

# How One Group Found a Path Out of the Liability Jungle

By DOUGLAS J. BESHAROV

It is common to hear how the "liability explosion" is threatening the financial viability of various businesses and professions. One group, however, is beginning to gain protection from unrestricted liability. The success of its approach should be a lesson to others seeking relief from high levels of tort liability.

From 1982 to 1985, the number of lawsuits brought against child-protection workers for inadequately protecting abused children doubled. The workers are sued, through the usually tax-financed agencies that employ them, for failing to accept reports for investigation, failing to investigate adequately, failing to place children in protective custody, returning children to dangerous parents and failing to provide adequate case monitoring. It's a familiar story: In one year some agencies have seen their insurance premiums increase fivefold; others cannot obtain insurance at any price.

Some suits involve shockingly reckless and insensitive conduct. But most workers are sued for situations simply beyond their control, for performing their professional and official responsibilities under the most difficult conditions. Child abuse occurs behind closed doors and it is extremely difficult to obtain evidence of what really happened. Moreover, many home situations deteriorate quickly, and without warning.

The vast majority of suits against child-protection workers are dismissed. But even when workers win in court, they lose. Legal vindication comes at a high price. Media attention focuses on the filing of the suit, not its dismissal. Workers are often suspended pending resolution of the case. And for long after, friends, colleagues and clients remember that the social worker's conduct, judgment and ability were challenged in court.

Legal fees also have to be paid. Lawyers' bills range from \$5,000 (when the case is dismissed quickly) to more than \$50,000 (when a trial and appeal are necessary). Rarely are victorious defendants reimbursed for these costs.

The negative effects of these lawsuits are felt throughout the child-protection field. My wife, Susan Besharov, a psychiatric social worker at D.C. Children's Hospital, interviewed workers and agency heads in different states. She found that: "Workers are often preoccupied with knowledge of suits in other agencies, and even other cities. When a suit is filed, it is perceived as a threat to all workers, not just those named in the complaint, especially when the workers are apparently acting in good faith and to the best of their abilities under trying circumstances. The director of an agency in which three workers were indicted described 'tremendous, agency-wide panic. As rumors about the case spread, morale plummeted, and children were removed from their families at the slightest hint of danger.'"

This "better-safe-than-sorry" attitude permeates child-protection decision-making. Social workers fear 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 take children from their parents whenever they might be criticized for not doing so.

Ironically, this kind of defensive decision making is breeding further litigation—as parents have begun to sue workers 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—for as much as a million dollars—are possible.

In seeking relief from this growing liability, child-protection workers have not

simply complained about the unfair harm done to them. Instead, they have emphasized the social costs of their legal vulnerability, showing how ordinary tort rules do more harm than good—since they lead to the unnecessary removal of children from parental custody. Because this is a major violation of parental rights that can leave lasting emotional scars on parent and child, they have argued that the good-faith exercise of discretion in deciding to leave a child in the home should not be penalized. And their argument is working.

Some federal and state courts have recently held that child-protection workers should enjoy "good-faith" immunity for their official acts. More important, the legislatures of nine states—Florida, Illinois, Minnesota, Missouri, New York, North Carolina, North Dakota, South Dakota, Wyoming, as well as Puerto Rico and the Virgin Islands—have enacted specific laws that provide such immunity. Many others are considering similar legislation.

"Good-faith" immunity does not give child-protection workers the right to act wrongfully. They are still subject to liability when they act in reckless or deliberate disregard of their official duties.

Most groups confronting onerous liability are not seeking "good-faith" immunity. For example, manufacturers now saddled with strict liability for "defective" products would be happy with a return to the negligence standard. Still, the legal protection being gained by child-protection workers exemplifies the most promising avenue for overall tort reform.

The American tort system has enjoyed wide political and popular support. And rightly so. It is decentralized, democratic, and gives all citizens access to legal redress. Thus, despite growing dissatisfaction, it is unlikely that liability will be limited without clear evidence that the social

benefits of doing so outweigh the cost of denying some persons the right to sue.

Up to now, those seeking tort reform have not convinced the public that current liability rules do more harm than good. Manufacturers, for example, cannot point to any convincing evidence that strict liability for "defective" products causes substantially higher prices for consumers (without making products appreciably safer) or that it causes manufacturers to systematically withhold socially valuable products from the market. Hence, rather than simply complaining about "outrageously" large awards, "unconscionable" contingent fees and "unaffordable" insurance, they should invest in the research needed to determine the degree to which current liability rules impose unwarranted costs on society.

*Mr. Besharov, a scholar at the American Enterprise Institute, is the author of "The Vulnerable Social Worker: Liability For Serving Children and Families," on which this is based.*

## Notable & Quotable

*Indian Prime Minister Rajiv Gandhi, after the U.S. raid:*

The nonaligned movement extends its firm support and solidarity to Libya in this critical hour.

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*From a recent Republican National Committee fund-raising letter signed by chairman Frank Fahrenkopf:*

This morning I received a comprehensive report, produced by our own Republican political analysts, predicting a sweeping Democrat victory in the November elections. Frankly, I have never been more alarmed about our Party's prospects than