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Liability of Religious Charities: A New Frontier

Accountability of Religious Persons and Institutions in Tort and Equity

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Of The Ontario Bar

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I. Overview

Litigation against religious institutions and officials for breach of legal or equitable duty raises important constitutional and practical issues.

In the United States for over 20 years persistent attempts have been made to assert the tort of "clergy malpractice" parallel to claims for breach of fiduciary duty. While clergy malpractice has repeatedly foundered on the First Amendment, some American state and federal courts have allowed claims in equity to circumvent constitutional protection.

In Canada, clergy malpractice has been raised only briefly in case law, with breach of fiduciary duty a more convenient claim although itself in a state of uncertainty. Regardless of the basis of the claim, in no Canadian case has a careful analysis been made of the constitutional implications of such proceedings.

In spite of the best intentions, by proceeding without care into constitutionally sensitive rights, courts may unwittingly cause a chilling effect on freedom of religion and association.

This paper examines and compares the approach to clergy malpractice and breach of fiduciary duty claims against religious persons and institutions in Canada and the United States, and attempts to distill the principles which have evolved and should guide the courts in such cases in Canada.

II. INTRODUCTION

Churches are increasingly parties to lawsuits in Canada.

The traditional deference and respect for religious institutions has declined due to changes in societal attitudes towards organized religion and litigation.

Canadians are disillusioned with organized religion. A study reported on in Maclean's magazine[1] in 2002 empirically illustrates what suburban Canadians getting their newspaper on Sunday morning already know: fewer people go to church.

According to this study, although 85% of Canadians associate themselves with a religious denomination, only 21% of Canadians attend a religious service on a weekly basis, a decline from 31% in 1975 and 60% in 1945. In the province with the most entrenched religious establishment - Quebec - regular church attendance declined from 90% in 1945 to 20% in 2000. Among sporadic attenders, 55% would consider becoming more active in the church only if they "found it to be worthwhile". The average person has spiritual needs but is disenchanted with organized religion.

The author of the study, Dr. Reginald W. Bibby, understandably concluded, "By the mid-90's, the collective picture was not a good one for Canada's religious groups."[2]

Children default to their parent's religion. The rebuttable presumption that children adopt the religion of their parents is enshrined in law as the maxim "religio sequitur patrem", or the

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[1]Brian Bergman, "Returning to Religion" *Maclean's* April 1, 2002 page 48.

[2]Reginald W. Bibby, *Restless Gods: The Renaissance of Religion in Canada* (Toronto: Stoddart, 2002) p.25

"father's religion is prima facie the infant's religion."[3]

Legal issues involving established churches in the past 20 years have done little to encourage confidence in religious institutions. The misdeeds of the Christian brothers in the province of Newfoundland was exposed in the Mt. Cashel inquiry. Scandals involving the residential school systems have tarnished the reputation of the Protestant religious establishment no less than the Catholic.

Bibby observed in 2002:

". . . today some six thousand individual lawsuits and several class-action suits over allegations of abuse at about a hundred residential schools are threatening to drain the resources of the Anglican, United, Presbyterian, and Roman Catholic churches."[4]

Ten years earlier, Stauffer and Hyde recognized that:

"[t]he number of tort actions for sexual abuse brought against church officers and employees has risen dramatically in recent years, as previously unsuspected incidents of abuse have been brought to a dismayed public's attention."[5]

The years since then have, if anything, seen the public's reaction progress from dismay to outright shock.

Unlike professions such as accountancy, law or engineering, which have enabling statutes or professional governing bodies in each province, religious institutions operate in most cases without statutory regulation and across provincial and international borders. In the result, the

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[3] *Black's Law Dictionary* (5th ed) 1979: West Pub. p. 1161

[4]Bibby, supra ftn.2 p.57

[5]Ian R. Stauffer and Christian Bourbonnais Hyde, "The Sins of the Fathers: Vicarious Liability of Churches", (1993) 25 *Ottawa Law Review*

brush that has tarred religious institutions in the United States in sex abuse scandals has splashed on their Canadian counterparts.

Litigation generally in Canada, in spite of the increased cost of lawsuits, is on the rise. Plaintiffs resort to the courts not only in traditional tort actions, but also in novel causes of action and class action lawsuits. The Law Society of Upper Canada now permits contingency fees. Relaxing borders allows interprovincial mobility of lawyers. Such developments colour the Canadian legal system with a distinctly American hue.

It is no surprise that proliferating litigation and declining respect for religious institutions should converge. The result is an explosion of tort litigation involving not only individual members of churches, but the religious establishments themselves.

A cursory search of Canadian cases anecdotally illustrates this trend. Prior to 1990 there were virtually no reported actions involving a breach of fiduciary duty involving religious institutions. By the time of the writing of this paper, there were scores of cases (a number at the appellate level), dozens of which are discussed at length below.

The American experience is similar, although with a fundamental difference in approach. In the United States, plaintiffs unsuccessfully advance the tort of “clergy malpractice”. In Canada, plaintiffs have proceeded instead with claims of breach of fiduciary duty with mixed and confusing results.

A. What is a Religious Person?

Religious activity can be many things. Certain activities (administration of the last rites, confession, communion, bar mitzvah or baptism) are clearly wholly religious in character and governed by some form of established practice emanating from a religious tradition.

Other activities are not so obviously religious. When a religious institution operates a religious school, the official supervising may be acting under the authority of an established religious governing body - for example, when supervising the content of religious instruction. But when hiring or firing secular staff, the activity is not religious. Marriage counselling may be offered within a religious community as a pastoral activity, or to the community at large as a public service. In one case, 50% of such counselling by a church was to non-members.[6] Sometimes, as in *Reed,*[7] the religious official goes "beyond the normal and accepted interactions" of a strictly religious role.

Canadian courts broadly define religious activity to include activity even from groups that deny they are an organized religion.[8] The Supreme Court has given a broad and subjective meaning to religious activity.[9] In determining if an objection or defence is based on the "tenet" of

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[6]Mark A. Weitz, *Clergy Malpractice in America* (Lawrence, Kansas: University Press of Kansas, 2001)p.191

[7]*E.M. v. Reed* [2000]O.J. No. 4791;[2000]O.T.C.896;(2000)24C.C.L.I.(3d)229; [2001]I.L.R.I-3947

[8]*Saumur v. Quebec (City)* [1953]2 S.C.R. 299;[1953]4D.L.R.641; (1953)106 C.C.C.289

[9]*R. v. Big M Drug Mart Ltd.*[1985]S.C.J.No.17; [1985]1S.C.R.295; (1985)18D.L.R.(4th)321; (1985)58N.R.81; [1985]3W.W.R.481; (1985)37Alta.L.R.(2d)97; (1985)60A.R.161; (1985)18C.C.C.(3d)385; (1985)85CLLC para.14,023 at 12108; (1985)13C.R.R.64; *R. v. Edwards Books & Art Ltd.* [1986]S.C.J. No.70; [1986]2S.C.R.713; (1986)35D.L.R.(4th)1; (1986)71 N.R.161; (1986)J.E 87-82; (1986)19 O.A.C.239; (1986)30C.C.C.(3d)385; (1986)87 CLLC para. 14,0001 at 12001; (1986)55C.R.(3d)193; (1986)28C.R.R.1

a religious organization, courts look to whether such belief is accepted by the religion as true and not open to serious debate within its ranks.[10]

The dictionary defines "religion" as "a system of faith and worship", and "religious" as "of or concerned with religion".[11] Similarly, for analysis of legal liability, a religious activity would have to be capable of definition and derived from a "system of faith or worship".

For the purpose of this paper, we assume that an action or potential action involves an individual acting in the course of his or her religious activity, either on their own account or under the specific direction of a religious institution.

Sometimes the act alleged is against a religious person acting as a priest, minister, elder, bishop, etc. and for ease we will use the term "cleric". Since almost all the cases involve Christian organizations, the term "church" is usually applied although of course the principles are equally applicable to any religious charity. In either instance, the author apologizes for any sacrifice of sectarian distinction in the interest of convenience.

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[10] *R v. Morgentaler* (1985)52 O.R. (2d)353 (adopting with approval the trial judge at 47 O.R. (2d) 353);(1985)22D.L.R.(4th)641; (1985)11O.A.C.81; (1985)22C.C.C.93d)353; (1985)48C.R.(3d)1; (1985)17C.R.R.223p

[11] *The Pocket Oxford Dictionary* (U.S. ed.) 1946: Oxford Univ. Press p. 706

B. What is a Religious Institution?

What constitutes a religious institution is problematic. Colloquially, many people refer to their religious buildings and institutions as a "church" but that word is primarily identified with Christian theology. Even among Christian religions, the legal structure may vary. Many religions establish corporations to facilitate business activities. Others operate through unincorporated associations. Even religions as established as the Anglican or Catholic Churches do not have an easily identified legal existence.[12]

Often difficulties arise where the church itself is an unincorporated entity. Intangible organizations such as the Catholic Church, The Anglican Synod, Jewish synagogues, local Pentecostal groups, Baptists, Jehovah's Witnesses, or other ecclesiastical bodies without organized trusteeships or corporations have no standing to sue or be sued, and in fact may often not be able to be sued by a member under the principle that one may not sue oneself.[13]

Generally issues of standing are resolved by selecting a representative plaintiff (such as a bishop or archbishop) or substituting a legal entity such as a trusteeship or corporation established to enable the ecclesiastical organization to hold property and manage temporal activities.

The local incorporation of a bishop as a corporation sole was the subject of a Supreme Court finding that it did, indeed constitute a "corporation capable of suing and being sued in all courts". However, on the issue of the Catholic Church itself the court declined, on the limited

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[12]*Residential Schools (Re)*[2000] A.J. No. 47;2000 ABQB45; (2000)183D.L.R.(4th)552; (2000)77Alta.L.R.(3d)62; (2000)44C.P.C.(4th)318; *J.R.S. v. Glendinning* 2004CanLII 5011 (ON S.C.);[2000]O.J. No. 2695;(2000)191D.L.R.(4th)750; [2000]O.T.C.743; (2000)49C.P.C.(4th)360; Robert Flannigan, "*The Liability Structure of Non-Profit Associations: Tort and Fiduciary Liability Assignments*" 77 Canadian Bar Review 73 (1998)

[13]*Flannigan* Id 83

record before it, to deal with the thornier aspects of the "nature of its status".[14]

Once a proper legal entity has been established as a prospective defendant, claims may be made for property, breach of contract and tort actions in the ordinary course. Religious institutions will then appear at bar in representative capacity or through substituted corporations.[15]

Black's definition of such an institution is "[a]n establishment, especially one of eleemosynary or public character or one affecting a community."[16]

In order to encompass these varied types of organizations, the legal face of any religious organizations can appropriately be called a "religious institution."

Curial deference is given by courts to ecclesiastical tribunals dealing with matters of church membership, appointment, promotion or deletion of ecclesiastical officials and discipline.[17] While in these cases the courts generally follow the same principles as in judicial review of any administrative board action, the deference to the religious tribunal in ecclesiastical matters is attenuated. Courts also apply a test for striking pleadings in a motion for summary judgment in

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[14]*Residential Schools (Re)* supra ftn.12 at para. 39-42; *John Doe v. Bennett*[2004]SCC17 para 15,35; [2000]N.J.No.203; (2000)190Nfld.&P.E.I.R.277; (2000)1C.C.L.T.(3d)261

[15]*Young v. Young*[1990]B.C.J.No.2254; (1990)75D.L.R.(4th)46; (1990)50B.C.L.R.(2d)1; (1990)29R.F.L.(3d)113

[16]*Black's Law Dictionary* supra ftn.3 p.718

[17]*Ash v. Methodist Church* (1901) 31 S.C.R. 497; *Mott-Trille v. Steed* [1998] O.J. No. 3583; *Worth v. Stettler Congregation of Jehovah's Witness* [2001] A.J. No. 926; 2001 ABQB 580; 2001 ABQB 626 tried together with *Worth v. Drews* [2001] A.J. No. 925;2001 ABQB578; 2001 ABQB 621; *McCaw v. United Church of Canada* [1991]O.J. No.1225; (1991)4O.R.(3d)481; (1991)82D.L.R.(4th)289; (1991)49O.A.C.389; (1991)37C.C.E.L.214; (1991)91CLLC para.14,035 at 12341; *Davis v. United Church of Canada* [1992]O.J.No.522; (1992)8O.R.(3d)75; (1992)92D.L.R.(4th)678

clergy malpractice that requires a higher threshold of specificity in pleading than ordinary cases.[18]

C. Constitutional Issues In Canada and the United States

Canadian law respects the internal rules and tribunals of religious institutions. There are three reasons for this.

First, religious tribunals are shown deference by courts for the same reasons that administrative tribunals or private associations (such as law societies) are: they have a competence in their sphere which the judge lacks. The Supreme Court of Canada recognized this in a case involving a minister disciplined by the Methodist church in a 1901 decision:

> "we have no right to interfere in a matter clearly within the powers of the domestic forum and in which they have taken action".[19]

Exceptions were cases of a denial of natural justice, the loss of a civil right or property interest.[20]

Second, membership in a religious institution is voluntary in Canada (unlike some jurisdictions with a state church), imparting a contractual dimension to a member accepting a religion's internal rules. The Supreme Court of Canada applied this principle to a religious association in *Hofer*,[21] adopting Lord Atkin:

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[18]*Byrd et al v. Faber* 57 Ohio St.3d 56, 565 N.E.2d 584 (1991)

[19]*Ash* supra ftn. 17

[20]*Lindenburger v. United Church of Canada*[1987]O.J.No.527; (1987)20O.A.C.381; (1987)17C.C.E.L.172; *Hofer v. Interlake Colony of Hutterian Brethren* [1970]S.C.R.958; (1970)13D.L.R.(3d)1; (1970)73W.W.R.644; *McCaw* supra ftn 17; *Mott-Trille* supra ftn17

[21]*Hofer* supra ftn. 20

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."[22]

Thirdly, religious institutions and individual members are entitled to protection of the Canadian Constitution.

The Canadian Charter of Rights and Freedoms[23] guarantees freedom of religion, association, conscience and expression. For that reason, courts have been reluctant to allow state-sponsored inquiries into a person's religious beliefs.[24]

Even before the Charter, the Supreme Court found that evidence as to whether a particular belief system was a religion should not even have been admitted.[25]

Although, as has been stated, when a property or civil right is affected a Canadian court will intervene in purely ecclesiastical decisions[26] neither the threshold, nor the extent, of the inquiry into religious doctrine has ever been carefully examined in light of the Charter.

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[22]*Fender v. St. John-Mildmay* [1938] A.C. 1, quoting with approval Jessel M.R. in *Printing & Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462 at 465; see also *V.B. v. Cairns* [2003]O.J.No.2750; (2003)65O.R.(3d)343; [2003]O.T.C.631; (2003)17C.C.L.T.(3d)34

[23]*Canadian Charter of Rights and Freedoms*, being part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11

[24]*Edwards Books* supra ftn. 9

[25]*Saumur* supra ftn. 8

[26]*Ukrainian Greek Orthodox Church v Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress* [1940] S.C.R. 586 at 591 see also ftn. 20; [1940]3D.L.R.670

In family law disputes, (also private law matters) courts observe a constitutional neutrality in considering religious evidence, recognizing that "it is not for the court to decide between two religions"[27] and "it has long been a tenet of the common law that courts will not prefer one religion over another in the adjudication of custody disputes" and in cases where there is conflict over religion, "the religious beliefs of the parties themselves [are not] on trial".[28] This principle has not yet been applied in a tort case.

One appeal court has ruled that evidence of religious beliefs should not be admitted without some cogent evidential threshold:

> "Theirs was a dispute between beliefs, not a dispute over whether real harm would befall their children as a result of the religious beliefs of one or the other. Thus there was no basis upon which the court could embark upon an evaluation of the religious beliefs of either , and the evidence which Mrs. Young persistently sought to bring before the court was clearly irrelevant...Nor did the evidence establish that the conflict in the religious beliefs of the parents was causing, or was likely to cause, such harm."[29]

The question of whether the Charter would bar such "evaluation" of a religious institution's domestic matters in a tort or breach of fiduciary duty action is still open.

In contrast, it will be seen that American law on the constitutional issue is more developed. Of course, these cases must be approached cautiously by the Canadian lawyer. The similarity in language of common law tort doctrine and equitable remedies should not lull one to ignore that there is a fundamentally different constitutional framework.

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[27] *Re Bennett Infants* [1952]3D.L.R.699; [1952]O.W.N.621 at 624

[28] *Voortman v. Voortman* [1994]O.J.No.1085; (1994)72O.A.C.252; (1994)4R.F.L.(4th)250 at 261 quoting L'Heureux-Dube J. in *Young v Young* supra 15 at 92

[29] *Young* supra ftn.15

That having been said, we should not throw the baby out with the bathwater.There is still sound reason to consider United States cases will be persuasive in Canada; as one commentator concluded:

> "... I would contend that an examination of the history of freedom of religion in the United States is both necessary and beneficial to the understanding of freedom of religion in Canada, for a number of reasons. First, American jurisprudence is unquestionably useful, both for an understanding of the role of religion in a liberal democracy and for a specific analysis of the content of s. 2(a); accordingly, it is necessary to appreciate the historical roots of the American jurisprudence, in order to see both its virtues and its flaws more clearly. Second, as Canadian society becomes increasingly pluralistic, the development of freedom of religion in the United States, which from its inception has been home to a profusion of religious sects, will be increasingly instructive. Third, despite our differences, Canadian and American courts have often achieved similar results in freedom of religion cases, and any effort to find out why (and whether) that should be is worthwhile. Finally, the sheer volume of American history and jurisprudence on freedom of religion, while it may not be a controlling influence on the development of Canadian jurisprudence, may fill a void left by a much smaller body of literature and jurisprudence on that subject in Canada."[30]

To the above might be added the fact that since virtually all Canadian religious institutions have American counterparts, in many cases sharing governing bodies, the internal obligations and expectations of members are the same irrespective of the country.

The establishment and free exercise clauses of the First Amendment to the United States constitution create a wall of separation between church and state:

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[30]Paul Horowitz "*The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*" (1996) 54 University of Toronto Faculty of Law Review 1 at 15

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[31]

Many of the United States cases involving "clergy malpractice" end in dismissals or striking of the offending portion of the pleading at an early stage on an in limine motion (and on occasion in Canada).[32] Where such cases have proceeded to trial, both the establishment and free exercise clause issues triggered vigorous dissents.

In the sole Canadian case finding clergy malpractice,[33] the trial judge found that the wall of separation between church and state erected on the First Amendment distinguished all U.S. cases from Canadian. But the court's analysis of the differing constitutional approach was superficial. The court cited (albeit with an awareness of the unique elements of cases of harm to children) child custody, welfare and breach of fiduciary duty cases as authority for the proposition that Canadian courts will trench upon fundamental freedoms more readily than in the U.S..

