

Child Welfare Tort Liability in Washington State

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- Sovereign immunity refers to the right of the government to be free from suit.
- Washington limited its sovereign immunity in 1961.



- The Washington waiver provides:

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.



- The Washington courts have strictly limited the scope of “discretionary immunity” for governmental actions.
- The courts tend to analyze negligence claims using common law tort principles which allow monetary recovery only where there was a “duty” owed to the plaintiff, a breach of that duty, and resulting harm.
- Federal civil rights claims require a showing of deliberate indifference to a constitutional right.



Washington Pattern Jury Instructions

Definition:

- Negligence* is the failure to exercise ordinary care.
- Doing some act which a reasonably careful person would not have done.
- Failure to act as a reasonably careful person would have done under the same or similar circumstances.



- Because of its general language, Washington's waiver is subject to judicial interpretation.
- Other states have:
 - Exclusions for governmental functions;
 - Exclusions for regulatory and licensing activities;
 - Exclusions for offender supervision;
 - Exclusions for design, capital improvement, and other discretionary decisions; and
 - Liability caps.



- Public duty doctrine: where there is no duty to a particular plaintiff, there can be no recovery.
- Exceptions:
 - Intent to create a duty toward a narrowly circumscribed class implied from legislation
 - Special relationship between government and particular plaintiff
 - Volunteer rescue doctrine
 - Failure to enforce a mandatory statutory duty



Potential Statutory Bases for Cause of Action

- RCW 26.44.050 - Duty to investigate.
- RCW 26.44.030 - Mandatory reporting provisions.
- RCW 13.34.020 - Decision to initiate dependency actions.
- RCW 13.34 - Failure to follow procedure.
- RCW 74.13 - Entitlement to services.
- RCW 74.15 - Mandatory licensing standards.



Currently, the Torts Division defends lawsuits regarding:

- Negligent investigation of child and adult abuse referrals*
- Negligent placement of children in relative placement/foster homes*
- Wrongful adoption
- Negligent removal of children from parents' home*
- Negligent licensing of foster homes
- Failure to monitor provision of services by contracted provider

*Often include civil rights violations.



“Negligent Investigation” Claims

- Cause of action is available to children, parents*, custodians, and guardians.
 - Failure to remove from harmful situation.
 - Placement in a harmful foster care setting.
 - Premature removal from parent.
 - Withholding information from court which leads to failure to remove, premature removal, or harmful placement.
- * Status of de facto parents is an unresolved issue.



Payouts in DSHS Cases

- \$26 million per year in DSHS payouts for FY 2008, FY-2009.
- Most cases have mixture of legal theories - failure to investigate, failure to seek dependency, harmful placement, failure to supervise providers.
- Foster care abuse highest payout cases FY 2009:
 - \$ 6,825,000 (6 Children)
 - \$ 5,250,000 (2 Children)



Emerging Issue: Braam – Type Claims Based on Failure to Provide Services

- Failure to maintain a stable placement.
- Failure to provide special needs.
- Failure to provide trained foster parents.
- Multiple placement.



Proportionate Liability Among Defendants is Determined by Jury

- Jury must apportion fault among negligent actors.
- All negligent entities must be identified on the verdict form, but no judgment can be entered against a non-party (empty chair).



Joint and Several Liability

- Is not the general rule but is available as between tortfeasors acting in concert when the plaintiff is fault-free.
- One negligent party is liable for another's share if they have a master/servant or agency relationship.



Potential Liability of Contractor Under Federal Law

- Contractor may be a state actor for purposes of a civil rights violation if it is performing a governmental function delegated by the state agency.

Questions?



Thank You