27 §25 (1973 Supp.).
- 3 LSA-RS 14:403 I (1974).
- 4 Delaware, Kansas, Kentucky, Louisiana, New York, Oklahoma, South Dakota, and Utah.
- 5 California, Connecticut, Florida, Indiana, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oregon, South Carolina, Tennessee, Wisconsin, and Wyoming.
- 6 See, for example, Kansas Stats. Ann. 74-4715, 74-4716 (1972); Colo. Rev. Stat. Ann. §24-10-104 (1971); Ark. Stat. Ann. §66-3242(1)(1959). In Arkansas, the insurer is sued directly.
- 7 See, for example, Ky. Rev. Stat. 44.070 (1974) and Conn. Gen. Stat. Ann. §4-141 *et seq.* (1959).
- 8 *Restatement (Second) of Torts* §895D, comment j at 46 (Tent. Draft No. 19 (1973)).
- 9 *Prosser* at §131.
- 10 But see *Landeros v. Flood*, 17 Cal.3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976) holding a physician and hospital liable for failure to diagnose and report a battered child.
- 11 *Prosser* at 200-201, and *Landeros v. Flood*, *ibid.*
- 12 *Landeros v. Flood*, *ibid.*, and the action by Thomas Robinson's father against four doctors for not reporting the abuse to Thomas as well as against a city and its police chief for not investigating when another doctor did report. This case was settled out of court for a reported \$600,000. Noted in *Time Magazine* (Nov. 20, 1974) at 74, as reported in *Sussman* at 297 fn 306, and in Cummins, "Personal Liability for Failing to Report Child Abuse and Neglect" (unpublished paper, 1975).
- 13 N.Y. Soc. Serv. Law § 420(2)(1976).