Unfortunately the court did not consider if the First Amendment is actually applied by U.S. courts as the Canadian Charter is by Canadian counterparts. To simply reject a highly developed body of U.S. law because Canadian courts will not let religious freedom be used as a harm to children or to permit breach of fiduciary duty is inappropriate. After all, U.S. courts take similar positions on these particular issues. What is more important is to look at what the Supreme Court of Canada has said in considering the application of the U.S. Constitution to religious activities.

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[31] *United States Constitution*, Amendment I

[32] *Worth* supra ftn 17

[33] *Cairns* supra ftn.22

It is true that corresponding freedoms in s.2 of the Canadian Charter are subject to a s.1 balancing clause which does not exist in the United States constitution and allows limit by law as can be "demonstrably justified in a free and democratic society." They are:

> "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association."[34]

The Supreme Court of Canada describes these freedoms as "absolute".[35]

In a "Sunday closing" case, Chief Justice Dickson compared the First Amendment and s.2, of the Charter.[36] He observed that in *Braunfeld*[37] the U.S. Supreme Court had upheld Sunday closing legislation with the majority agreeing that the law would "make the practice of their religious beliefs more expensive", but that the law was not unconstitutional. In dissent, Justice Douglas asserted First Amendment rights were absolute. Justice Dickson concluded at paragraph 93:

> "In summary then all nine members of the Court held that Sunday-closing laws imposed an indirect economic burden on Saturday-observing retailers. Six of the Justices regarded this burden as a necessary incident of achieving a valid legislative

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[34]*Charter* supra ftn. 23

[35]*Edmonton Journal v. Alberta (AG)* [1989]S.C.J.No.124; [1989] 2 S.C.R.1326 at 1337; (1989)64D.L.R.(4th)577; (1989)102N.R.321; [1990]1W.W.R.577; (1989)J.E.90-47; (1989)71Alta.L.R.(2d)273; (1989)103A.R.321; (1989)41C.P.C.(2d)109; (1989)45C.R.R.1

[36]*Edwards Books* supra ftn. 9

[37]*Braunfeld v. Brown*, 366 U.S. 599 (1961)

> objective. Two of the Justices would have required a Sabbatarian exemption. The remaining Judge considered the absence of a "reasonable limits" clause in the American Constitution to be determinative. I agree with Douglas J.'s assessment that the majority was engaged in a balancing process which, under a constitution like Canada's, would properly be dealt with under a justificatory provision such as s. 1."

Justice Dickson concluded that Canadian courts come to the same result. The U.S. courts consider the s.1 balancing factors within the rights themselves. The route may be different, but the destination is the same.[38] The Canadian Charter may not have an anti-establishment clause, but the principle of non-entanglement and non-interference is the same in both jurisdictions.

> Take, for example, *Syndicat* [39] in which the Supreme Court of Canada observed: "[s]ecular judicial determinations of theological or religious disputes or of contentious matters of religious doctrine unjustifiably entangle the court in the affairs of religion."

In *Syndicat*, the Supreme Court held that a court is qualified to inquire only into the sincerity of the belief (and only where that inquiry is truly necessary), which is the same approach taken in the U.S. under the First Amendment.

The court stated that any other test would involve "nothing short of a religious inquisition . . . to decipher the innermost beliefs of human beings."[40] The court recognized in that regard the

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[38]Later in this paper the U.S. case *Berry v. Watch Tower Bible and Tract Society Inc.* N.H.S.C.01-C-0318 Feb.6,2003 and November 4, 2003(unreported) will be discussed as an illustration of this balancing.

[39]*Syndicat Northcrest v. Amselem* [2004]S.C.J.No.46; 2004 SCC 47 para.50;[2004]2S.C.R.551; (2004)241D.L.R.(4th)1; (2004)323N.R.59

[40]Id at para..52

need for the law to avoid "the invidious interference of the state and its courts with religious belief." [41]

> In another case, the same court observed:
> "[The] purpose of s.2 (a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself " and "State sponsored inquiries into any person's religion, should be avoided wherever possible, since they expose an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting."[42]

Such jurisprudence lays a basis for sound argument that the non-entanglement principle is part of the constitutional fabric of the Charter.

With respect to religious activity. the fact that there is no Establishment Clause in the Charter is irrelevant. As noted in *Big M*, "the applicability of the Charter guarantee of freedom of conscience and religion does not depend on the presence or absence of an 'anti-establishment principle' in the Canadian Constitution, a principle which would can only further obfuscate an already difficult area of the law."[43]

That is not to say that there are not variations in procedure between the two countries that flows from the different constitutional frameworks.

> In *Committee for the Commonwealth of Canada*, the Supreme Court noted that, while "Americans must do their balancing in the context of the definition of the right, Canadians can take advantage of the existence of section 1. A priori exclusions of

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[41] *Id* at para..55

[42] *Edwards Books* supra ftn.9

[43] *Big M* supra ftn.9

whole categories of [rights] are not necessary in Canada."[44]

In other words, the existence of the section 1 limitation clause enables Canadian courts to develop a contextual rather than a categorical approach, the latter of which governs general First Amendment jurisprudence. In Canada the balancing exercise carried out under section 1 is sensitive to the facts of each case.

As noted in *Edmonton Journal:*

> "the contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s.1."[45]

In short, the s.1 balancing mechanism requires an ad hoc fact-sensitive analysis. Unlike First Amendment jurisprudence, whole classes or categories of claims cannot be protected under the Charter.

This means that Canadian courts have been less likely to strike out clergy malpractice claims by way of summary dismissal or motion in limine. Unless the case on its face runs afoul of the Charter, Canadian courts are more inclined to let such cases go to trial where the court will undertake the constitutional balancing exercise in the context of the specific facts of the case.

Based on this reasoning, a religious person or institution would be reasonably entitled to

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[44]*Committee for the Commonwealth of Canada v. Canada* [1991]S.C.J.No.3; [1991]1S.C.R.139; (1991)77D.L.R.(4th)385; (1991)120N.R.241; (1991)J.E.91-184; (1991)4C.R.R.(2d)60

[45]*Edmonton Journal* supra ftn.35

expect that the response by a Canadian court to objections at trial under s.2, should be similar to the response of a U.S. court to a First Amendment motion in limine.[46] The analysis of the United States common law in determining whether or not an action for clergy malpractice can survive, and the cases where fiduciary duty was analysed, is therefore a useful to the Canadian lawyer.

III. Liability in Tort Arising During the Course of Religious Activities

A. Intentional Torts

A tort is a civil wrong other than a breach of contract, which the law will redress by an award of damages.[47] Torts are broadly divided into two categories: intentional torts and unintentional torts (or negligence).

For most of common law history, the courts were principally concerned with intentional torts. Unintentional tort, or negligence, is a relatively recent legal development authorities date to the beginning of the 19th century.[48]

The classic intentional tort was trespass to the person, commonly called assault or battery. Trespass can also be effected against land or property and includes conversion of property to personal use.

Defences to intentional torts are not exclusive to religious persons or institutions; as

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[46]In limine is an expression commonly used in American jurisprudence to describe a pre-trial motion brought for a protective order prohibiting prejudicial questions or statements. "Purpose of such motion is to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial." see Black's Law Dictionary supra ftn.3; see *The Bank of Nova Scotia v. Del Grande* [1994] O.J. No. 2918 para. 9; (1994)76O.A.C.31

[47]John G. Fleming, *The Law of Torts (6th)* p. 1

[48]*Fleming* Id p. 97

Professor Ogilvie noted in discussing *Gruenke*[49] and *Church of Scientology*[50]:

> "The courts have repeatedly stated in Canada that religious institutions enjoy no absolute protection or exclusion from the law of the land . . ."[51]

There are common law rights, such as religious privilege, unique to religious litigants and which may play a procedural role in, for example, the admission of evidence before secular courts. On the other hand, traditional defences to tort - mistake, consent, self-defence, defence of property, necessity, discipline or legal authority, etc. - are also available irrespective of the religious character of the defendant.

In consequence, in cases involving physical or sexual assault religious persons who are tortfeasors are liable in damages. Institutions in general are less often liable for intentional torts, and the traditional respect for religious institutions in particular has led courts to take judicial notice that established churches do not promote or condone illegal activity.[52]

Once it is established to the satisfaction of the court that an intentional tort has been committed it should not be necessary to resort to negligence.[53]

In the rare case a religious institution is proven to have committed an intentional tort, it

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[49]*R. v. Gruenke* [1991] S.C.J.No.80; [1991]3 S.C.R.263; (1991)130 N.R.161; [1991]6 W.W.R. 673; (1991)J.E.91-1647; (1991)75ManR.(2d)112; (1991)67C.C.C.(3d)289; (1991)8C.R.(4th)368; (1991)7C.R.R.(2d)108

[50]*R. v. Church of Scientology(No.6)* [1987]O.J.No.64; (1987)18O.A.C.321; (1987)31C.C.C.(3d)449; (1987)30C.R.R.238p

[51]M.H. Ogilvie, *Religious Institutions and The Law in Canada* (1996:Carswell)p.147

[52]*Bennett* supra ftn.14; *C(M) v. M(F)*[1990]O.J. No. 1862; (1990)74D.L.R.(4th)129; (1990)46C.P.C.(2d)254

[53]*F.W.M. v. Mombourquette* [1996] N.S.J.No.260; (1996)152N.S.R.(2d)109

will be held liable.[54] There is nothing unique about religious institutions when it comes to intentional torts generally, except when a tort is alleged arising from its religious activities.

In such a situation, at least two intentional torts have been alleged against religious institutions. They are liability for "intentional infliction of mental suffering" and "outrageous conduct", both for conduct which occurred solely in the course of a religious activity.

[54]*Hill v. Church of Scientology of Toronto* [1995]S.C.J.No.64;[1995] 2 S.C.R. 1130; (1995)24O.R.(3d)865; (1995)126D.L.R.(4th)129; (1995)184N.R.1; (1995)J.E.95-1495; (1995)84O.A.C.1; (1995)25C.C.L.T.(2d)89; (1995)30C.R.R.(2d)189

B. Intentional Infliction of Mental Suffering and Outrageous Conduct

The tort of intentional infliction of mental suffering is: 1) flagrant or outrageous conduct that is 2) calculated to produce harm and 3) results in a visible and probable illness.[55]

The tort was recognized by the Supreme Court of Canada in *Frame*[56] by Madame Justice Wilson (in dissent but not on this issue).

In *Bell* [57] the Saskatchewan Court of Queen's Bench, considering a motion to strike paragraphs in a pleading, compared the tort of intentional infliction of mental suffering in Canada with the American case law. The court found:

> "Anyone who intentionally causes another person severe mental suffering may be liable in tort. This basis of liability, which was established relatively recently, is not the progeny of the trespass action, but a descendant of the action on the case. Consequently, it is not actionable without proof of actual harm. There must be a 'visible and provable illness' resulting from the conduct of the defendant. (Allen M. Linden, Canadian Tort Law, 6th ed. (Toronto:Butterworths, 1997) pp.52-3) . . . The American cases, which are much more numerous than the Canadian and Commonwealth ones, have drawn a line between mere insult, which is not actionable, and 'extreme and outrageous' conduct, which is. The latter type of conduct is not only more reprehensible, and therefore more deserving of sanction, but there is also a greater likelihood that the mental suffering is not feigned in such a case. . . (Canadian Tort Law, supra, pp.53-4) . . . if the intentional infliction of

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[55]*Prinzo v. Baycrest Centre for Geriatric Care* [2002]O.J.No.2712; (2002)60O.R.(3d)474 para.43; (2002)215D.L.R.(4th)31; (2002)161 O.A.C.302; (2002)17 C.C.E.L.(3d)207

[56]*Frame v. Smith* [1987]S.C.J.No.49; [1987]2 S.C.R.99; (1987)42D.L.R.(4th)81; (1987)78 N.R.40; (1987)23 O.A.C.84; (1987)42 C.C.L.T.1; [1988]1 C.N.L.R.152p; (1987)9 R.F.L.(3d)225

[57]*Bell v. Intertan Canada Ltd.* [2001] S.J. No. 377para..11,12; 2001 SKQB278

mental suffering is claimed, it must be pleaded as a distinct claim."

While, as Justice MacLeod observed in *Bell*, this tort is actionable if there is a visible and provable illness which can be tied to the conduct of the tortfeasor, that does not mean it is necessarily a separate head of recovery from the other injuries a person would have recovered. Usually, the victim will have already recovered damages under more traditional torts.[58]

The principle barring double recovery applies internally within the law of tort no less than between legal systems and so the observations of the trial court in *M.B.*[59] are apropos:

> "It has become common not to distinguish damages from compensation, as equity has borrowed from the common law for assessment of appropriate equitable compensation and the two areas are fused such that compensation versus damages is a "difference without a distinction" . . . Indeed, the nature of the damage suffered by the plaintiffs as led in evidence in this case fell within the concept of personal injury in damages and there was no suggestion that the assessment of compensatory relief should be any different."

That was the case in *McKerron*,[60] a defamation action. The court found that the victim's recovery for defamation completely compensated him for the loss (put him in the position he would have been in had the tort not been committed). He was not allowed "double recovery" under the head of intentional infliction of mental suffering:

"This case is in a sense complicated by the fact that the plaintiff seeks damages for

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[58]*S.G.H. v. Gorsline* [2001]A.J. No.263 par.140,141; 2001 ABQB 163; [2001]6W.W.R.132; (2001)90Alta.L.R.(3d)256; (2001)285A.R.248; (2001)5C.C.L.T.(3d)65

[59]*M.B. v. British Columbia* [2000] B.C.J. No.909 par.326-328; 2000 BCSC 735

[60]*McKerron v. Marshall* [1999] O.J. No. 4048 par.189-191

> two causes of action, for defamation and for intentional infliction of mental suffering. It is somewhat problematic to separate these two claims since the damages for intentional infliction of mental suffering are arguably the same damages as may be claimed for defamation. This is so because the damages, general, aggravated and punitive for defamation may be based in part upon post libel conduct which damages are the same as those claimed for intentional infliction of mental suffering, for "harassment". In my assessment of damages I have therefore taken into account the concept of "totality." I have assessed all damages conscious that the plaintiff is not entitled to "double-recovery" for the same wrong suffered."

In at least two cases involving religious persons or institutions for claims arising from their religious activity, claims have been made under this tort. In another case, *Cairns*,[61] the plaintiff, who might more properly have claimed under this head of damages, instead advanced a claim in negligence.

In *Zecevic*[62] a plaintiff husband brought action against churches and priests who refused to bury his deceased wife according to her testamentary wishes. The court rejected the claim on the grounds that there was not the "visible and provable illness" required by the definition of the tort:

> "The second branch, namely the intentional inflicting of mental suffering is next to be dealt with. In a forceful submission, counsel for the plaintiff asserted that Father Doder intended to stop the funeral and did not take into consideration the impact on the plaintiff. He intended to make an example of these people and intended to

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[61] *Cairns* supra ftn.22

[62] *Zecevic v. Russian Orthodox Christ the Saviour Cathedral* [1988]O.J. No. 1282. The court also addressed the tort of negligent infliction of mental suffering.

> cause mental suffering as shown by the fact that he himself did not telephone the plaintiff or his family or back off from his original assertion. After a careful consideration of all the evidence aforesaid, I am not prepared to hold that Father Doder intended to inflict mental suffering on the plaintiff. He honestly believed in what he did and it is also arguable that the plaintiff's complaints do not amount to mental suffering in the sense that the phrase is used with respect to this tort."

Deiwick[63] was a 1991 decision of Craig, J. of the Ontario Court of Justice. It was an action by a woman against the minister of her church who she consulted for marriage counselling. A sexual relationship between the plaintiff and her minister resulted in her pregnancy. There were financial and property gift promises between the minister and the plaintiff. Suit was brought for breach of fiduciary duty, resulting trust, fraudulent conveyance and intentional infliction of mental suffering.

The court dealt at length with the damages available for breach of fiduciary duty. Unfortunately, the court considered the fiduciary duty claim first, and the claim in tort for intentional infliction of mental suffering, second. As we will see below, it would have been more appropriate for the court to exhaust common-law tort remedies first before a foray into equity.

In the result the court found damages for breach of fiduciary duty resulted in emotional and mental stress. The court then went on to consider whether or not the damages would be available for intentional infliction of mental suffering. It stated:

> "The claim for damages based upon the alleged intentional infliction of mental suffering upon the plaintiff.
>
> "On the evidence in this case, it is my view that this claim for damages should be considered in the alternative to a claim for damages for breach of fiduciary duty and breach of confidence.

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[63] *Deiwick v. Frid* [1991]O.J. No. 1803

> "The tort of intentional infliction of mental suffering is to be distinguished from mental suffering as a head of damages. As a head of damages, a claim for mental suffering is supported by an underlying tort, e.g. negligence resulting in injury. In Kahemtulla v. Vanfed Credit Union (1984)29 C.C.L.T.78 (B.C.S.C.), McLaughlin J. as she then was, dealt with a case where the plaintiff, after only three months in her first job as a bank teller, was wrongfully accused of taking money, and was summarily dismissed. In consequence she suffered severe emotional distress for which she claimed damages. Her action succeeded. McLachlin J. found that, the conduct complained of could be described as "flagrant and extreme". She also commented that the conduct considered in the leading authorities such as Wilhenson v. Downton (1987)2 Q.B. 57 and Janvier v. Sweeney (1919)2K.B.316 (C.A.) was in fact "flagrant and extreme". See also Linden: Canadian Tort Law 4th ed. 1988, pp.50-53.
>
> "In the instant case, the evidence does not support a finding of intentional infliction of mental suffering."

There seems some confusion in the judgment as to whether it was considering the intentional or negligent tort of infliction of mental suffering. In the end, it found that the case had not the "flagrant and extreme" conduct required to make out the intentional tort.

The wide ranging of grounds of liability in *Deiwick* contributed to similar confusion in a later judgment relying upon it. That case will be discussed below.[64]

As can be seen from these two cases involving religious persons, it would be unusual if the flagrant or outrageous conduct complained of was itself intended to cause visible and provable illness. Generally, if the tortious act has another object (for example sexual assault) it will have had that as the intended wrong, not the illness.

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[64] *Cairns* supra ftn.22

Further, as in *Zecevic*, if the objective of the religious person is not tortious but directed toward accomplishing some goal necessary to a religious activity, the necessary mental intention would be missing.

A good example of where a religious activity causes mental suffering might be the confessional. To some extent the object of the confessor is to induce a mental suffering in the penitent, but for a religious and not tortious purpose.

