At Issue: Do Child Protection Workers Deserve Immunity When They Misrepresent or Fabricate Evidence?

Daniel Pollack, JD, MSW

The critics and plaintiffs' attorneys are out there. They seethe with frustration in their assertion that there are child protection workers who are as dysfunctional and flawed as some of the abusive and neglectful parents they investigate. They feel mistreated, ambushed, and without recourse to a neutral oversight authority and fume that the courts will believe the word of child protection workers over their clients. And yet, when there is a credible allegation that a child protection worker has knowingly made misleading or false statements that resulted in the wrongful removal of a child, their criticism and anger seem justified. Such misrepresentations may involve highly contested issues of material fact that more properly should be examined by an agency supervisor or in court on the merits. The supervisor or court, inadvertently giving credence to the worker's misrepresentation, may thereby be swayed in favor of the worker's recommendations.

Legal Aspects of Immunity for Government Social Workers

It is an accepted principle that a parent has a constitutionally protected interest in the custody and care of his or her child. This interest does have exceptions, especially when the child may be in immediate or apparent danger. This is when child protection services gets involved. Crucial to every child protection investigation is to establish the facts and circumstances of the case. When these are presented to the court at a dependency hearing, the evidence may become proof.

The best professional judgment of child protection workers may, in hindsight, be wrong. For this and other reasons, child protection workers usually have some level of immunity from prosecution.[1] When individual government officials are sued for monetary damages, they generally are granted either absolute or qualified immunity. The U.S. Supreme Court has stated that qualified immunity is the norm and absolute immunity is the exception.[2]

Should that immunity disappear when, in their official capacities as child protection workers, they make knowingly inaccurate or false statements that result in the wrongful removal of a child? California law provides for public employee immunity from liability for an injury caused by the employee instituting or prosecuting any judicial or administrative proceeding within the scope of one's employment, even if one acts maliciously and without probable cause.[3] However, a public employee has no such immunity if she acted with malice in committing perjury, fabricating evidence, failing to disclose exculpatory evidence, or obtaining evidence by duress.

Generally, whether an employee is acting within the scope of his employment is ordinarily a question of fact to be determined in light of the evidence of the particular case. Some courts hold that immunity for child protective workers exists as long as they act responsibly in the performance of their duties. The immunity applies even where a complaint alleges caseworker misconduct or intentional wrongdoing.[4] Others hold that the worker must be involved in a function critical to the judicial process itself. In either case, the more outrageous the employee's alleged tortuous conduct, the less likely it could be described as foreseeable, and the less likely the social service agency could be required to assume responsibility for the act as a general risk of doing business.

Recent Cases

In *Doe v. Lebbos*, the Ninth Circuit held that a social worker was entitled to absolute immunity for allegedly failing to investigate adequately the allegations of abuse and neglect against a father and in allegedly fabricating evidence in a child dependency petition because those actions had the "'requisite connection to the judicial process' to be protected by absolute immunity (at 826)." In *Van Emrik v. Chemung County Dep't*

of Soc. Servs.,[5] the court found that child protective caseworkers were entitled to qualified immunity in connection with the removal of a child from the custody of her parents during a child abuse investigation. In the Sixth Circuit and the District of Columbia Circuit, the type of immunity depends on the particular task the worker is doing. In *Gray v. Poole*,[6] the court held that qualified immunity covers social workers acting as investigators, while social workers testifying as witnesses are protected by absolute immunity. In *Rippy ex rel. Rippy v. Hattaway*,[7] the court ruled that absolute immunity protects social workers who initiate proceedings on behalf of a child. In *Austin v. Borel*,[8] the court ruled that child protection workers were not entitled to absolute immunity when they filed an "allegedly false verified complaint seeking the removal of two children" from the family home (at 1363).

Ethical Considerations

There is, of course, a difference between misrepresentation of a piece of physical or verbal evidence and the actual creation of false evidence. Misrepresentation involves the willful giving of a misleading representation of the facts. Creation of false evidence involves the act of improperly causing a "fact" to exist. More often, critics and attorneys accuse workers of a willingness to misrepresent, selectively quote, and misconstrue information to support their claims and therefore to present an entirely misleading case. Rather than sticking to agency protocols and training, the workers sensationalize their documentation and findings in a misleading fashion.

To what extent are such allegations true? Do workers consciously or unconsciously misrepresent evidence and selectively engage in systematic distortion? How often do they make deliberate efforts to mislead, deceive, or confuse their own supervisor or the court to promote their own personal or ideological objectives? How frequently are workers omitting or concealing material facts? Under the guise of vigilance, are there child protection workers whose adherence to rules and procedures is purposely excessive?

From a social work, legal, or judicial perspective, making a knowing misrepresentation in a child protection case is a serious ethical breach. The NASW *Code of Ethics,* 4.01(c), notes the following: "Social workers should base practice on recognized knowledge, including empirically based knowledge, relevant to social work and social work ethics." At 4.04 the *Code* goes on to state: "Social workers should not participate in, condone, or be associated with dishonesty, fraud, or deception." Dishonesty, shading the truth, or lack of candor cannot be tolerated in child protection services, a field of endeavor built upon trust and respect for the law. Whether or not child protection workers deserve immunity from prosecution when they misrepresent or fabricate evidence is a question each states' courts are dealing with. Similarly, each court must decide whether such misconduct warrants setting aside the decision to remove the child from his or her home. In the final analysis, the question might soon find itself before the U.S. Supreme Court.

A worker's misrepresentation or fabrication of evidence is particularly pernicious because it puts the whole field of child protection in a negative light. Whether or not immunity is granted, there is simply no excuse for this kind of willful and egregious conduct.

Notes

[1] See, e.g., *Abdouch v. Burger*, 426 F.3d 982 (8th Cir. 2005) and *Babcock v. Tyler* (884 F.2d 497 (9th Cir. 1989) (absolute immunity shields social workers to the extent that their role is functionally equivalent to that of a prosecutor); but, see *Burton v. Richmond*, 276 F.3d 973 (2002) (when a state department of human services affirmatively places children in an abusive foster care setting, the state may be liable for damages): *Gray v. Poole*, 275 F.3d 1113, (D.C. Cir. 2002) (qualified immunity covers social service workers acting as investigators, but when testifying as witnesses they are protected by absolute immunity). Qualified immunity is often afforded if the social worker is involved in a "discretionary function" unless his or her conduct is clearly a violation of a statute or constitutional principle (*Snell v. Tunnell*, 698 F. Supp. 1542 (W.D. Okla. 1988).

[2] *Harlow v. Fitzgerald*, 457 U.S. (1982) (absolute immunity is appropriate in limited circumstances—judicial, prosecutorial, and legislative function—whereas executive officials usually receive qualified immunity).

[3] Cal. Gov't Code § 821.6.

[4] *Cunningham v. Wenatchee*, 214 F. Supp. 2d 1103 (E.D. Wash. 2002).

[5] 348 F.3d 820 (9th Cir. 2003).

[6] 911 F.2d 863, (2d Cir. 1990).

[7] 275 F.3d 1113 (D.C. Cir 2002).

[8] 270 F.3d 416 (6th Cir. 2001).

[9] 830 F.2d 1356, 1363 (5th Cir. 1987).

About the Author

Daniel Pollack, MSW, JD, is Professor at Wurzweiler School of Social Work, Yeshiva University, in New York City. He is a frequent expert witness in child welfare cases. Contact information: 2495 Amsterdam Avenue, Room 818, New York, New York, 10033. dpollack@yu.edu.