

See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication/349158644>

Hindsight bias in the context of child protection services

Article · February 2021

CITATIONS

0

READS

4

2 authors:



Elisa Reiter

Law Offices of Elisa Reiter

11 PUBLICATIONS 0 CITATIONS

SEE PROFILE



Daniel Pollack

Yeshiva University

220 PUBLICATIONS 282 CITATIONS

SEE PROFILE

Some of the authors of this publication are also working on these related projects:



Collaboration with Prof. Dan Pollack, Yeshiva University [View project](#)

TEXAS LAWYER

Commentary

Hindsight bias in the context of child protection services

There is a well-known psychological phenomenon known as hindsight bias, “the recognized tendency for individuals to overestimate or exaggerate...

By Elisa Reiter & Daniel Pollack | February 9, 2021 at 5:03 PM



There is a well-known psychological phenomenon known as hindsight bias, "the recognized tendency for individuals to overestimate or exaggerate the predictability of events after they have occurred." [*Chavez v. City of Los Angeles*, 47 Cal. 4th 970, 104 Cal. Rptr. 3d 710, 224 P.3d 41, 52 \(Cal. 2010\)](#). "[S]tudies have demonstrated

not only that people claim that they would have known it all along, but also that they maintain that they did, in fact, know it all along." Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, [65 U. Chi. L. Rev. 571, 577 & n.22 \(1998\)](#). Unsurprisingly, "the law is not blind to the influence of the hindsight bias." [Rachlinski, at 573](#).

To what extent and in what ways might hindsight bias exist in the context of child protection services?

Texas mandates individuals with knowledge of child abuse or neglect to make a report to the appropriate authorities (local or state police and/or the Texas Department of Family Protective Services) ([TFC Section 261 et seq.](#)). Mandatory reporting is imposed upon teachers, mental health professionals and other licensed individuals. Attorneys, mental health professionals, physicians, clergy and others whose license appears to require confidentiality must be reported within 48 hours.

Abuse and neglect have broad definitions under the statute. Mandated reporters are taught to err on the side of caution. Acting in good faith to make a report, or to assist in an investigation of abuse or neglect, renders one immune from civil or criminal liability. Failing to make a report of child abuse or neglect can hold the person who made such an omission to prosecution for a Class A Misdemeanor, which can be punishable by up to one year in jail and/or a fine of up to \$4000.

Texas Family Code Section 153.013 provides that "If any party to a pending suit affecting the parent-child relationship makes a report alleging child abuse by another party to the suit that the reporting party knows lacks a factual foundation, the court shall deem the report to be a knowingly false report." [Texas Family Code Section](#)

[261.107](#) sets forth the repercussions the for a false report of child abuse and provides that a false report is: (1) a state jail felony; (2) may be grounds to restrict further access to the child by the person who made the report; (3) requires payment of attorney’s fees to the person who was falsely accused to be remitted by the person who made the false allegation; and (4) may subject the accuser to a civil penalty of \$1000.00.

The Texas Department of Family Protective Services initiated a new program in 2015, fully implemented by 2019, known as Alternative Response. As described by the agency:

[Alternative Response](#) (AR) represents a philosophical shift in how Child Protective Investigations (CPI) responds to certain cases of alleged abuse and neglect based on factors such as the type and severity of the alleged maltreatment, number and sources of previous reports, and family willingness to participate in services.

Alternative Response lets CPI handle less serious allegations of abuse or neglect in a more flexible way – engaging families while still focusing on the safety of the children. CPI provides services and support to help families resolve safety issues and reduce future involvement with CPI.

In general, there are now two pathways for accepted reports of abuse or neglect. Some reports with less immediate safety or risk issues are routed to Alternative Response, while reports of serious abuse or neglect will take the traditional investigation track. AR differs from traditional investigations because there is no final case disposition or designation of a perpetrator of

abuse/neglect; no one is added to the Central Registry as a result of the intervention; and work with families is less adversarial and more collaborative.

For those of us involved in the prosecution or defense of parents involved in allegations of abuse or neglect, we experience hindsight bias in terms of how a person who made a report may stick to their story, even when faced with contradictory evidence. In 2018, a couple in [Tomball, Texas](#) presented at Texas Children's Hospital with their five-month-old, whom they indicated had fallen out of a lawn chair, hitting his head on the driveway. MRI results reflected two skull fractures and bleeding on the brain. One fracture seemed to make sense to the hospital's child abuse team, but not two. When the child's mother could not and did not offer an alternative explanation, the team made a report to CPS that it deemed the child's presenting injuries as consistent with child abuse. Those associated with the hospital stuck to this story, even after a Houston judge awarded sanctions in the amount of \$127,000 against the agency for its wrongful removal of the parents' children. In fact, CPS dropped its appeal of the sanctions, apparently due to concern that, "Had the court of appeals ruled against them it could have set a precedent that would make it easier for other families to win sanctions in [similar cases](#)".

As [Diane Redleaf writes in The Atlantic](#):

I had seen doctors work hand in glove with CPS to decide the merits of the hotline calls that their own hospitals had placed—a recipe for confirmation bias. They rarely used independent forensic specialists—a common practice in settings where controversies may arise over contested facts. A select group of child-abuse pediatricians served as the liaisons between accused parents

and the state authorities. Later, if cases were filed in court, state prosecutors relied heavily on these same pediatricians to provide medical-expert testimony against the accused parent. None of the families I represented were informed about their assigned pediatrician's entanglement with CPS. Some parents had freely shared personal histories with these state-paid medical consultants, only to find the same information mistranscribed in notes by the police, CPS investigators, and the state's attorneys.

How does one counter hindsight bias?

1. Assure that there is truly an independent investigation.
2. Courts need to grant court-appointed counsel the resources to assure independent investigation takes place.
3. Provide continuous training for agencies, mandated reporters, and others to ensure that investigations with an open mind.
4. More legislation like the [Texas 2017 medical review law](#) may be a consideration.

When professionals work together, they can assure the safety of children, while simultaneously avoiding hindsight bias.

[Elisa Reiter](#) is Double Board Certified by the Texas Board of Legal Specialization (Family Law and Child Welfare Law). Contact: elisareiter@msn.com; 214-219-9800.

[Daniel Pollack](#) is an attorney and professor at Yeshiva University's School of Social Work in New York City. Contact: dpollack@yu.edu; 646-592-6836.