In the U.S. the necessity of proving actual physical illness is gradually giving away.[65] Indeed, American courts in cases with religious defendants in which an action for what in Canada would be styled "intentional infliction of mental suffering", have instead assessed damages for "outrageous conduct".[66] In Canada outrageous conduct is not a separate head of damages but may trigger punitive or exemplary awards.[67]

Unlike the United States, where it is not as common to award costs, the outrageous conduct of a defendant can trigger an award of solicitor client costs - sometimes against the solicitor involved.[68]

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[65]*Fleming* supra ftn.47 p. 32

[66]*Destefano v. Grabrian* 763 P. 2d (1988); *Bohrer v. DeHart* 943 P. 2d 1220 (1996);944 P. 2d 633 (1997); *Debose v. Bear Valley Church of Christ* 890 P.2d 214 (1994); *Bear Valley Church of Christ v. Debose* 928 P.2d 1350 (1996)

[67]*Whiten v. Pilot Insurance Co.*[2002]S.C.J.No.19par.39;2002 SCC 18; [2002]1S.C.R.595; (2002)209D.L.R.(4th)257; (2002)283N.R.1; (2002)J.E.2002-405; (2002)156O.A.C.201; (2002)20B.L.R.(3d)165; (2002)35C.C.L.I.(3d)1; [2002]I.L.R.I-4048 *Hill v. Church of Scientology of Toronto* supra ftn.54

[68]*Petten v. E.Y.E. Marine Consultants, a division of CSE Marine Services Inc.* [1998] N.J. No. 371 par.75;(1998)179Nfld.&PE.I.R.94; *Kent v. Thiesen (B.C.C.A.)* [1990] B.C.J. No. 2615; *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*[2000]O.J.No.4428; (2000)51O.R.(3d)97par.75; (2000)138O.A.C.201; (2000)42C.P.C.(5th)65

It is generally associated with intentional actions, although if the civil wrong arises as an unintentional tort one commentator has suggested it might be available if the underlying negligence was reckless.[69]

Because sexual assaults are intentional torts, and normally done without the knowledge (and contrary to the policy) of the church who might be the employer or supervisor of a tortfeasing minister or priest, the church, if liable, is vicariously rather than originally, even if the conduct itself is outrageous.[70]

In order to trigger punitive or exemplary awards, or costs, there must be:
"a finding that the defendant was motivated by actual malice which increased the injury to the plaintiff . . . by increasing the mental distress and humiliation of the plaintiff".[71]

Finally, in Canada, the intention of punitive or exemplary awards is not to compensate the plaintiff for loss but rather to punish the defendant.[72] Courts have refused to add exemplary damages in even the most serious assaults by religious defendants on the basis that recovery in tort had already taken place.[73]

In the United States, on the other hand,
"the enormity of the outrage itself may sometimes carry conviction that there has in fact been a severe emotional shock, neither feigned nor trivial, so as to dispense

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[69]S.M.Waddams, *The Law of Damages* (Toronto: Canada Law Book 1st ed.1983) par.998

[70]*Bennett* supra ftn.14; *C(M) v. M(F)* supra ftn.52

[71] *Norman v. Westcomm International Sharing Corp.* [1997]O.J. No. 4774 par.150; (1997)46O.T.C.321

[72]*Waddams* supra ftn.69 par.979

[73]See ftn.58,60

> with proof of physical injury as a guarantee of the genuineness of the plaintiff's claim."[74]

Accordingly, in the United States awards are made against individual religious persons for outrageous conduct in the appropriate case (although not the governing religious institution).[75]

In *Destefano* the Supreme Court of Colorado allowed a claim of a husband and wife against a minister who was a marriage counsellor for outrageous conduct when the minister seduced the plaintiff wife the court stated:

> "The test for outrageous conduct in Colorado is. . .(1)One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress to another, and if bodily harm to the other results from it, for such bodily harm. Outrageous conduct must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'. . . it is for the trial court, in the first instance, to determine whether the conduct at issue is 'outrageous'".(Citations omitted).[76]

To the extent the church negligently supervised the minister, the court also allowed that claim to proceed.

In *Bohrer* the Colorado Court of Appeals affirmed judgment against a minister who convinced a fourteen year old plaintiff parishioner to have a sexual relationship with him. The trial judge awarded $187,500.00 for breach of fiduciary duty and outrageous conduct, and an equal

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[74]*Fleming*, supra ftn.47 p.32

[75]See ftn.66

[76]*Destefano* supra ftn.66

amount of punitive damages. On appeal the Court of Appeal was asked to find that the tort of outrageous conduct was, in essence, assault and battery and barred by a statute of limitations. The Court of Appeal did not agree, and after defining assault and battery compared it with outrageous conduct:

> "In contrast, to succeed on a claim for outrageous conduct, a plaintiff must prove by a preponderance of the evidence that the defendant, by conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community, intentionally caused severe emotional distress.
> "Depending on the facts of the case, a claim for outrageous conduct may overlap with a claim for assault and battery. The claims may coexist or either claim may exist without the other. Hence, in this case, even if the statute of limitations on an assault and battery claim had run, plaintiff still had the right to sue on the separate and still viable claim of outrageous conduct and to have the jury consider all of DeHart's conduct, including that constituting assault and battery. (Citations omitted).[77]

The court later observed that where the conduct was not religiously motivated, there was no First Amendment protection.

The definition of outrageous conduct in the U.S. is similar to the definition of the tort of intentional infliction of mental suffering in Canada. Both torts require there be flagrant and outrageous conduct. The difference is that in Canada there also must be provable harm.

The Supreme Court of Florida addressed the issue of outrageous conduct in a jurisdiction where the tort of outrageous conduct did not previously exist. *Evans*[78] was a 2002 case involving

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[77] *Bohrer* supra ftn.66

[78] *Doe v. Evans* 814 So.2d 370 (2002)

an action against a priest who, during a counselling relationship with a parishioner, became romantically involved. There was an action for breach of fiduciary duty and a claim against the priest and the church for outrageous conduct. The defendants moved to dismiss, alleging the tort claims were barred by the First Amendment and involved practices and procedures beyond the purview of secular courts and that the cause of action for outrageous conduct was not recognized by the Florida courts.

The Florida Supreme Court followed a previous decision of the same court and found:

> "As we explained in Malicki, '[w]hether the priest's tortious conduct in this case involved improper sexual relations with an adult parishioner he was counseling or sexual assault and battery of a minor, the necessary inquiry in the claim against the Church Defendants is similarly framed: whether the Church Defendants had reason to know of the tortious conduct and did nothing to prevent reasonably foreseeable harm from being inflicted upon the plaintiffs.'"

The Supreme Court of Florida recognized the tort of outrageous conduct is synonymous with the tort of intentional infliction of emotional distress, and is available as a claim against an individual member of a religious institution, but will only lie against the institution if it was also guilty of knowing of the conduct (presumably beforehand by knowledge of prior acts or predisposition) and not acting to prevent foreseeable harm.

Courts in Canada and the U.S. will find for intentional torts, such as assault, battery and intentional infliction of mental suffering against defendant individuals regardless of the religious nature of their position. However, absent vicarious liability or the tort of negligent supervision, they will not find in intentional tort against the governing institution. Only where the institution has prior knowledge will liability follow.

C. Negligence and Clergy Malpractice

Before discussing whether or not the tort of clergy malpractice does, or should, exist at law, we should differentiate malpractice from intentional torts and negligence in general.

"Malpractice" is a general term most often applied against professionals such as lawyers or doctors. The frequency with which the term malpractice is used in law might lead one to believe that it has a concrete meaning as a term of art. This is not the case, as is generally juxtaposed to the profession to which it applies: i.e., "legal malpractice", "medical malpractice".

Blacks defines the term as:

> "Professional misconduct or unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyers, and accountants. Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them. It is any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct."[79]

The first step in determining malpractice is to identify a skill and learning commonly applied under all the circumstances in the community by the average member of the profession. When applied to medical, legal or accounting professionals there is a generally accepted central governing body, enacted by statute or long custom, to which the court adjudicating a claim can turn to establish the elements of duty of care.

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[79]Blacks supra ftn.3 p. 864

But even within such well regulated, established and universally recognized professions as law, medicine or accountancy, the term is used gingerly. Picard cautioned:

> "Negligence is the most common basis for a lawsuit against a doctor or hospital. Malpractice is a term that is often applied, sometimes even in statutes, to negligent practice, but the scope of its meaning is not clear. Until the term is adequately defined by the legislature or the courts, it use is best avoided."[80]

If the generality of the term "malpractice" troubles experts contemplating accepted professions, it should come as no surprise the term is even more suspect when applied to a group as indeterminate and amorphous as "clergy".

The Court of Appeal of Nova Scotia ran into this problem in one of the few cases in Canada which touched the issue of clergy malpractice, albeit indirectly.[81] Unfortunately, the court muddled the discussion of clergy malpractice by relating it to vicarious liability issues against the Catholic Church employing a tortfeasor priest. The trial court had looked at the role of a priest within a small community and determined that the employing church had placed him in a position where he was ultimately able to commit sexual assaults on young children.

The Court of Appeal found the trial court in error in applying vicarious liability to the church for acts that were criminal and intentional by the priest.

Had the court found the priest to have been negligent, vicarious liability might have resulted against the church. It did not. Under the general principle of respondeat superior, the master is liable for the negligent acts of the servant performed in the course of employment, but

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[80]Ellen I. Picard, "*Legal Liability of Doctors and Hospitals In Canada*" 2nd ed. (1984:Toronto, Carswell)p.28

[81]*Mombourquette* supra ftn.53

not for intentional or criminal acts outside of the course of employment.[82]

If the trial court or Court of Appeal in *Mombourquette* had attempted an analysis of negligence by the priest, which it did not, it would have struck the same rocks that doomed malpractice actions against clergy in the United States. Indeed, the Court of Appeal in *Mombourquette* relied heavily on American case law, although applying it to other issues at bar.

American courts recognize clergy malpractice raises vexatious questions, one of which is the definition of malpractice itself:

> "Fortunately, we need not address these and the other vexatious questions that arise in this area because clergy malpractice is not a tort theory that is viable under the facts before us. Malpractice, it must be noted, is not a theory of ordinary negligence or of intentional tort. It is a separate and distinct cause of action. A tortfeasor may be liable for acts of ordinary negligence or for intentional torts, regardless of the "professional" color of his conduct."[83]

The primary element of malpractice, as well as negligence generally, is the establishment of a duty of care, which American judges recognize is the "most difficult aspect of a clergy malpractice action".[84]

The Federal District Court for the Southern District of New York called such exercise "impossible" without opening a "Pandora's box":

> "It would be impossible for a court or jury to adjudicate a typical case of clergy

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[82]Id par.22

[83]*Strock v. Pressnell* 38 Ohio St.3d 207 (1988)

[84]*Odenthal v. Minnesota Conference of Seventh-Day Adventists* (unreported, File No. C1-01-278; C4-01-291)State of Minnesota Court of Appeals (2001); see also *Cairns* supra ftn.22

> malpractice, without first ascertaining whether the cleric, in this case a Presbyterian pastor, performed within the level of expertise expected of a similar professional (the hypothetical "reasonably prudent Presbyterian pastor"), following his calling, or practicing his profession with the community."[85]

This exercise becomes perilous when it involves analysis of organizations entitled to the umbrella of constitutional freedom as are religious institutions. Thus, malpractice actions against clerics at the start should trigger an analysis which may well be as unconstitutional in Canada as it is in the United States. As the Utah Supreme Court observed:

> "Indeed, malpractice is a theory of tort that would involve the courts in a determination of whether the cleric in a particular case–here an LDS Church bishop–breached the duty to act with that degree of 'skill and knowledge normally possessed by members of that profession.' Defining such a duty would necessarily require a court to express the standard of care to be followed by other reasonable clerics in the performance of their ecclesiastical counseling duties, which, by its very nature, would embroil the courts in establishing the training, skill, and standards applicable for members of the clergy in this state in a diversity of religions professing widely varying beliefs. This is as impossible as it is unconstitutional; to do so would foster an excessive government entanglement with religion in violation of the Establishment Clause."[86](Citations omitted)

Bearing in mind the problematic nature of determining malpractice involving religious persons we turn to an analysis of the attempts to found an action on this tort.

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[85]*Schmidt v. Bishop* 779 F.Supp. 321 (1991)par.8,9

[86]*Franco v. The Church of Jesus Christ of Latter-Day Saints* 21 P.3d 198 (2001)par.23; see also *F.G. v. MacDonell 696 A.2d 697, 703(1997)*

i) In Canada

The tort of clergy malpractice has not been widely advanced in this country. Canadian courts are aware of American decisions rejecting attempts to establish an action under this head of negligence. There has only been one case allowing this tort in Canada.

The Ontario case, *Cairns,*[87] involved a 31 year old woman who sued the Canadian wing of Jehovah's Witnesses and three of its ministers.

The adult plaintiff alleged that when she was a minor she was abused in her family home. When an adult she revealed the abuse to elders of the church. She alleged they required her to confront her father as part of the church discipline process. The Church and elders denied they forced plaintiff to do anything.

In the result, Molloy, J. found against the church (but not the individual defendants) for negligence. While not expressly defined as such, it was, in effect, clergy malpractice. The court awarded damages of $5,000.00.[88]

The case has not yet been adopted as authority for allowing clergy malpractice by any other court[89] and was not appealed.[90]

In the unusual facts of this case, the act complained of was not ignoring or hiding the

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[87]*Cairns* supra ftn.22

[88]In an Ontario case involving sexual assault by a priest upon a parishioner, *Cairns* was cited as authority that "courts are and should be reluctant to intervene in and interpret spiritual matters." *P.D. v. Allen* [2004]O.J. No. 3042 par.293

[89]In *Allen*, Lissaman, J. accepted Justice Molloy's view that courts should avoid religious questions but did not find clergy negligence.

[90]Counsel for the Watch Tower Bible and Tract Society has advised the author that there has been no appeal perfected.

sexual abuse, but rather the trauma of a confrontational meeting, held at the instigation of the plaintiff herself.

The court found that the church did not, in fact, require the confrontational meeting complained of, but that it resulted from a mistaken application of doctrine. No expert evidence was led as to the standard of care, namely, the doctrine which ought to have been applied. Instead, the plaintiff unsuccessfully attempted to introduce irrelevant evidence through disaffected members who were critical of the church.

While admitting that there was no evidence on which to establish a standard of care - normally the first step in any negligence action - the court instead created a "reasonable person" standard based on judicial notice without evidence or any consideration of the unique position of a cleric:

> "There was no evidence of the particular standard of care applicable to elders of the Jehovah's Witness faith in this community at the relevant time. I agree with the defendants' submission that the standard of care applicable to psychiatrists, psychologists, or social workers is not the appropriate standard against which to measure the conduct of the elders. In the absence of specific evidence as to the standard, it is appropriate to apply the general standard of care for negligence, that of a reasonable person in like circumstances. The elders in this situation had no particular expertise dealing with victims of childhood sexual abuse. They cannot be expected to be familiar with the literature on how to handle disclosure of abuse by vulnerable victims. However, as a matter of the general knowledge any person in the community would be expected to have in 1989, the defendants must have known that being a victim of sexual abuse is traumatic and that for any such victim to confront her abuser about such conduct in front of others would also likely be emotionally difficult. It was reasonably foreseeable that such a confrontation could

be emotionally harmful to the plaintiff." [91]

But V.B. was an adult, and in the facts accepted by the court, arranged the meeting herself. The was apparently no evidence to support the conclusion that "any person in the community", or any elder of the church, in 1989 "must have known" that confronting an abuser would be traumatic. Normally such sweeping generalizations, without factual underpinning, would not create a duty of care in a general negligence action. In the case of religious defendants, there are other factors that should have been weighed.

The court found that while the requirement to confront an accuser was, in fact, not a church teaching, some unnamed individual gave incorrect advice to the local ministers that it was necessary.[92] The court concluded the church was liable not because its own policies and procedures were flawed, but that while correct they were not followed by a minister who was not actually a party to the action. To reach this conclusion, the court had to embark the exact type of "state-sponsored inquiry" the Supreme Court warned should be avoided.[93]

The court went even further in placing a duty upon clerics to make independent inquiry of secular professionals to determine how to conduct internal religious counselling:

> ". . . aware of their own lack of expertise, it was incumbent upon the elders to make inquiries of a professional as to how the potential harm to the plaintiff could be minimized, if not avoided entirely. In my opinion, failure to take this very basic precaution was a breach of the standard of care."[94]

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[91] *Cairns* supra ftn.22 par.176

[92] *Id* par.56,57,62,65

[93] *Edwards Books*, supra ftn.9

[94] *Cairns* supra ftn.22 par.177

Such a requirement threatens the religious autonomy of churches, and religious liberty in general. The spectre of psychiatrists, psychologists or social workers imposing, by law, their views and standards on how a minister of a religion conducts counselling sessions is alarming. It will impact the confessional, marriage and other pastoral counselling, even delivery of sermons and the writing of religious literature.

In fact, it may have already had such an effect. In light of Justice Molloy's ruling, one legal writer advised Christian denominations to "review their internal policies regarding when and how they apply" the bible book of Matthew 18:15-18, and warned that "clergy may be forced to defend their conduct in the face of interpretations of Scriptures made by the secular court system on an on-going basis".[95]

If that prospect comes to pass, courts could in effect be conducting "heresy" trials to determine what sort of religious counselling is orthodox.

Another curious duty was imposed by the court on ministers of religion to pass on to successor congregations information about emotionally vulnerable members. In the facts of the *Cairns* case, given the lack of special expertise of the elders in dealing with victims of abuse, the duty raises many questions, not the least of which is the extent personal information should be passed on to ministers who may later be constituting a church court. The judge opined that there should have been "better communication between the two groups of elders".[96]

By establishing such detailed legal obligations of church elders - to consult outside secular professionals and to establish communication procedures - courts are being led inexorably to examination of internal ecclesiastical doctrine and policy. By standardizing a duty of care, the

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[95]White, Mervyn, F. & White, Suzanne E. "*Recent Decision Casts Doubt on Use of Matthew 18:15-18 To Address Church Disputes",* Church Law Bulletin No.03, April 27, 2004

[96]*Cairns* supra ftn.22 par.177

court in *Cairns* imposed a judicially defined orthodoxy on how a religious organization is to counsel and discipline members or govern itself. These are exactly the sort of non-entanglement and non-interference principles the U.S. constitution prohibits.

In particular, *Franco*[97] in the Supreme Court of Utah appears to be on all fours with the *Cairns* case, and resulted in a dismissal of all the actions against the church, not only for breach of First Amendment issues but also for failing to properly establish a cause of action. It is difficult to see how Justice Molloy reached a different conclusion.

The court acknowledged that the overwhelmingly uniform position of U.S. courts would have probably resulted in a summary dismissal of a clergy malpractice claim in *Cairns.*[98] But it then concluded that the constitutional language guaranteeing religious freedom in Canada is "not identical" to the U.S.[99]

The judge relied for authority for this proposition on, among other cases, *Deiwick*[100] which as we have seen is itself a problematic case.

The trial judge also did not consider the Supreme Court of Canada's view of the similarity of the U.S. non-establishment and free exercise clauses and the Canadian Charter, or the congruent balancing processes applied to religious issues in both countries, as discussed at length above.

Cairns remains the first and only reported case in Canada finding a religious organization

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[97]*Franco v. The Church of Jesus Christ of Latter-Day Saints* supra ftn.88

[98]*Cairns* supra ftn.22 par.130

[99]*Id* par.134

[100]*Deiwick* supra ftn.63

may be found liable of clergy malpractice. Given the unanimous position of U.S. courts in rejecting clergy malpractice claims, will the more conservative Canadian courts run against the current and adopt *Cairns*?

Shortly after *Cairns*, another Ontario trial court in *Allen*[101] had the opportunity to do so, but refused. It was a fact situation similar in key respects to *Cairns.*

In *Allen*, a priest had sexually abused a young girl who some 40 years later (after the priest was convicted in a criminal court) brought a civil action. The case had a number of unusual factors, including many intervening causes between the abuse and later alcoholism. The court found that the priest had committed the assaults and breached his fiduciary duty. What is notable is the claim against the diocese. The court found a vicarious liability on the part of the diocese but refused to find negligence.

In both *Cairns* and *Allen*, the plaintiffs came forward as adults to their church to report they had been abused as children. In *Cairns* the abuser was her father, merely a member of the church, while in *Allen* he was a priest.

In *Cairns* negligence was found because the elders in violation of church policy recommended she confront the abuser, causing her trauma. In *Allen*, the bishop of the church violated the church clergy misconduct protocol in refusing to assist the victim, which did "aggravate P.D.'s injury".

Given that the neither the elders nor the church had any role in controlling or directing the father in *Cairns* while the church employed and directed the priest in *Allen*, one would think that liability for malpractice would more likely have been found in the latter - particularly since *Cairns* was not only already decided, but the court in *Allen* referred to it on another point. But this was

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[101] *Allen* supra ftn.88

not the case.

The plaintiff had claimed that she approached the bishop for help (she had become a nun later in life, although left that vocation) and was rebuffed in what the trial judge called "willful blindness" and "a most callous way".[102]

Unlike *Cairns*, however, Lissaman, J. refused to find breach by a church of its own rules governing how to deal with sexually abused victims constituted negligence:

> "The plaintiff argues that the Diocese is directly liable for its negligent mishandling of PD's disclosure of the childhood abuse in May 1992. She further alleges that the Diocese breached their own clergy sexual misconduct protocol when they failed to provide any support to PD following her disclosure. Here again, the conduct in question is pastoral conduct which courts should be reluctant to second guess. Furthermore, I agree with the submission of the defendants that a self-imposed protocol does not necessarily amount to a duty of care. The conduct of the Bishop was callous and may have operated to aggravate PD's injury with respect to her pain and suffering from the childhood abuse, but it does not amount to negligence. The claim for direct liability of the Diocese is dismissed."[103]

The decision of Lissaman, J. on this point is consistent with the law of the U.S. and Canada, while it is inconsistent with *Cairns*. The conflicting views of these two Ontario trial courts on the legal issue of clergy malpractice remain to be reconciled by a higher court. In the meantime, *Cairns* remains an anomaly that, to be accepted, requires that we assume constitutional protection of religion in Canada is weaker than in the United States.

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[102] *Allen* supra ftn.88 par.309

[103] *Id* par.311

The only other case referring to the tort of "clergy malpractice" is *Mombourquette,*[104] a 1996 decision of the Nova Scotia Court of Appeal on which leave to appeal to the Supreme Court was not granted.

In *Mombourquette* a nine year old altar boy had been sexually abused by a parish priest and 24 years later commenced an action against the priest and the church as employer. The plaintiff was awarded damages against the priest and the church at trial. The church appealed.

With respect to the church, the Court of Appeal of Nova Scotia found that because the priest's wrongful conduct had not been during the course of his employment there was no vicarious liability, nor was there a fiduciary relationship between the church and the plaintiff. The priest had default judgment entered against him and was not party to the appeal.

The Court of Appeal in the course of deciding that the sexual assault was not a negligent but an intentional act on the part of the priest (necessary in order to establish the limitation period issue), reviewed the case of *Jones,*[105] a decision of the New York courts on clergy malpractice. The court cited this decision to establish that an intentional tort cannot be, at one and the same time, negligence. The case cited also addressed whether or not a tort of clergy malpractice was available where the gravamen of the case sounded in intentional tort. The court said no:

> "On the facts as alleged by plaintiffs the Court is satisfied that the seventh cause of action, purporting to state a claim for clergy malpractice and negligence, must be dismissed, for the reason that the alleged wrongful conduct of the priest Trane constituted intentional torts-assault and battery, which are independently pleaded as three causes of action of the second amended complaint. As Judge Brieant affirmed, 'New York has adopted the prevailing modern view that, once

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[104] *Mombourquette* supra ftn.53

[105] *Jones v. Trane* 153 Misc. 2d 822 (1992)

> intentional offensive contact has been established, the actor is liable for assault and not negligence, even when the physical injuries may have been inflicted inadvertently; 'There is, properly speaking, no such thing as a negligent assault'. The principle applies with equal force to the claims of negligence and malpractice, which 'in its strict sense means the negligence of a member of a profession in his relations with his client or patient.'"[106] (Citations omitted)

Jones was a decision of the Supreme Court of New York involving a parish priest who had sexually abused a child and was, along with his employer church, sued for "clergy malpractice" and other traditional causes of action.

In dismissing the claim for clergy malpractice the court adopted *Schmidt*[107] and found:

> "Defendants jointly, in all motions directed to plaintiffs' complaints, have relied primarily and almost exclusively on the rationale of Chief Judge Charles L. Brieant of the United States District Court for the Southern District of New York in Schmidt v. Bishop, in which summary judgment on causes of action for clergy malpractice, negligence and breach of fiduciary duty was granted, both to a church pastor who had allegedly carried on long term sexual contact with the plaintiff in the course of "emotional, spiritual and familial counselling" initiated at the request of plaintiff's parents, and to his congregational and judicatory employers. The Judge concluded that, in addition to being without precedent in New York law and on other grounds, the causes of action constitutionally could not be sustained because they would require the definition of a standard of care for the cleric, and that the defining of such a standard would, in his view, necessarily run afoul of the prohibition against excessive entanglement in religion inherent in the First

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[106] *Mombourquette* supra ftn.53 par.18

[107] *Schmidt* supra ftn.85

Amendment of the United States Constitution under Lemon v. Kurtzman.
"All defendants argue strenuously for adoption by this court of the result and conclusions reached by Judge Brieant, with which the court concurs, but in part only."[108] (Citations omitted)

Jones distinguished *Schmidt* in that the latter involved finding a church liable for clergy misconduct during the context of an established and existing ongoing pastoral counselling relationship, which would have required the court to become excessively entangled in the beliefs of the church; the court observed this would be "as unconstitutional as it is impossible."[109]

In *Jones,* however, none of the alleged sexual abuse of the defendant was in the course of any religious activity or was part of the tenets or practices of the Roman Catholic Church. In other words, the court was not prepared to apply the *Schmidt* case to create a complete bar to an action against a church where the tort would have been committed within counselling sessions or, as he later added, where a minor had been involved. Nevertheless, the court concurred with *Schmidt*, and other decisions including *Destefano*,[110] that the tort of clergy malpractice does not exist.

So while the Court of Appeal of Nova Scotia in *Mombourquette* relied upon the reasoning in *Jones*, it provided no authority for clergy malpractice as a tort in Canada. The Court of Appeal ruled an intentional tort cannot be negligence. Once an intentional tort has been established the tortfeasor is liable for an assault and not in negligence. By adopting with approval the New York court's statement that there is no such thing as a "negligent assault", it in effect adopted the American law with respect to clergy malpractice.

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[108] *Jones* supra ftn.105

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[110] *Destefano* supra ftn.66

In another 2004 Ontario case, *Glendinning,*[111] the court did find negligence by the diocese, but not on the basis of any clergy malpractice. The case is more properly viewed as based on negligent supervision and vicarious liability. In *Glendinning* a priest had been allowed to entertain young children in his seminary room, something noticed by other seminarians. The breach of duty found by Kerr, J. was based on the failure of the diocese to provide supervision.

In *O'Dell*[112] a court also found a diocese not liable for negligently supervising a priest. The priest was liable for battery and breach of fiduciary duty, and the diocese, as employer, was liable vicariously.

In many of these case the line between negligent supervision and vicarious liability is blurred.

We are left, then, with *Cairns*. It is a trial decision, and in the two years since being rendered it has not been accepted by any other court. Nevertheless it remains an invitation to violation of religious freedom by courts in Canada, and if adopted, could have a chilling effect on religious activity in this country.[113]

The court in *Cairns*, did not consider *Mombourquette* or *Jones*. It did, however, consider and reject *Schmidt* and *Franco* as well as several other American decisions.

Does then, the American law of clergy malpractice deserve consideration by Canadian courts? An analysis of this substantial body of law will assist in weighing the merit of adopting the U.S. approach or rejecting it - as did the court in *Cairns*.

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[111] *Glendinning* supra ftn.12 par.212, 220

[112] *Doe v. O'Dell* [2003]O.J.No.3546;(2003)230 D.L.R.(4th)383; [2003]O.T.C.821

[113] *White & White*, supra ftn.95

ii) In the United States

Applying American cases immediately raises questions for Canadian lawyers: Will an action for clergy malpractice survive on the common law in the United States independent of constitutional considerations unique to that country? Are the constitutional differences between Canada and the United States significant in respect to the particular issues raised in clergy malpractice? Given our close proximity to the United States and our shared democratic, economic, religious and cultural values, should the Canadian judiciary rush in where their American counterparts have been constitutionally afraid to tread?

Although as early as 1966 an action was brought against a clergyman for alienation of affection,[114] an avalanche of clergy malpractice cases in the United States was precipitated by *Nally*[115] in 1980 in California.

The novelty of the issues in the *Nally* case are matched only by the complexity of the procedural course that followed. Over a nine year history, the *Nally* case was before a trial court, and an intermediary appeal court twice and a state Supreme Court once. Each of the five trial and appeal proceedings resulted in fulsome reasons.

Kenneth Nally was born and raised a Catholic, but at the age of 20 in 1974 became a born again Christian and joined Grace Community Church in nearby Sun City, California. The Grace Community Church of the Valley had been founded in July 1956 as a Baptist faith. By the time Kenneth Nally joined it had about 10,000 members. As part of its ministry, the church offered pastoral counselling and by the late 1970's had established a cadre of 50 pastoral counsellors and even employed a full-time secretary to schedule counselling sessions. About one half of those who

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[114] *Carrierri v. Bush* Wn.2d (1966)

[115] *Nally et al v. Grace Community Church of the Valley et al* 204 Cal.4 Rptr.303(1984); 240 Cal.Rptr.215 (1988); 763 P.2d 948 (1988);

attended pastoral counselling sessions were not members of the Grace Community Church but from the community at large.[116]

The Grace Community Church was "fundamentalist". It accepted the Bible as literal. Bible counsellors used the Bible to resolve both spiritual and mental health problems.[117]

Kenneth Nally had emotional and mental health problems that resulted in suicide attempts, all known to his counsellor and the pastor of the Grace Church. The evidence presented before the trial court differed as to whether or not the pastor and counsellors of the church actively discouraged Kenneth Nally from pursuing professional psychiatric or psychological counselling and instead maintain his pastoral counsellors as his sole advisors.

Legal argument at all levels concerned admissibility and interpretation of teachings of the church that seemed to support the idea that if one who is born again committed suicide he would still be in favour with God and admitted to heaven. On April 1, 1979, after having been released from hospitalization following a suicide attempt, and residing for 6 days with the pastor of the Grace Community Church, Kenneth Nally killed himself.

On March 31st, 1981 the Nally family commenced a one million dollar negligence and clergy malpractice action in Los Angeles Superior Court against the pastoral counsellors, the pastor and the Grace Community Church itself.

Following extensive discovery, on October 2, 1981 the trial judge granted a motion for summary judgment in favour of the defendants and dismissed the action on the grounds that there was insufficient evidence to sustain the claims of Nally.

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[116] *Weitz* supra ftn 6 The recitation of the facts and the procedural history that follow are derived from Weitz excellent analysis and discussion of the *Nally* case.

[117] Id p.17

Three years later, June 28, 1984 the California Court of Appeal overturned the dismissal and sent the matter back to trial.

May 16, 1985 at the close of the case for the plaintiff, a second trial judge granted defendant's motion for non-suit on the basis that the Grace Community Church, its pastor and counsellors were protected by the First Amendment.

The intermediary Court of Appeal once again reversed the trial judges ruling on September 16, 1987 and reinstated the trial action on the basis that the counsellors of the church were in a "special relationship" with Kenneth Nally and that there was therefore a triable issue as to whether or not they had an affirmative duty to prevent his suicide. The court also decertified its previous appeal decision, a procedure available in California to vitiate its precedent value. On November 23, 1988 the highest appeal court in California, the California Supreme Court, dismissed *Nally,* reversing the decision of the intermediary Court of Appeal. The United States Supreme Court denied certiorari in 1989.

The lengthy procedural life of the *Nally* case resulted in widespread publishing and academic debate over the issue of clergy malpractice. It also spawned other clergy malpractice litigation. By 1987, there were over 7,000 clergy malpractice suits pending across America. In spite of the eventual findings in favour of the religious defendants the attempts to found an action on this cause of action continue.[118]

Illustrative of the tension between the application of legal principles by courts and the general public's loss of respect for religious institutions is the informal polling of the jury following the dismissal of *Nally* for non-suit. According to the New York Times, at the end of the plaintiff's case the jury was 10-2 in favour of the plaintiff.[119] While the defendant's case had

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[118]Id p.143

[119]Id p.136

not been presented to them, all of the individual defendants had already testified during the course of the plaintiff's case.

The controversy over clergy malpractice and fiduciary duty issues raised was fanned by a windstorm of articles in the legal, behavioural sciences and religious academic press staking out positions on both sides of the issue. The storm persists.[120]

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[120]C. Eric Funston, "*Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*" (1993), 19 California Western Law Review 507; Scott C. Idleman, "*Tort Liability, Religious Entitites, and the Decline of Constitutional Protection*" (2000), 75 Indiana Law Journal 219; Carl H. Esbeck, "*Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*" (1986), 89 West Virginia Law Review 1; Mark E. Chopko, "*Ascending Liability of Religious Entities for the Actions of Others*" (1993), 17 American Journal of Trial Advocacy 289; Juin Barker, "*Clergy Malpractice for Negligent Counseling*" (1993), 47 American Jurisprudence Trials 271; Paul T. Hayden, "*Religiously Motivated 'Outrageous' Conduct: Intentional Infliction of Emotional Distress as a Weapon Against 'Other People's Faiths*'" (1993), 34 William and Mary Law Review 579; C. Grace McCaffrey, "*Nally v. Grace Community Church of the Valley: Clergy Malpractice-A Threat to Both Liberty and Life*" (1990), 11 Pace Law Review 137; Martin R. Bartel, "*Clergy Malpractice After Nally: "Touch Not My Anointed, And To My Prophets Do No Harm*" (1990), 35 Villanova Law Review 535; Mark A. Anthony, "*Through The Narrow Door: An Examination Of Possible Criteria For A Clergy Malpractice Action*" (1990), 15 University of Dayton Law Review 493; Randall K. Hanson, "*Clergy Malpractice: Suing Ministers, Pastors, and Priests for Ungodly Counseling*" (1990), 39 Drake Law Review 597; Michael J. Fiorillo, "*Clergy Malpractice: Should Pennsylvania Recognize A Cause of Action for Improper Counseling By A Clergyman*?" (1987), 92 Dickinson Law Review 223; Lee W. Brooks, "*Intentional Infliction of Emotional Distress By Spiritual Counselors: Can Outrageous Conduct Be 'Free Exercise*'?" (1986), 84 Michigan Law Review 1296; M. Maureen Anders, "*Religious Counseling-Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide*" (1985), Arizona State Law Journal 213; Ben Zion Bergman, "*Is The Cloth Unraveling? A First Look at Clergy Malpractice*" (1981), 9 San Fernando Valley Law Review 47; Janice D. Villiers, "*Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*", (1996) 74 Denver University Law Review 1; James K. Lehman *"Clergy Malpractice: A Constitutional Approach*" (1990), 41 South Carolina Law Review 459; Constance Frisby Fain, "*Clergy Malpractice: Liability for Negligent Counseling and Sexual Misconduct*" (1991), 12 Mississippi College Law Review 97; Steven A. Chase "*Clergy Malpractice: The Cause of Action that Never Was*" (1989), 18 North Carolina Central Law Journal 163; John H. Arnold, "*Clergy Sexual Malpractice*" (1996), 8 University of Florida Journal of Law and Public Policy 25; Samuel E. Ericsson, "*Clergyman Malpractice: Ramifications of a New Theory*" (1981) 16 Valparaiso University Law Review 163; John F. Wagner Jr., "*Cause of Action for Clergy Malpractice*" 75 ALR 4th 750; Julie Johnson,

The parties themselves kindled the heated debate. During the hiatus between the original summary judgment dismissal and the hearing by the first level of the Court of Appeal, one of the two counsel for the defendants published a detailed analysis in the Valparaiso Law Review.[121] While the plaintiff's lawyer died three years following the end of the proceedings, his wife later published the plaintiff's position in Volume 47 of the Trial series.[122]

If nothing else, the controversy has created a windfall in marketing opportunities for insurance companies offering clergy malpractice insurance.[123]

The final battle of *Nally* was determined on defendant's motion to non-suit. On a motion for a non-suit the court must give plaintiff's evidence all the weight to which it would be legally entitled including every legitimate inference in its favour. Similar to the test in Canada, California law requires that a court on appeal not sustain a judgment for non-suit "unless interpreting the evidence most favourably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favour of the plaintiff a judgment for the defendant is required as a matter of law."[124]

The precedent value of *Nally* was thereby enhanced: the Supreme Court of California assumed credibility of all allegations made by Nally at the conclusion of the four weeks of trial of the plaintiff's case.

"*The Sanctuary Crumbles: The Future of Clergy Malpractice in Michigan*" (1997) 74 University of Detroit Mercy Law Review 493

[121] *Ericsson* Id

[122] *Baker* Id

[123] *Weitz* supra ftn 6 p.206; *Nally*, supra ftn 115 at par.5(e); *Brooks*, supra ftn.120 at 1300

[124] *Mason v. Peaslee* (1959) 173 Cal.App.2d 587,588

The California Supreme Court had no need to approach any of the constitutional issues in the case. The plaintiff's allegations hinged instead on whether or not a common law duty to refer Kenneth Nally for professional help should be imposed upon the pastoral counsellors. This makes the case all the more relevant to the development of common law in Canada on this issue irrespective of any constitutional differences between the two countries.

Negligence, whether in California or Canada, requires the existence of a duty of care, a breach of that duty and a causal connection between the breach of duty and the actual harm or damages caused.[125]

The Supreme Court of California observed that "under traditional tort law principles, one is ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship of custody or control."[126] The Court also recognized that in determining the existence of a duty of care the court must consider the forseeability and certainty of harm, closeness of the connection between the conduct and injury, moral blame of the defendant, and public policy.

Was there a special relationship between the pastoral counsellors and Kenneth Nally? The court looked for it but could not find any special statutory or contractual relationship giving rise to a legal duty. Unlike a psychiatric or psychological counsellor, whether therapeutic or non-therapeutic, Kenneth Nally was "not involved in a supervised medical relationship with the defendants".[127]

The court distinguished the duty to prevent suicide when psychiatric treatment falls below a standard of care in the framework of a traditional medical malpractice action. It refused to

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[125] *Fleming* supra ftn.47 p.99

[126] *Nally* supra ftn.115 par4

[127] *Nally* Id par5

extend professional malpractice principles applied in medical malpractice to the clergy.

The Court then turned to the connection between the counselling and Kenneth Nally's suicide, and observed that "mere forseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm".[128]

Having established that there was no statutory or existing common law duty of care on a pastoral counsellor, the court then turned to the issue of whether or not such a duty of care should be established. This, it decided, was problematic:

> "Even assuming that workable standards of care could be established in the present case, an additional difficulty arises in attempting to identify with precision those to whom the duty should apply. Because of the differing theological views espoused by the myriad of religions in our state and practised by church members, it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counsellors. Such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity."[129]

The Supreme Court, on this basis, dismissed the action for malpractice, although in a footnote they left it open in obiter that liability might be imposed on therapist counsellors if they held themselves out as professionals.[130] In such a case it would be on the basis of their representations that they could be held to a professional duty of care and not because of their religious office. The Court then turned to the claim for "intentional infliction of emotional

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[129]Id

[130]Id

distress".

Key to determining whether or not there was an intentional infliction of emotional distress upon the plaintiffs was the existence of a tape containing teachings of the Church. Did this tape cause Kenneth Nally to believe he was born again and could commit suicide and remain in a state of grace? This evidence had been excluded by the lower court. For three reasons the Supreme Court refused to allow this tort.

First, the evidence did not prove that the defendants encouraged Nally to commit suicide based simply on the Church teachings. Common sense tells us that just because his church taught something, even if actually passed on to Kenneth Nally, it does not necessarily follow that he would forseeably act on them.[131] Second, the evidence that was attempted to be led post-dated Kenneth Nally's suicide. It was unknown as to whether or not it reflected teachings or counselling the pastoral counsellors would have passed on to Kenneth Nally. Third, appellate deferral to a trial judge's discretion to exclude evidence.

Based on the findings that there was no duty of care arising to allow a clergy malpractice action and no intentional infliction of economic harm, the Supreme Court upheld the judgment of non-suit of the trial court. The Supreme Court of United States refused certiorari,[132] which was to be expected as the Supreme Court of California's decision had rested upon common law and procedural principles and did not touch First Amendment issues.

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[131]This is reminiscent of the observations of a Nova Scotia judge in rejecting the evidence of a proffered witness, James Penton, as a religious expert:"I have enough life experience to know that whatever the doctrine might be of a congregation or of a church, it doesn't apply with uniformity to each member of that congregation or church." (MacDougall, J. in *R. v. Spencer* (April 16, 1998), unreported, Truro, Nova Scotia Court File #732086/734875/754059 (N.S. Prov.Crt.))

[132]*Nally* 109 S.Ct. 1644

The effect of the *Nally* decision was powerful. In no case which followed in various U.S. jurisdictions has any appeal court ever accepted clergy malpractice exists. Subsequent courts did refine the issues. It is interesting to review the summary effect *Nally* had in other United States jurisdictions.

In 1988 in *Strock*[133] the Supreme Court of Ohio heard the case of a former husband against a minister of a Lutheran Church who engaged in an affair with his former wife while the couple was in marriage counselling. The trial court dismissed. The Court of Appeal reversed in part and allowed the former husband to maintain his cause of action for intentional infliction of emotional distress. On appeal the Supreme Court of Ohio found that, while the minister may not be protected by the Constitution, actions for alienation of affection had been abolished and the plaintiff could not by an indirect route revive such action by alleging infliction of emotional distress or by breach of fiduciary duty. The church could not be liable vicariously where the agent minister was not himself legally liable. In the course of reaching this decision the majority considered the pre-Supreme Court of California decisions in *Nally* and observed the following:

> "While considerable scholarly attention has been focussed on the tort of 'clergy malpractice' in recent years, most courts have been cautious in accepting this cause of action. In fact, this theory of recovery was rejected by the same California court and in the very same lawsuit that legal commentators suggest was the genesis of this cause of action."

The Ohio court conducted the same analysis dealing with the problematic nature of the tort of clergy malpractice and succinctly summarized it as follows:

> "The reluctance of courts to embrace the tort of clergy malpractice may be attributed to the many, and often complex, questions that arise under it. For

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[133] *Strock* supra ftn 83par3

example, what exactly are the 'professional services' rendered by a cleric? And does the standard of the professional vary with the ecclesiastical office? In other words, is a rabbi, priest, pastor, or lay elder held to the same standard of care regardless of training or wide variances in the authority and obligation of religious offices? Also, where a 'professional service,' such as the marriage counselling involved in this case, is not unique to the cleric, should the cleric be held to the same duty of care as secular counsellors? Finally, if a legal duty is imposed on clergy to perform or not to perform in a particular way, will this clash with the religious beliefs of some faiths and thus violate the Free Exercise Clause of the First Amendment to the United States Constitution?

"Fortunately, we need not address these and the other vexatious questions that arise in this area because clergy malpractice is not a tort theory that is viable under the facts before us. Malpractice, it must be noted is not a theory of ordinary negligence or of intentional tort. It is a separate and distinct cause of action. A tortfeasor may be liable for acts of ordinary negligence or for intentional torts, regardless of the 'professional' colour of his conduct.

"For clergy malpractice to be recognized, the cleric's behaviour, even if it is related to his "professional" duties, must fall outside the scope of other recognized torts. "It is clear that clergy malpractice is distinct from an intentional tort, since the latter claims are currently actionable against clergymen regardless of their 'professional' nature.' . . . To be viable, clergy malpractice must address lack of professional skill and the exercise of reasonable professional care, not intentional or reckless behaviour directed against the claimant . . . To avoid a redundant remedy, any functional theory of clergy malpractice needs [to] address incidents of the clergy-communicant relationship not already actionable." [134] (Citations

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[134] Id

omitted)

The Ohio Supreme Court took a step beyond the analysis of the tort of clergy malpractice as discussed in the *Nally* case in recognizing that, as in any other malpractice action, the plaintiff must first exhaust his or her remedy under the head of intentional torts before proceeding to professional negligence. In the *Strock* case the wrong itself was not actionable as an intentional tort and could not be made actionable by boot-strapping it to the novel concept of clergy malpractice.

In the result, the Ohio Supreme Court agreed with the court in *Nally* in recognizing that pastoral counselling, even if negligent, would not be clergy malpractice.

In 1991 in *Byrd*[135] the Supreme Court of Ohio then considered the next logical issue that would arise. In this case, a minister of the Seventh Day Adventist Church had non consensual sexual relations with a parishioner. Unlike *Strock,*[136] which was barred because of the statutory abolishment of the tort of alienation of affection, *Byrd* raised whether or not a minister acting during religious activities who commits an intentional tort unrelated to church activities could then be considered to have committed clergy malpractice.

The court returned to its position in *Strock* and reiterated their holding that in order to generate a cause of action for clergy malpractice, the clergyman's behaviour must "fall outside of the scope of other recognized torts". They then observed:

> "If the cleric's behaviour fits within an established category of liability, such as fraud, duress, assault, or battery, it would be redundant to simultaneously hold the cleric liable for 'clergy malpractice': [T]o avoid a redundant remedy, any

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[135] *Byrd et al v. Faber* 57 Ohio St.3d 56, 565 N.E.2d 584 (1991) par. 1

[136] *Strock* supra ftn.83

functional theory of clergy malpractice needs [to] address incidents of the clergy-communicant relationship not already actionable."

Since the action against the minister in *Byrd* was potentially recoverable in battery, fraud and intentional infliction of emotional distress, all of which were recognized torts, there was no need to take the next step into negligence, much less a leap into clergy malpractice.

But what about vicarious liability against the Seventh Day Adventist Church itself?

The court considered the doctrine of respondeat superior in and of itself, without looking at the employer-church in any religious context. As in Canada, in order to be liable under the doctrine of respondeat superior the employer's tort must have been committed within the range of his employment. An employer is not, for example, liable for damages if his or her employee unexpectedly assaults somebody without provocation during a period of time while he or she is employed. The common law was stated by the Supreme Court of Ohio to be that an "employer is not liable for independent self serving acts of his employees which in no way facilitate or promote his business."[137]

This principle is identical to that in Canada. Vicarious responsibility "only extends to incidents 'in the ordinary course of the servant's employment'".[138]

The Ohio court then referred to two California cases in which children were assaulted by employees of the church. In *Milla*[139] priests were alleged to have assaulted a 16 year old girl, and

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[137] *Byrd* supra ftn.35 par.4

[138] *Fleming* supra ftn.47 p.348

[139] *Milla v. Roman Catholic Archbishop of Los Angeles* 187 Cal. App. 3d 1453 (1986)

in *Scott*[140] a Sunday school teacher had assaulted a minor.

In both cases, the California court acknowledged that the sexual activity alleged between the priest or the Sunday school teacher and the minor was not characteristic of the church and could not reasonably have been foreseen by either church. In both cases the torts were independent "self serving pursuits unrelated to church activities."[141]

Similarly, in *Byrd*, the court found that the Seventh Day Adventist organization did not promote or advocate non-consensual sexual conduct and could not have reasonably foreseen that the minister would have behaved in such a way. The church was therefore not vicariously liable.

By reaching the conclusion in a religiously neutral way on the principle of respondeat superior, the Supreme Court of Ohio avoided dealing with First Amendment issues other than indirectly in approving the *Nally* decision. But it made this observation in obiter:

> "We hold today that as with fraud claims and intentional tort claims against employers, greater specificity in pleading is required when a claim is brought against a religious organization for negligent hiring due to the myriad First Amendment problems which accompany such a claim. . . . As with fraud claims and intentional tort claims against employers, an important principle underlies our decision to require that the plaintiff plead operative facts with particularity. In order to determine whether a religious organization has exercised due care in hiring, it is necessary to examine its employment policies and practices. In all probability, these policies will be infused with the religious tenets of the particular sect involved. If the state becomes involved in assessing the adequacy of these standards, serious entanglement problems may arise under the First Amendment.

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[140] *Scott v. Central Baptist Church* 197 Cal.App.3d 718 (1988)

[141] *Byrd* supra ftn.135 par4

> See, e.g., Lemon v. Kurtzman (1971), 403 U.S. 602, 91 S.Ct.2105, 29 L.Ed.2d 745. While even the most liberal construction of the First Amendment will not protect a religious organization's decision to hire someone who it knows is likely to commit criminal or tortious acts, the mere incantation of an abstract legal standard should not subject a religious organization's employment policies to state scrutiny."[142]

Far from allowing the existence of an action for clergy malpractice, having the opportunity to consider on two separate occasions such an action against the clergy, the Supreme Court of Ohio not only rejected such a claim but set the bar higher as to the pleadings required to sustain such claims in the future.

The reasoning of the Ohio court would be useful to a religious organization in Canada moving for summary judgment where a plaintiff fails to particularize a pleading.

In the same year as *Byrd*, the United States Federal District Court in *Schmidt*[143] relied upon both *Nally* and *Byrd* in a case involving a Presbyterian Church pastor who initiated sexual conduct with a twelve year old. *Schmidt* has been widely accepted as authoritative. It added federal court weight to the mounting state decisions barring clergy malpractice actions.

In addition to bringing a claim for clergy malpractice, the plaintiff pleaded a breach of fiduciary duty. The sexual relationship had continued from the time that the plaintiff was twelve years old until she was forty-one years old. The court noted that the allegations supported an action for a battery, which in New York had a statute of limitations of one year. Ms. Schmidt, by pleading a claim of negligence against the minister, attempted to extend the time period.

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[142]Id par.7,8

[143]*Schmidt* supra ftn.85; *Schmidt* was specifically not followed in *Cairns* supra ftn.22

The court stated:

> "Even if the Court were to invite a trial jury to engage in the Constitutionally dubious task of setting a standard of reasonable care for clergymen engaged in counselling, the obstacle remains that New York courts have rejected uniformly such attempts to transmogrify intentional torts into 'negligence'... Similarly, to the extent that the plaintiffs negligence claim is founded on Bishop's mishandling of the counselling relationship generally, that claim is properly treated as one for malpractice . . . This particular aspect of defendants conduct involves a purported breach of professional standards by an ordained minister, and as such is cognizable only as a malpractice claim."[144]

The court was referred to a number of cases, including *Byrd* and *Nally* (and Ericsson's [145] article published in the Valparaiso Law Review, one of defendant's counsel in *Nally*). The court said:

> "Although the Court has reviewed these authorities, this Court must respect and apply the law of New York as it exists now. And the fact is that neither the legislature nor the courts of New York have upheld or authorized a claim for clergy malpractice. ('Petitioners contend, and defendants do not dispute that, in fact, no member of the clergy has ever been held liable for clerical malpractice') . . . Nor is this likely in New York.
> "Defendants concede, as they must, that tort claims can be maintained against clergy, for such behaviour as negligent operation of the Sunday school van, and other misconduct not within the purview of the First Amendment, because

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[144]Id par.1,2. The third issue raised in *Schmidt* was whether or not the minister was liable as a fiduciary. We will review that later in this paper.

[145]*Ericsson* supra ftn.120

> unrelated to the religious efforts of a cleric. . . . Claims of malpractice stand on a different footing. While the clergy of most denominations do provide counselling to youths and other members of their congregations, when they do so it is normally part of their religious activities; in so doing, they do not thereby become subject to the same standards of liability for professional malpractice which would apply, for example, to a state-licensed psychiatrist or a social worker, . . . That there is no recorded instance of a New York court upholding an action for clergy malpractice, in this most litigious of states, speaks to this point, and loudly.
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> "It would be impossible for a court or jury to adjudicate a typical case of clergy malpractice, without first ascertaining whether the cleric, in this case a Presbyterian pastor, performed within the level of expertise expected of a similar professional (the hypothetical "reasonably prudent Presbyterian pastor"), following his calling, or practicing his profession within the community . . . As the California Supreme Court has held in *Nally v. Grace Community Church of the Valley*: 'Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional to impose a duty of care on pastoral counsellors. Such a duty would necessarily be intertwined with the religious philosophy of a particular denomination or ecclesiastical teachings of the religious entity.'
>
> "This Court agrees with *Nally*, and regards the unconstitutionality as more than possible. It is real."[146] (Citations omitted)

The court necessarily looked at the difficulty which was recognized in the *Nally, Strock* and *Byrd* cases in trying to define and express a standard of care to be imposed on a particular clergyman. Not only did the court recognize it would be breaching the First Amendment, it regarded "this is as unconstitutional as it is impossible".[147]

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[146] *Schmidt* supra ftn.85 par.6,7,8

[147] Id par.9

Schmidt took a step farther than simply considering the technical difficulties of establishing a duty of care. It also considered the nature of pastoral counselling and how inappropriate it is to compare it with psychological or psychiatric counselling.

Religious teachings incorporate moral concepts. The goal of the religious teacher is to instill in each church member the religious and moral values of the church. Unlike the psychological or psychiatric counsellor, who may be endeavouring to assist a patient to overcome feelings of guilt or inadequacy, the pastoral counsellor may depend upon guilt as evidence of a troubled conscience. The court addressed this issue:

> "It may be argued that it requires no excessive entanglement with religion to decide that reasonably prudent clergy of any sect do not molest children. The difficulty is that this Court, and the New York courts whose authority we exercise here, must consider not only this case, but the next case to follow, and the ones after that, before we embrace the newly invented tort of clergy malpractice. This places us clearly on the slippery slope and is an unnecessary venture, since existing laws against battery, and the criminal stature against sexual abuse if timely invoked, provide adequate protection for society's interests. Where could we stop? Assume a severely depressed person consults a storefront preacher, unaffiliated with any of the mainstream denominations, but with them, equally protected by the First Amendment. The cleric consults with our hypothetical citizen, reminds him of his slothful life, and that he is a miserable sinner; recommends prayer and fasting and warns of the Day of Judgment. Our depressed person becomes more so, and kills himself and a few more people. These deaths are followed by lawsuits. As to a licensed psychiatrist or social worker, our lay courts should have no trouble adjudicating a claim of professional malpractice on these facts. As to a clergyman,

it would be both impossible and unconstitutional to attempt to do so."[148] (Citations omitted)

Summary judgment was then granted in favour of the defendant minister. Since the underlying claim against the minister was dismissed, any claim for vicarious liability against the church was also dismissed. The court also commented on the difficulty in determining a respondeat superior in such cases:

"Furthermore, any inquiry into the policies and practices of the Church Defendants in hiring or supervising their clergy raises the same kind of First Amendment problems of entanglement discussed above, which might involve the Court in making sensitive judgments about the propriety of the Church Defendants' supervision in light of their religious beliefs. Insofar as concerns retention or supervision, the pastor of a Presbyterian Church is not analogous to a common law employee. He may not demit his charge nor be removed by the session, without the consent of the presbytery, functioning essentially as an ecclesiastical court. The traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation. Church governance is founded in scripture, modified by reformers over almost two millennia. As the Supreme court stated long before the Lemon formulation was developed: 'It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.' . . . It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect

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> leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause. U.S. Const. amend. I.[149] (Citations omitted)

The *Schmidt* case took *Nally* and the Ohio decisions a step farther in ruling that not only vicarious liability, but also what is in essence the tort of negligent supervision would also be a difficult row to hoe, given the deference accorded to ecclesiastical tribunals.

The decisions in California, Ohio and New York were followed in 1994 by the United States Court of Appeal Seventh Circuit in *Dausch*[150] which affirmed that under Illinios law, a cause of action for clergy malpractice was not recognized.

In 1999, *Borchers* involved a Maryland church member who sued her pastor for exploiting his position to initiate a sexual relationship with her while counselling her for marital difficulties. The circuit Court of Appeal dismissed the allegation that the defendant committed the tort of clergy malpractice. The Court of Special Appeals found:

> "The circuit court dismissed this count on the ground that Maryland does not recognize the tort of clergy malpractice. Borchers now asks us to recognize the viability of that tort, but we decline to do so."[151]

So, by 1999, the Court of Special Appeals of Maryland was able to conclude:

> "In addition, there are good reasons for declining to recognize the tort of clergy

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[149]Id par.15

[150]*Dausch v. Rykse* 52 F.3d 1425 (1994)

[151]*Borchers v. Hrychuk et al*126 Md.App.10, 727 A.2d 388 (1999) par.6

> malpractice. As the Supreme Court of New Jersey discussed in F.G. v. MacDonell, 150 N.J. 550, 696 A.2d 697 (1997), 'such a claim requires definition of the relevant standard of care[,] and [d]efining that standard could embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a variety of religions with widely varying beliefs.' Id.696 A.2d at 703. In addition, 'defining such a standard would require courts to identify the beliefs and practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them.' Id. These requirements, quite obviously, have a large potential to restrain the free exercise of religion; and largely for this reason, no other courts in the United States (including New Jersey) have recognized the tort of clergy malpractice."[152] *(*Emphasis added)

The same year (1999) in *Teadt*[153] the Court of Appeals of Michigan ruled that in a case of an adult plaintiff suing her minister, the claim of clergy malpractice may not be pursued in Michigan.

By now the clergy malpractice issue had been put to rest. But some decisions had left open possible claims against clerics when they acted in their capacity of pastoral counsellors. The Supreme Court of Utah considered this argument in 2001 in *Franco*[154] (another U.S. case rejected in *Cairns* although seemingly on similar facts).

A seven year old girl had been sexually abused by another member of the church. When she recounted the abuse years later (but while still a minor), she was told by Church officials to "forgive and forget". When the sexual abuse was ultimately reported to the police the girl's family felt they were ostracized. They brought an action against the ministers and church for clergy

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[153] *Teadt v. St. John's Evangelical Church* 237 Mich. App.567 (1999)

[154] *Franco* supra ftn.86

malpractice, among other things. The church moved to dismiss the complaint and was successful. The plaintiff appealed to the Court of Appeal. Once again the court repeated the analysis that was made in *Dausch*, *Nally* and other cases and ruled:

> "Because Franco's negligence-based claims allege that the LDS Church Defendants generally mishandled their ecclesiastical counselling duties, a determination of the claims, like the clergy malpractice claims asserted in Nally and White, could not be made without first ascertaining whether the LDS Church Defendants performed within the level of expertise expected of a similar professional, i.e., a reasonably prudent bishop, priest, rabbi, minister, or other cleric in this state. Indeed, malpractice is a theory of tort that would involve the courts in a determination of whether the cleric in a particular case–here an LDS Church bishop–breached the duty to act with that degree of "skill and knowledge normally possessed by member of that profession." ...Restatement (Second) of Torts 299A (1965). Defining such a duty would necessarily require a court to express the standard of care to be followed by other reasonable clerics in the performance of their ecclesiastical counselling duties, which, by its very nature, would embroil the courts in establishing the training, skill and standards applicable for members of the clergy in this state in a diversity of religions professing widely varying beliefs. This is as impossible as it is unconstitutional; to do so would foster an excessive government entanglement with religion in violation the Establishment Clause. See, e.g., Dausch v. Rykse (stating that an evaluation of a clergy malpractice claim would require courts to evaluate and investigate religious tenets and doctrines); Hester v. Barnett (stating that clergy malpractice would force courts to judge 'competence, training, methods and content of the pastoral function'); F.G. v. MacDonell (stating that creating a tort of clergy malpractice would 'establish an official religion of the state'); Bladen v. First Presbyterian Church of Sallisaw ('Once a court enters the realm of trying to define the nature of advice a minister should give a parishioner serious First Amendment issues are implicated.').

(Citations omitted)

"Accordingly, we conclude that the trial court correctly determined that Franco's claims against the LDS Church Defendants for gross negligence, negligent infliction of emotional distress, and breach of fiduciary duty are barred by the First Amendment to the United States Constitution."[155]

The same year in *Odenthall*[156] the Court of Appeals of the State of Minnesota agreed, and concluded that the First Amendment barred a negligence claim against a clergyman for negligent counselling. The court relied upon *Teadt* and *Franco*:

"The most difficult aspect of a clergy malpractice action concerns the duty of care. This could 'embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions with widely varying beliefs.' Further, it 'would require courts to identify the beliefs and practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them.' Doing so, 'would necessarily entangle the courts in the examination of religious doctrine, practice, or church polity,' which is prohibited by the Establishment Clause. Franco, 21 P.3d at 204." (Citations omitted)

In 2003 in *Richelle*[157] the California Court of Appeal stated that a clergy member cannot be held liable for "breach of a duty arising out of a special relationship" with a parishioner. The court noted:

"Even if a reasonable standard could be devised, which is questionable, it could not be uniformly applied without restricting the free exercise rights of religious

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[155]Id par.23

[156]*Odenthall* supra ftn.84

[157]*Richelle L. v. Roman Catholic Archbishop*106 Cal. App. 4th 257, 270 (2003)

> organizations which could not comply without compromising the doctrines of their faith. The application of such a standard would also result in the establishment of judicially acceptable religions, because it would inevitably differentiate ecclesiastical counseling practices that are judicially acceptable from those that are not."

Thus, the court concluded that the plaintiff's cause of actions for negligence could not be sustained without violating the law against the viability of clergy malpractice doctrine.

The Court of Appeal in *Richelle* also addressed the fiduciary duty argument which will be discussed below.

In 2004, the Minnesota Court of Appeals considered a case of alleged sex abuse committed by one member of the congregation against another member in *Meyer*[158] noting:

> "Providing faith-based advice or instruction, without more, does not create a special relationship . . . Because there is no special relationship, there is no duty . ."

Thus, the plaintiff's negligence claims were not allowed to proceed against the religious organization because no duty could be established.

By 2004 the U.S. courts with unanimity rejected attempts to sue religious persons or institutions for clergy malpractice, negligent supervision or vicarious liability for these supposed torts.

But what about vicarious liability for torts committed during religious activity, ostensibly

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[158]*Meyer v. Lindala*, 675 N.W.2d 635 (Minn. App. 2004), cert. denied, (Minn. May 26, 2004)par.640

as part of that activity itself?

Whether in Canada or the United States, the mere fact that a potential defendant is acting in the course of his or her religious duties, or that the defendant is itself a religious institution, does not immunize them against legal liability.

The law reports are replete with constitutional, criminal and private law disputes where churches or church employees/agents are defendants or plaintiffs. We have to differentiate intentional torts generally from those intentional torts committed in the course of religious activities.

With respect to intentional torts, we have seen that a religious motivation is no defence. Similarly, a religious institution is obviously liable for negligence of a general nature: if a church fails to keep sidewalks in repair, has a dangerous building or a church van is driven negligently, no court would consider immunity. When liability can be founded on a pure tort basis, the religious nature of the defendant is not relevant. Sexual abuse by clerics where a religious institution knowingly employs a priest, minister or anyone predisposed to sexual abuse, or is willfully blind to or negligently supervises a cleric in private contact with children, is actionable against the institution. In such cases the courts have no need to progress beyond the establishment of an intentional tort or general negligence to consider any religious or constitutional issues. The issues can "be framed for the trier of fact in secular rather than sectarian terms",[159] what is sometimes described as the "neutral-principles doctrine".[160]

A more delicate balancing act is required when the teachings of the church itself constitute an intentional tort. While, as we have seen, vicarious liability does not apply to an employer when an employee commits an intentional tort outside of the course of his or her employment, if the

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[159] *Richelle* supra ftn.157

[160] *Moses v. Diocese of Colorado* 863 P.2d 310 (1993)n.15

employer actually employs the servant for a tortious purpose the employer may be liable.

For example, if the owner of a bar instructs the "bouncer" to deliberately assault patrons, the bar owner would be liable. If the owner knew the "bouncer" had a propensity for unprovoked violence and was willfully blind, liability would also follow. That is why courts leave the door open to a possible framing of a claim in vicarious liability.

What would happen if a church instructed a cleric to assume a role that resulted in committing an intentional tort in the course of his or her employment? Would the prohibition against undue entanglement in First Amendment issues prevent the U.S. courts from dealing with these?

A series of cases in the Supreme Court of Colorado attempted an approach to this potential dilemma.

We begin in 1988 with *Destefano*.[161] Mr. Destefano and his wife went to their parish priest (Grabrian) for counselling and the parish priest began a relationship with Mrs. Destefano that resulted in the break up of their marriage. Mr. Destefano sued the priest for negligent counselling and the church for failing to supervise, intentional infliction of emotional distress and breach of duty by Mr. Grabrian.

The trial court dismissed Mr. Destefano's case finding that it raised issues "inextricably linked to questions of doctrine, theology, the usage and customs of the [Catholic] church, written laws, and the fundamental organization of the church: and because the action was a disguised effort to circumvent abolishment of the amatory causes of action,"[162] (barred under the rather poetically nick-named "Heart Balm Statute"). The Court of Appeal agreed. The Supreme Court

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[161] *Destefano* supra ftn.66

[162] Id par.7

agreed with the Court of Appeal and barred Mr. Destefano's claims which fell under the Heart Balm Statute, but ruled for various reasons that Mrs. Destefano's claims did not fall under the heading of alienation of affection or criminal conversation. The balance of the claims of Mr. and Mrs. Destefano related to whether or not the member of the clergy was immune from liability. The court recognized that the only case to the date of their decision had been *Nally*, which at that time had not yet been reheard at trial and the court had only the first Court of Appeals decision to which certiorari to the Supreme Court of California had been denied. Ericsson's article[163] was also considered by the court.

That left the Colorado court open to consider whether or not it would adopt the reasoning of the Court of Appeal in *Nally* and allow the case to proceed or not.

One distinguishing fact was that a statute in Colorado imposed penalties against psychologists who engaged in sexual intimacies with their patients, but specifically excluded "a duly ordained minister, priest, or rabbi," provided he did not hold himself out to the public as a psychologist. The court accepted that since there was a legislative intent to exclude religious counsellors from the liability provisions of the statute, the claim for negligent counselling would have to be dismissed.

That left two issues before the Court: clergy malpractice and negligent supervision. The Court tersely resolved the first issue by stating:

> "Malpractice consists of any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct. See Black's Law Dictionary 864 (5th ed.1979). Since Grabrian is a Catholic priest, the malpractice claim alleged by Edna falls within the realm of 'clergy malpractice.' To date, no court has acknowledged the existence of such a

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[163] *Ericsson* supra ftn.120

> tort. Since the claim for clergy malpractice is not supported by precedent and raises serious first Amendment issues, we have concluded that Edna's second claim for relief was properly dismissed. We do not recognize the claim of 'clergy malpractice'."[164]

The Court decided that since the claim for negligent supervision could stand alone, and fell within the established torts recognized in other jurisdictions, the plaintiff's claim for relief against the diocese could stand and it was remanded for hearing.

Five years later the Supreme Court of Colorado was asked to overrule *Destefano,*[165] in *Moses*[166] (referred to by the Appeal Courts of Nova Scotia in *Mombourquette*[167] and British Columbia in *FSM*[168]).

Moses involved a woman with a long history of mental illness who was sexually abused by an Episcopalian priest. When the sexual relationship came to light other members of the church kept the affair secret. The woman suffered emotional damages. The woman later sued the priest (who filed for bankruptcy), the Episcopalian Diocese and bishop for negligent supervision, vicarious liability and breach of fiduciary duty.

The Supreme Court of Colorado affirmed the judgment on fiduciary duty and negligent hiring, but reversed the decision on vicarious liability. Before the Supreme Court, the defendant

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[164]*Destefano* supra ftn.66 par. 27

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[166]*Moses* supra ftn.160

[167]*Mombourquette* supra ftn.53

[168]*F.S.M. v. Clarke* [1999] B.C.J. No.1973; [1999]11W.W.R.301

church and bishop asked the court to overrule it's decision in *Destefano*[169] and argued that clergy malpractice and breach of fiduciary duty are one and the same thing. Once the court had ruled it could not allow a claim for clergy malpractice to proceed, the defendants argued it could not then allow a claim of breach of fiduciary duty to persist (this principle will be discussed further below).

The defendants also argued that they should not be vicariously liable for the acts of the Episcopalian priest, since it was not within the scope of the priest's duties. The Supreme Court agreed:

> "Regardless of the denomination, when a priest engages in oral sex with a mentally ill parishioner, the priest is not acting within the scope of employment".[170]

The Court did find that the Episcopalian Church had negligently supervised the offending priest knowing that he had a propensity towards sexual abuse. The defendant argued that the First Amendment prohibited the trial court from admitting into evidence information which would establish the employment relationship between the diocese of the church and the offending priest. The Supreme Court found that this evidence was admissible provided the "neutral-principles" doctrine was applied, namely that "a civil court must take special care to scrutinize the [church] document in purely secular terms, and not to rely on religious precepts..."[171]

In summary, in the *Moses* case the Supreme Court of Colorado had the opportunity to reconsider it's position in *Destefano* and did not resile from refusing to recognize the tort of clergy malpractice. It recognized that the sexual wrongs committed by the priest were not within the scope of employment so the church was not vicariously liable. However, because the church negligently employed a priest who had a propensity to the tortious conduct, it was liable for the

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[169] *Destefano* supra ftn.66

[170] *Moses* supra ftn.160 n.28

[171] Id n.15

tort of negligent supervision. The court considered limited evidence to establish the hierarchal structure of the church simply for the purpose of verifying the tort of negligent supervision.

While maintaining its position in disallowing clergy malpractice, it did allow limited evidence, subject to the neutral-principles doctrine. The saving fact which avoided vicarious liability against the church was that the court could not conceive that the sexual misconduct could have been or was condoned by the church. *Moses* also allowed a claim for breach of fiduciary duty to stand.

But what would happen if the church condoned, or mandated, such activity as part of its religious beliefs? That is exactly the issue the same court addressed in 1996 in *Bear Valley Church of Christ.*[172]

The Bear Valley Church of Christ, an autonomous church, hired a pastor who performed massage that allegedly included sexual touching as part of his religious counselling. The question in limine was whether or not the pastor or the church asserted a sincere religious basis for the use of therapeutic massage. If so, would that be a constitutional defence?

Plaintiffs succeeded at trial against the pastor and the church across the board for breach of fiduciary duty and vicarious liability, negligent hiring and supervision, and outrageous conduct.

Defendants appealed to the Court of Appeal for Colorado which remanded the case for a new trial holding that the jury should have been advised that the counselling activities were protected by the First Amendment, expert witnesses regarding standards for professional counselling should not have been admitted and that the jury awards were duplicative.

The Court of Appeals instruction was that the jury should have been instructed that if the

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[172] *Bear Valley Church of Christ* supra ftn.66

> "touching was engaged in solely in a sincere effort to facilitate the minor's communication with God, and that [the pastor] was not motivated by any personal desires, then the jury must conclude that [the pastor] did not violate any fiduciary duty owed to the minor or to his mother nor did he engage in any outrageous conduct toward either of them".[173]

The Supreme Court disagreed with the Court of Appeal and found that the massage therapy was nothing more than the pastor's "choice of a relaxation and communication method between himself and his counselees",[174] and therefore did not spring from any religious motivation.

Religious evidence admitted at trial was not directed toward the issue of clergy malpractice, since the court recognized that in *Moses* they had already decided that "in Colorado, breach of fiduciary duty is actionable, clergy malpractice is not."[175]

The issue, then, was whether or not the church was aware that the pastor was using inappropriate counselling methods. The court concluded that there was sufficient evidence before the jury that there was, and that such could be determined on neutral principles without reference to any of the protected religious activities of the church.

The fineness of the debate was illustrated two years later in the 1996 decision of the Court of Appeals of Colorado in *Bohrer*.[176] This case involved the United Methodist Church who was sued after a minister commenced a sexual relationship with a minor during counselling of the minor.

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[173]*DeBose* supra ftn.66 Sec.II.A

[174]*Bear Valley Church of Christ* supra ftn.66 Sec. II.A.2

[175]Id Sec. III.C.

[176]*Bohrer* supra ftn.66

By now the principles have been firmly established in Colorado that clergy malpractice did not exist and that claim was not advanced. On appeal the unsuccessful defendant minister tried to argue that the claims of outrageous conduct and breach of fiduciary duty against him violated the First Amendment. Since the defendant did not claim the religious conduct was religiously motivated (and in fact could not have done so given that the church itself would not have permitted it), that ground of appeal failed.

The church itself objected to findings of negligent supervision and breach of fiduciary duty but the law had been settled in previous decisions. The highest Court of Colorado had been presented with the opportunity to strike down - or permit - a defence to an intentional tort through vicarious liability by a church. It refused to admit such was possible. An intentional tort stands on its own. It seems unlikely that a court would find a church condoned activity that is so patently tortious.

A consideration of these cases before the Colorado courts demonstrates the development of a solid line of authority in the United States that bars clergy malpractice actions and any related action that would require an investigation and weighing of the internal religious doctrines of a defendant church member or church. Even when such investigation has as its goal establishing vicarious liability, courts are loathe to commence any inquiry. Courts will permit an action to proceed for a tort against a church vicariously where it has condoned or concealed the wrongdoing or, on its own footing, an action for negligent supervision.

Before leaving the discussion of the U.S. law of clergy malpractice, one further case deserves consideration: *Berry*[177]

The trial judge in *Cairns*[178] was referred to Berry while deliberating. The court concluded

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[177]*Berry* supra ftn.38

[178]*Cairns* supra ftn.22

that in *Berry*, the New Hampshire Superior Court had "found the elders owed a duty of care to the plaintiff, even in the absence of direct privity".[179]

The decision in *Cairns* was rendered June 26, 2003. The *Berry* order relied upon was on a preliminary motion for summary judgment. While in the first instance (in the order relied upon by Molloy, J.), the judge at first denied most of the defendants summary judgment motion, the court also ordered an evidentiary hearing and as a result reversed his decision and granted summary judgment on July 21, 2003. A further motion to dismiss was brought to resolve questions remaining and an additional motion to dismiss by the defendants was finally granted November 4, 2003.[180]

In fairness to the court in *Cairns*, it was unaware that the end result was different from the early decision provided the court. While Molloy, J. observed that *Berry* was "at odds with the overwhelming trend in [the] United States"[181] in *Cairns* the court did reach the same conclusion and find a duty of care against the Watch Tower Society in the absence of privity. For that reason we will look briefly at the *Berry* case as presented to Molloy, J.

The court in *Berry* found on the preliminary motion that a mother had informed church elders of the sexual abuse of her daughter by a stepfather but had been told by the elders not to report it on penalty of disfellowshipping (excommunication from the church). There was a statutory reporting requirement in New Hampshire that did not exempt ministers. Reasoning that the reporting requirement fell under the "neutral principles doctrine" the court concluded:

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[179]*Cairns* supra ftn.22 par.129

[180]Counsel for the defendants advised the author that plaintiffs have appealed the second and third orders and defendants cross-appealed the first order on which oral argument was heard before the New Hampshire Supreme Court (there is no intermediate appellate court) in early October 2004.

[181]*Cairns* supra ftn.22 par.130

> "the prevention of sexual abuse of children is one of society's greatest duties. In this case, to impose such a duty places little burden upon the defendants. The burden requires only common sense advice to the church member and a reporting of the abuse to the authorities. Clearly, the social importance of protecting the plaintiff from her father's continued brutal sexual abuse outweighs the importance of immunizing the defendants from extended liability. The court finds that the defendants did owe a duty of care to the plaintiff, despite the absence of privity between them."

The preliminary decision in *Berry* had been submitted by the plaintiff to the court in *Cairns* apparently as authority for clergy malpractice existing in the United States. This proposition was rejected by the court:

> "Given the extreme facts in *Berry*, in particular the clear breach of the statutory reporting requirement, I do not see *Berry* as authority overriding the long-standing American case law. Accordingly, I conclude that Had V.B.'s action been brought in the United States, it would likely be subject to summary dismissal based of these cases."

The distinguishing facts in the in limine decision as considered by the Cairns court in *Berry* deserve review.

First, a statutory reporting requirement in *Berry* was the basis to establish the duty of care. That statutory duty is upon any person, and can be applied in a neutral-principles fashion. Had any of the defendants in *V.B. v Cairns* violated a statutory reporting requirement - which Molloy, J. specifically found was not the case - negligence might have been a triable issue..

Second, and more relevant to the constitutional issue, is that even in the preliminary order, the court in *Berry* applied a balancing of religious freedoms akin to the s. 1 limitation in the Canadian Charter. Thus *Berry* should have reassured the court that U.S. cases should not be

rejected because it is thought that Canadian courts apply a balancing factor unknown to the U.S. constitution.

The court in *Cairns* correctly rejected the plaintiffs contention that the preliminary order in *Berry* had opened the door to clergy malpractice in the United States.

In the decision of November 4, 2003 (four months after the decision in *Cairns*), the New Hampshire Court brought *Berry* into the mainstream of U.S. cases on clergy malpractice by finding:

> "The First Amendment Establishment of Religion Clause has been implicated when a law suit is brought against a church or religious institution for negligent or improper acts of their clerics or supervisors. See *Destefano, Nally, Franco, Hiles*. These cases focus on the 'excessive government entanglement with religion test.'
> "The excessive entanglement test is, by necessity, one of degree. Indeed, separation of church and state cannot mean the absence of all governmental contact with religion, since the complexities of modern life inevitably produce some contact...However, it is well settled that civil tort claims against clerics that require the courts to review and interpret church law, policies, or practices in the determination of the claims are barred by the First Amendment under the entanglement doctrine.
> "The plaintiffs' remaining claims against the defendants for negligence question the appropriateness and adequacy of their counselling of the plaintiffs' mother at the "Shepherding Meetings." These shepherding meetings are a part of the Jehovah's Witness religious beliefs, practice and policy. The plaintiffs have claimed that the conduct of these Elders in advising the plaintiffs' mother regarding the child abuse were, in fact, a product of the standard policies and practices of the Jehovah's Witness Organization. A determination of these claims would necessarily entangle the courts in an examination of religious doctrine, practice, and church policy.

> Such an inquiry is clearly prohibited by the First Amendment. Therefore, the remaining claims are barred by the First Amendment...
> ...Through the various Motions to Dismiss filed by the defendants in this matter and the resulting Orders of the Court thereon, all plaintiffs' claims have now been dismissed. No claims remain upon which the plaintiffs can seek relief. Therefore, the plaintiffs' writ including all causes of action set forth therein has been dismissed."[182]

It is unfortunate that the trial judge in *Cairns* did not have the benefit of the final decision in *Berry*. Although the court rejected *Berry* as authority, since the facts were similar and findings against the defendant in *Cairns* the same as *Berry*, it is difficult to discount the persuasiveness the case had on the court.

Given that the *Berry* decision considered by the court was later effectively reversed in line with what Molloy, J. herself recognized was "long standing American case law"[183], courts should therefore be very cautious in accepting *Cairns* as authority.

If anything, the careful balancing of the constitutional issues demonstrated by the series of orders in *Berry* illustrates that Canadian courts should accept with confidence the weight of U.S. authority and avoid entertaining claims of clergy malpractice.

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[182] *Berry* supra ftn.38 p.4,5

[183] *Cairns* supra ftn.22par.130

D. Negligent Supervision

The tort of negligent supervision arises where there is a statutory duty,[184] a contractual duty[185] or a recognized duty of care.[186] In *K.L.B.* the government, for example, while supervising children pursuant to its statutory duty to children in its care, was held to the standard of a careful or prudent parent.

While the tort stands on it own,[187] it is secondary to a finding of actual negligence on the part of the agent/servant/employee.

One can be in a fiduciary relationship, and be guilty of negligent supervision, without breaching a fiduciary duty.[188]

In the cases analogous to that of institutional liability for churches, residential schools and social service agencies have been held to have committed the tort of negligent supervision.

The tort requires the establishment of the elements of negligence, as with any other

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[184]*Odhavji Estate v. Woodhouse* [2000]O.J.No.4733; (2000)52O.R.(3d)181; (2000)194D.L.R.(4th)577; (2000)142O.A.C.149; (2000)3C.C.L.T.(3d)226; *K.L.B. v. British Columbia* [2001]B.C.J.No.584; 2001BCCA 221; (2001)197D.L.R.(4th)431; [2001]5W.W.R.47; (2001)151B.C.A.C.52; (2001)87B.C.L.R.(3d)52; (2001)4C.C.L.T.(3d)225; (2001)23C.P.C.(5th)207

[185]*347202BC Ltd. v. Canadian Imperial Bank of Commerce* [1995]B.C.J. No.449

[186]*K.L.B.* supra ftn.184par.11

[187] *EDG v. Hammer* [2001] B.C.J. No. 585 par.32, 44, 52, 76; 2001 BCCA 226; (2001)197 D.L.R.(4th)454; [2001]5 W.W.R.70; (2001)151 B.C.A.C.34; (2001)86 B.C.L.R.(3d)191; (2001)4 C.C.L.T.(3d)204; *K.L.B* supra ftn.184par.14,16,23,52

[188]See *K.L.B.* supra ftn184*, E.D.G.* Id and *C.A. v. Critchley*[1998]B.C.J. No. 2587; (1998)166 D.L.R.(4th)475; (1998)113 B.C.A.C.248; (1998)60 B.C.L.R.(3d)92; (1998)13Admin.L.R.(3d)157; (1998)43 C.C.L.T.(2d)223; (1998)42 R.F.L.(4th)427

unintentional tort, and for that reason can apply to a religious institution provided no investigation is necessary of the internal religious doctrine under the "neutral-principles doctrine".

In Canada negligence has been found against the governing religious institution in *Pornbacher,*[189]and *F.S.M.*[190]

In *Bennett,*[191]a case against a tortfeasing priest, the Supreme Court applied the test adopted by it in *Bazely*[192] for determining if intentional torts should be vicariously imposed. It concluded:

> "In summary, the evidence overwhelmingly satisfies the tests affirmed in *Bazely*, *Jacobi* and *K.L.B*. The relationship between the diocesan enterprise and Bennett was sufficiently close. The enterprise substantially enhance the risk which led to the wrongs the plaintiff-respondents suffered. It provided Bennett with great power in relation to vulnerable victims and with the opportunity to abuse that power. A strong and direct connection is established between the conduct of the enterprise and the wrongs done to the plaintiff-respondents. The majority of the Court of Appeal erred in failing to apply the right test. Had it performed the appropriate analysis, it would have found the Roman Catholic Episcopal Corporation of St. Georges vicariously liable for Father Bennett's assaults on the plaintiff-respondents."

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[189]*W.K. v. Pornbacher*[1997] B.C.J. No. 57; [1998]3 W.W.R.149; (1997)32 B.C.L.R.(3d)360; (1997)27 C.C.E.L.(2d)315; (1997)34 C.C.L.T.(2d)174

[190]*F.S.M.* supra ftn.168

[191]*Bennett* supra ftn.14

[192]*Bazely v. Curry* [1999]S.C.J.No.35; [1999]2S.C.R.534 at par.32; (1999)174 D.L.R.(4th)45; (1999)241 N.R.266; [1999]8W.W.R.197; (1999)124B.C.A.C.119; (1999)62 B.C.L.R.(3d)173;(1999)43C.C.E.L.(2d)1; (1999)46C.C.L.T.(2d)1

The principle in *Bennett* was also applied to a priest-bishop-diocese relationship in *O'Dell*.[193]

The principles in these cases are no different than those arising in the American cases where negligent supervision has been found against a church such as *Evans,*[194] *Bear Valley*,[195] *Destefano*[196] and *Bohrer.*[197]

In *Moses*,[198] the Colorado Supreme Court on appeal was careful to distinguish between the tort of negligent supervision and that of vicarious liability.

In 1995 the Supreme Court of Wisconsin in *Pritzlaff*[199] dismissed a case against a priest who had allegedly coerced the plaintiff to have a sexual relationship with him. The decision largely hinged on a limitation period which the Court ultimately found barred the action of the plaintiff. Nevertheless, the court went on to recognize that there were currently a number of cases pending in Wisconsin as to whether or not a religious governing body could be liable for negligence in supervising clergymen employees who commit tortious acts. They ruled:

> "To establish a claim for negligent hiring or retention, Ms. Pritzlaff would have to establish that the Archdiocese was negligent in hiring or retaining Fr. Donovan because he was incompetent or otherwise unfit.... But, we conclude that the First

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[193]*O'Dell* supra ftn.112

[194]*Evans* supra ftn.78

[195]*DeBose* supra ftn.66

[196]*Grabrian* supra ftn.66

[197]*Bohrer* supra ftn.66

[198]*Moses* supra ftn.160

[199]*Pritzlaff v. the Archdiocese of Milwaukee* 194 Wis.2d 302 (1995)par.11

> Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices. Therefore, Ms. Pritzlaff's claim against the Archdiocese is not capable of enforcement by the courts."

The court adopted the reasoning of the decision in *Schmidt*[200] on the basis that there would be "a chilling effect"on the free exercise of religion if the courts were to determine that ecclesiastical authorities had negligently supervised the clergymen.

The court recognized that there might be a case where a plaintiff established that the religious governing body knew that an individual clergyman was potentially dangerous and could be liable. It rejected those cases as "unpersuasive". It was left to the Maine courts to deal with this issue.

In 1996 the Supreme Judicial Court of Maine decided *Swanson,*[201] a claim by a husband and wife against a Catholic priest. The priest had initiated a sexual relationship with the wife. The action alleged intentional and negligent infliction of emotional distress and negligent pastoral counselling by the priest and negligent supervision by the church. The trial court partially granted the church's motion to dismiss but permitted the case to proceed on negligent supervision. The intermediary Appeal Court held that the First Amendment barred the negligent supervision claim. The Supreme Court of Maine remanded the case with instructions to dismiss the complaint against the church.

The court in Maine was travelling for the first time down the road which had been illuminated by obiter opinions in the *Schmidt* and *Pritzlaff* cases and ultimately adopted those

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[200] *Schmidt* supra ftn.85

[201] *Swanson v. The Roman Catholic Bishop of Portland* 692 A.2d 441 (1997)

decisions. It found:

> "The exploration of the ecclesiastical relationship is itself problematic. To determine the existence of an agency relationship based on actual authority, the trial court will most likely have to examine church doctrine governing the church's authority over Morin. As the U.S. Supreme Court noted in one case, determining the authority of a religious body under religious law,... 'frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power with a [hierarchical] church so as to decide...religious law [governing church polity]...would violate the First Amendment in much the same manner as civil determination of religious doctrine.'"[202]

The court accepted that even if a trial court could somehow determine some kind of secular authority within a church in order to find vicarious liability, it would then face the hurdle of defining the nature of a relationship between a church bishop and parish priest. Quoting *Pritzlaff*, and echoing *Schmidt* it observed:

> "beliefs and penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants the court to probe the tort-law reasonableness of the church's mercy toward the offender. . . . because of the existence of these constitutionally protected beliefs governing ecclesiastical relationships, clergy members cannot be treated in the law as though they were common law employees."[203]

They then went on to review the claim for the tort of negligent supervision. They concluded that pastoral supervision is an ecclesiastical prerogative, and:

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[202]Id par.10

[203]Id par.12

> "We conclude that, on the facts of this case, imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy in the manner deemed proper by ecclesiastical authorities and would not serve a societal interest sufficient to overcome the religious freedoms inhibited."[204]

The court recognized that, as in *Pritzlaff*, there was a limited authority in several cases where negligent supervision claims had been allowed to precede. The court, however, felt that after a review of these decisions that these courts had "failed to maintain the appropriate degree of neutrality required by the United States and Maine constitutions."[205]

Clearly, the principles in the United States in determining liability of churches for negligent supervision are similar both in Canada and the United States. Unlike clergy malpractice, negligent supervision may be found without any need to delve into religious doctrine. The point of divergence in the two judicial systems is in applying constitutional brakes on the inquiry.

In the U.S. the courts have considered the risks of treading on constitutionally protected activities, and tried to reach a solution using the "neutral-principles doctrine".

In Canada, likely because no Charter challenge has been effectively advanced, the courts have not even considered any constitutional obstacles that might exist.

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[204]Id par.13

[205] Id

V. Liability for Breach of Fiduciary Duty

In addition to the issues of liability and tort, courts are being asked to consider whether or not there would be liability for breach of fiduciary duty.

Under what circumstances will a clergyman or a church be liable for breach of fiduciary duty in Canada? The answer is complicated by the confusing approaches Canadian courts have taken to claims for breach of fiduciary duty.

The origins, principles and remedies for actions in tort are completely different than for breach of fiduciary duty.

A tort is a civil wrong other than a breach of contract which a court will redress by an award of damages.[206] It originated in the common law or Kings Bench Courts in England in the early years of the common law legal system. Originally confined to intentional actions that resulted in damage to another person, the law of tort gradually enlarged to include unintentional wrongs, which became known as negligence.[207]

Sexual assault or abuse by a cleric is an intentional tort just as it would be if committed by any other person. It finds its historical origins as part of the tort of battery or trespass to the person. While damages are compensatory in tort, in other words they seek to put the person in the position they would have been had the tort not occurred, in certain narrow circumstances, an award is made even where damage was not proven. By and large "damages" (the amount of money awarded to compensate a person for their tortious loss) is restricted to losses that can be proven

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[206] *Fleming* supra ftn.47p.1

[207] Id p.97

(an exception is battery or trespass).[208] Courts also have discretion to add a further amount as "exemplary" or punitive damages where the wrong is egregious or public policy concerns of the court require it.[209]

A fundamental principle is that in compensating a person for their loss, whether it be actual loss of punitive/exemplary damages, a person may not recover twice for the same loss.[210]

As with any legal system, as the common law develops rules can produce unfairness and injustice. In some cases, the general rules applicable to tort actions were changed by statute or by the development of the common law through judicial decisions in the courts. In England a second way to mitigate the unfairness of the common law developed by the establishment of the principles and courts of equity. While the common law began sometime shortly after the Norman conquest in 1066 C.E., the petitions to a court of equity were not documented until about 1349 C.E. But by 1474 C.E. there was a separate court, presided over by the Chancellor of England on behalf of the king, who would hear petitions from those who were not able to obtain a remedy or justice before the courts of common law.[211]

Gradually the courts of equity themselves developed rules and principles. Over time, certain classes of litigation were wholly within the jurisdiction of the courts of equity, such as, for example trusts and wills.

Starting in 1873 the courts of equity and of common law were consolidated and now one judge of a Superior Court of a jurisdiction will grant common law or equitable relief. However,

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[208]Id p.16

[209]Id p.1

[210]See generally ftn.58&59

[211]*Snell's Principles of Equity*(London:Sweet & Maxwell Ltd., 1960)25th ed. p. 5 (The discussion of equity which follows is taken largely from this text.)

matters originally within the jurisdiction of the common law court would still be heard according to common law principles and their remedy granted accordingly, while relief which one is entitled to in a court of equity is subject to the rules of equity and the corresponding relief available from an equitable court.

Fiduciary duty is an equitable concept. Breaches of an equitable duty entitled one to a different remedy than in common law tort actions. A petitioner in a court of equity was entitled to be compensated not just for his or her loss, but also for the profits, advantages or benefits which the wrongdoer accumulated through the wrongdoing.

However, a plaintiff is only entitled to an equitable remedy once it is established a remedy is unavailable from a common law court, and is not entitled to double indemnity.

The courts of the United States have been more careful in preserving the distinction between common law causes of action in tort and claims in equity. First of all, they recognize, as in *Jones*,[212] that once an intentional tort is established there is no need to look further to find other remedies in negligence since the plaintiff would have already been compensated.

Similarly, if a plaintiff is able to recover in damages, for example due to being sexually abused, by way of an action for tort there is no need to proceed in equity for further relief. The equitable court has no power to do anything other what has already been granted by the common law court. The equitable principle is "equity follows the law":

> "The Court of Chancery never claimed to override the courts of common law. 'Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it.' It is only when there is some important

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[212] *Jones* supra ftn.105

circumstance disregarded by the common law rules that equity interferes."[213]

Having briefly set out the development of the common law and equitable courts, we come to the more specific consideration of the law of fiduciary duty, commonly invoked in cases involving charitable religious defendants.

Legal commentators have observed that "this vague concept we call a 'fiduciary' has never been successfully defined or analysed".[214] Judges avoid narrowly defining "fiduciary":

> "Morever, it is neither feasible nor desirable to attempt closely to define the relationship, or its characteristics, or the demarcation line showing the exact transition point where a relationship that does not entail that duty passes into one that does."[215]

Ellis defines it as:

> "Simplistically put then, a fiduciary duty is one that arises in the context of trust. A fiduciary individual is someone who stands in a position of trust to another individual. However, as noted below, a true 'trust' relationship need not underlie a fiduciary relationship."[216]

Obviously, from the definition there must be at least two parties to a fiduciary relationship. These two parties have been named in terms that come from trust law as the trustee and the cestui

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[213] *Snell's* supra ftn.211 p.26

[214] J.C. Sheppard *The Law of Fiduciaries* (Toronto:Carswell, 1981)p.4

[215] *Lloyds Bank v. Bundy* [1974]3All E.R.757

[216] Ellis, Mark Vincent *Fiduciary Duties in Canada* (Toronto:Carswell, 2000) p.1-1

que trustent. The cestui que trustent is often known as the beneficiary and the terms can be used interchangeably.

The relationship of a trustee with a beneficiary in a fiduciary relationship is much more than that in a normal business relationship. The law requires a fiduciary to act only in the best interests of the beneficiary. It does not demand that of a party to a business transaction. One of the most famous definitions of fiduciary responsibility is that of Justice Cardozo, who said:

> "...[C]onduct permissible in a work-a-day world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity had been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciary been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."[217]

This high standard is imposed upon a fiduciary because of the grossly disproportionate power between the fiduciary and the beneficiary. A fiduciary is one in a position of control over another person. It was neatly described by Chief Justice McEachern of British Columbia, in *Critchley* where he said:

> "The law relating to fiduciary duty arose out of the responsibility assumed by everyone who undertakes to act for another to act honestly and loyally, and not to profit personally from that responsibility except, of course, for proper

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[217] *Meinard v. Salmon* (1928)164 N.E. 545(N.Y.C.A.)P.546

> remuneration. Until recently, this remedy was used for the purpose of requiring disloyal agents to disgorge secret or unlawful profits. Quite recently, fiduciary law has been extended to cover a myriad of circumstances usually but not always related to the law of trusts."[218]

It is easy to see why a fiduciary was required to disgorge profits he or she may have obtained, for example, rather than just compensate a person for money that had been taken. A classic example of a breach of fiduciary duty is where a lawyer takes a clients funds that have been left in trust and invests it on the lawyer's own account. When discovering the money is missing, the client is entitled not only to have the money returned but also the profits that the lawyer had made on the money in the meantime.

Traditionally, certain persons were automatically deemed to be fiduciaries by virtue of their office. Hundreds of years of litigation in equity have established parents, guardians, fiancees, religious, medical, other advisors and solicitors are presumed to be in a fiduciary relationships.[219] This is not an inclusive list. The general principles for a fiduciary obligation to exist are recognized by the Supreme Court of Canada to be:

> 1. The fiduciary has scope for the exercise of some discretion or power,
> 2. The fiduciary can unilaterally exercise that power or discretion so as to effect the beneficiaries legal or practical interest,
> 3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power[220]

The Supreme Court of Canada imposed fiduciary obligations in a number of cases (as listed

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[218] *Critchley* supra ftn.183

[219] *Snell's* supra ftn.211 p.498

[220] *Frame* supra ftn.56

in *Critchley):*[221]

1. Federal officials in leasing Indian lands
2. A wife refusing access of children to her husband
3. A mining company breaching a duty of confidentiality to a potential partner
4. A solicitor acting in a real estate property flip
5. A doctor extorting sexual favours in return for drugs
6. A father committing incest
7. A financial advisor recommending investments in which he had an undisclosed interest

Given the broadness with which the high standards of loyalty can be applied (and the historical designation of religious persons as fiduciaries) it comes as no surprise that in actions against clergymen or churches plaintiffs will plead breach of fiduciary duty.

Under traditional legal principles, the plaintiff is required to exhaust his or her remedies in tort before being entitled to relief for breach of fiduciary duty. If the plaintiff can be entirely compensated in common law for an intentional or unintentional tort, an equitable remedy for breach of fiduciary duty is not required.

Unfortunately, a great deal of confusion has arisen over what entitles a person to relief for breach of fiduciary duty. Part of it may be due to the confusion over the concept of a "duty of care", which exists both in the common law tort of negligence and in a breach of fiduciary duty-a confusion which Sachs, J.A. recognized in *Lloyd's Bank:*

"the phrase 'fiduciary care' is used to avoid the confusion with the common law duty of

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[221] *Critchley* supra ftn.188

care - a different field of our jurisprudence."[222]

One court has gone so far as to describe a "tort of breach of fiduciary duty":

> "I find that the defendant fell below the standard of care required of a competent solicitor by failing to make the disclosures that I have enumerated. On this basis the plaintiff succeeds in negligence. I also find that the plaintiff is entitled to succeed on breach of fiduciary duty, and that that is, in effect, a tort in this jurisdiction."[223]

Such a statement is a confusion in terms. It would be like creating a "tort of breach of contract", or a "tort of breach of the criminal code." Fortunately, no other court has adopted this reasoning although, surprisingly, at least one commentator has observed:

> "The equation of breach of fiduciary duty with negligence could lead to liability where all traditional elements of tort are not proven because, as discussed earlier, a plaintiff need not demonstrate a causal link between the breach of fiduciary obligation and the damages he or she has suffered. It is suggested that not only will breach of fiduciary duty provide a cause of action against a professional person, it will also give rise to liability in tort."[224]

If this reasoning were true, a plaintiff would have no need to sue for clergy malpractice (or any tort) in the first place and instead simply sue for breach of a fiduciary duty. But it is necessary historically and legally that available tort remedies at common law be exhausted first, and only

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[222]*Lloyd's Bank* supra ftn.215

[223]*Morris v. Jackson* [1984]O.J.No.1341; (1984)34R.P.R.269

[224]Krever, Horace and Lewis, Marion Randall, *"Fiduciary Obligation and the Professions"* in Special Lectures of the Law Society of Upper Canada, 1990 Fiduciary Duties (Scarborough: The Law Society of Upper Canada, 1991)

then, and if necessary, is recourse to breach of fiduciary duty available.

In the Ontario case *Glendinning,*[225] a court dealt with competing claims of breach of fiduciary duty and negligence against a diocese. The diocese had not properly supervised a priest of a seminary who abused young children. It was found negligent for this failure.

After reviewing the principles of fiduciary duty, the court refused to find a breach of such duty, observing:

> "Nevertheless, in my view, all of those factors have more relevance to the issue of negligence on the part of the diocese than to the issue of the existence or otherwise of a fiduciary duty owed by the diocese to the plaintiffs. Liability on the part of the diocese in this case is properly resolved on the basis of negligence or vicarious liability, rather than on an alleged breach of fiduciary duty. It cannot be said that the diocese took any action, or failed to take any action to further its direct or indirect advantage, thus fulfilling the first criterion for liability on the basis of breach of fiduciary duty. On the facts presented at trial, I am unable to find any evidence that the diocese took any action by which it secured an advantage for itself, either direct or indirect. Indeed, the opposite is true. Its inaction in properly supervising Glendinning was a major contributing factor to the injury to the plaintiffs. That allowed the assaults to continue over a period of several years undetected thus exposing it to liability for damages for its negligence."

Finding breach of fiduciary duty in such circumstances was unnecessary.

Loss or damage alone does not constitute a breach of fiduciary duty. The duty of the fiduciary is to act in good faith. A fiduciary may be negligent, but still act in good faith. This is

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[225] *Glendinning* supra ftn.12 par.250,251

particularly relevant when dealing with claims against religious organizations for breach of fiduciary duty. Sheppard observed:

> "Contrast this with situations of pure negligence, of which *Hedley Byrne* is a good example. There, the issue was not the defendant's good faith or honesty, but his competence. This negligence aspect arises in any case in which, despite a lack of bias, the adviser gives unreasonably bad advice, or unknowingly and negligently makes untrue statements. In these circumstances, there is a duty of care, but . . . this duty of care has no essential connection with the fiduciary relationship. It may be imposed in tort, as a general duty to all of the class that may be relying on one's statements, or it may be imposed in contract, for example where the adviser is a solicitor or an accountant. In these cases, there is no misuse of power. The fiduciary has attempted to use his information-giving power in the interests of his beneficiary; the problem is that he has not succeeded."[226]

In other words, provided the fiduciary has acted in good faith, his or her negligence does not result in liability for breach of fiduciary duty. If liability is established in negligence the remedy is available there.

Madame Justice McLachlin (in a paper) recognized that although the categories of fiduciary duty have been increasing to include situations in which there has been no unilateral power exercised by the fiduciary, and certainly in cases in which there has been no financial gain to the fiduciary, it still does not mean that a plaintiff is entitled to leap frog over common law remedies:

> "The application of fiduciary principles in commercial relations traditionally governed by contract and tort poses many problems which courts will be required

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[226] *Sheppard* supra ftn.214p247

to grapple with in the future.

"One is the measure of damages to be awarded. Contract damages are limited by the principle of proximity. Tort damages are similarly limited by the principle of forseeability. Damages at equity have traditionally been subject to neither of these limits. McLachlin J. argued in *Canson v. Boughton & Co.*, supra, that where fiduciary principles are applied in commercial situations, it may be necessary to harmonize the award of damages with those of contract and tort. Plaintiffs should not be entitled to a windfall merely because they can establish a fiduciary relationship on the new, broader tests. The aim of broadening the concept of who may be a fiduciary was to prevent the victim of an abuse of power being denied an effective remedy, not to increase the awards of plaintiffs who already have perfectly good remedies in contract and tort. To do so, would be 'punitive' damages in every situation where a fiduciary obligation is established. The public we serve does not see the law in terms of boxes, one labelled contract, one labelled tort, another labelled fiduciary obligation. We must work toward the goal of comprehensive system of civil redress that unifies and harmonizes all three branches of the law. We must eschew the anomalies that bring the law into disrepute and aim for a system that provides fair justice for every wrong."[227]

After the presentation of this paper in 1996, the Supreme Court had the opportunity to apply fiduciary duties to quasi-religious persons but did not do so. The case was *Jacobi*[228] in 1999. The Canadian Conference of Catholic Bishops was an intervener.

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[227]The Honourable Madam Justice Beverley McLachlin *"The Fiduciary Relationship"* paper presented to the 11th Commonwealth Law Conference, Canadian Bar Association Annual Meeting, Vancouver, August 26-30, 1996 p.9

[228]*Jacobi v Griffiths*[1999]S.C.J.No.36; [1999]2S.C.R.570; (1999)174 D.L.R.(4th)71; (1999)241 N.R.201; [1999]9 W.W.R.1; (1999)124 B.C.A.C.161; (1999)63 B.C.L.R.(3d)1; (1999)44 C.C.E.L.(2d)169; (1999)46 C.C.L.T.(2d)49

A companion case *Bazley*[229] definitively established the principles of vicarious liability, but did not address claims of breach of fiduciary duty.

Jacobi and another plaintiff had been child members of the Boys and Girls Club of Vernon, and an employee who was viewed as "god-like" misused his position to sexually abuse them. While breach of fiduciary duty was claimed, the trial judge found:

> "Liability is assessed on the basis of assault and battery. It is not necessary to consider breach of fiduciary duty by Griffiths as I see no difference in remedy in this case. The cases cited do not extend fiduciary duty beyond parents and step-parents in any event."[230]

The British Columbia Court of Appeal did not address the fiduciary duty issue, and the Supreme Court remitted it for re-trial:

> "The trial judge, upon being satisfied that the Club was liable under the doctrine of vicarious liability, did not address the question of whether the Club was also negligent (at para. 69) despite the fact that negligence was specifically pleaded by the plaintiffs. Also, the trial judge did not consider the question of whether the Club owed a fiduciary duty to the plaintiffs and hence did not consider that head of liability. . . In the result, the matter should be sent back to trial for a determination as to whether the Club is liable under a fault-based cause of action, whether it be negligence or other breach of duty, on the whole of the evidence. The present appeal, based as it is purely on the attribution of vicarious liability, should be dismissed."[231]

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[229] *Bazley* supra ftn.192

[230] *G.T. v. Griffiths* [1995] B.C.J.No.2370par.66

[231] *Jacobi* supra ftn.228par.87

The Supreme Court did not rule on the trial judge's comments regarding the scope of fiduciary duty, although the trial court may have been incorrect insofar as the strict position set out. Fiduciary duty has been imposed upon other defendants besides parents, including the federal crown, schools and supervisors in other cases involving sexual assault of minors.

On the other hand, the Supreme Court has found fiduciary liability by medical doctors. The best known case is *Norberg*.[232]

In *Norberg* a physician elicited sexual favours from his adult, drug-addicted client in exchange for supplying drugs. The trial court found there was a breach of fiduciary duty but since the plaintiff was an adult, had consented and the plaintiff's actions were themselves illegal, the defendant was not liable. The Court of Appeal went further and found that no fiduciary duty existed. In the Supreme Court McLachlin, J., in concurring reasons, ruled:

> "I have had the advantage of reading the reasons of my colleagues Justice La Forest and Justice Sopinka. With respect, I do not find that the doctrines of tort or contract capture the essential nature of the wrong done to the plaintiff. Unquestionably, they do catch aspects of that wrong. But to look at the events which occurred over the course of the relationship between Dr. Wynrib and Ms. Norberg from the perspective of tort or contract is to view that relationship through lenses which distort more than they bring into focus. Only the principles applicable to fiduciary relationships and their breach encompass it in its totality. In my view, that doctrine is clearly applicable to the facts of this case on principles articulated by this Court in earlier cases. It alone encompasses the true relationship between the

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[232]*Norberg v Wynrib* [1992]S.C.J.No.60; [1992]2S.C.R.226; (1992)92D.L.R.(4th)449; (1992)138N.R.81; [1992]4W.W.R.577; (1992)J.E.92-939; (1992)9B.C.A.C.1; (1992)68B.C.L.R.(2d)29; (1992)12C.C.L.T.(2d)1

parties and the gravity of the wrong done by the defendant; accordingly, it should be applied.

". . . I think it is readily apparent that the doctor-patient relationship shares the peculiar hallmark of the fiduciary relationship -- trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests. Recognizing the fiduciary nature of the doctor-patient relationship provides the law with an analytic model by which physicians can be held to the high standards of dealing with their patients which the trust accorded them requires. This point has been well made by Jorgenson and Randles in "Time Out: The Statute of Limitations and Fiduciary Theory in Psychotherapist Sexual Misconduct Cases" (1991), 44 Okla. L. Rev. 181.

"The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other."[233]

If a doctor is so clearly in such a relationship, could not a religious institution similarly be a fiduciary? That depends on the context. The Supreme Court had recognized that the context of the

[233]Id par.62

duty is an important factor in an earlier case, *McInerney*.[234]

In *McInerney*, a physician refused to provide medical reports from referred physicians to a patient on the basis that the reports belonged to the other doctors and she could not release them to her patient. The New Brunswick trial and Appeal courts agreed that the doctor had to supply the records based on patient's right of access.

The Supreme Court agreed that the originating doctors owned the physical records, but that the patient had the right to the information they contained. The physician had a professional duty arising from the physician-patient relationship to give the records to the patient. The Court also found that there was a fiduciary duty:

> "A physician begins compiling a medical file when a patient chooses to share intimate details about his or her life in the course of medical consultation. The patient "entrusts" this personal information to the physician for medical purposes. It is important to keep in mind the nature of the physician-patient relationship within which the information is confided. In *Kenny v. Lockwood* . . . Hodgins J.A. stated, . . . that the relationship between physician and patient is one in which 'trust and confidence' must be placed in the physician. This statement was referred to with approval by LeBel J. in *Henderson v. Johnston* . . . who himself characterized the physician-patient relationship as 'fiduciary and confidential', and went on to say: 'It is the same relationship as that which exists in equity between a parent and his child, a man and his wife, an attorney and his client, a confessor and his penitent, and a guardian and his ward' . . . Several academic writers have similarly defined the physician-patient relationship as a fiduciary or trust relationship . . . I agree with

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[234] *McInerney v MacDonald* [1992]S.C.J.No.57; [1992]2S.C.R.138; (1992)93 D.L.R.(4th)415; (1992)137 N.R.35; (1992) J.E.92-917; (1992)126 N.B.R.(2d)271; (1992)12 C.C.L.T.(2d)225; (1992)7 C.P.C.(3d)269

this characterization."[235] (citations omitted)

But the court went on to caution that the mere finding of the fiduciary relationship, or duty, did not settle the extent of the duty. Justice LaForest, for the court, wrote:

> "In characterizing the physician-patient relationship as 'fiduciary', I would not wish it to be thought that a fixed set of rules and principles apply in all circumstances or to all obligations arising out of the doctor-patient relationship. As I noted in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, not all fiduciary relationships and not all fiduciary obligations are the same; these are shaped by the demands of the situation. A relationship may properly be described as 'fiduciary' for some purposes, but not for others. That being said, certain duties do arise from the special relationship of trust and confidence between doctor and patient. Among these are the duty of the doctor to act with utmost good faith and loyalty, and to hold information received from or about a patient in confidence. . . . When a patient releases personal information in the context of the doctor-patient relationship, he or she does so with the legitimate expectation that these duties will be respected."[236]

The peculiarities of the physician-patient relationship require that, at times, the doctor might refuse to provide information to the patient under the same fiduciary duty that in other circumstances require he release it. LaForest, J expressed this discretionary exercise of fiduciary duty in this way:

"While patients should, as a general rule, have access to their medical records, this

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[235]Id par.19

[236]Id par.20

> policy need not and, in my mind, should not be pursued blindly. The related duty of confidentiality is not absolute. In *Halls v. Mitchell*, supra, at p. 136, Duff J. stated that, prima facie, the patient has a right to require that professional secrets acquired by the practitioner shall not be divulged. This right is absolute unless there is some paramount reason that overrides it. For example, 'there may be cases in which reasons connected with the safety of individuals or of the public, physical or moral, would be sufficiently cogent to supersede or qualify the obligations prima facie imposed by the confidential relation'. Similarly, the patient's general right of access to his or her records is not absolute. The patient's interest in his or her records is an equitable interest arising from the physician's fiduciary obligation to disclose the records upon request. As part of the relationship of trust and confidence, the physician must act in the best interests of the patient. If the physician reasonably believes it is not in the patient's best interests to inspect his or her medical records, the physician may consider it necessary to deny access to the information. But the patient is not left at the mercy of this discretion. When called upon, equity will intervene to protect the patient from an improper exercise of the physician's discretion. In other words, the physician has a discretion to deny access, but it is circumscribed. It must be exercised on proper principles and not in an arbitrary fashion. . . . "

The fiduciary model imposed on a physician in *McInerney* is more applicable to a religious person or institution than that in *Norberg* or Supreme Court cases on other types of fiduciaries.

As with a doctor, a religious defendant answers to more than to just his or her patient. He or she is there to "save the soul" of the penitent, and is expected to act in the penitent's best interests in doing so. But like the doctor, the religious defendant also has larger duties to the constituency that he or she serves.

For example, it may be emotionally distressing to a penitent in a confessional to disgorge

details of their sins, and perhaps even more to perform some act of penance to purge themselves spiritually at the behest of a priest. Is such intentional infliction of emotional distress by the priest a breach of fiduciary duty? This was the conundrum discussed in the *Schmidt* case.[237]

A religious institution may expel a member, depriving him or her of spiritual or social association with members of the community. The institution does so as part of its fiduciary duty to the expelled member to discipline according to its reading of canon law, and also as part of its larger fiduciary duty to the religious community. As with the physician described in *McInerney*, the religious fiduciary is entitled to conduct him or herself in such a manner because there are "reasonable grounds" for so acting.[238] As Justice Brient in *Schmidt* observed, conduct which would be patently negligent on the part of a psychiatrist, would be "impossible and unconstitutional" to find against a cleric;[239]or, a fortiori, his church.

In the absence of Supreme Court rulings on this specific issue, how have other Courts applied fiduciary duty to religious persons or institutions?

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[237]*Schmidt* supra ftn.85

[238]See ftn.17

[239]*Schmidt* supra ftn.85par.8,9

A. In Canada

Notwithstanding the present legal controversy regarding fiduciary duty and the silence of the Supreme Court on this issue, courts in Canada have held religious persons and institutions liable for breach of this equitable duty. Under what circumstances?

One example is the 1991 Ontario decision *Deiwick*[240] (discussed elsewhere in this paper under infliction of mental suffering).

Mrs. Deiwick brought an action against the minister of a United Church whom she and her husband consulted for marriage counselling. A sexual relationship began between her and the minister that ultimately resulted in her pregnancy. There were promises of property transfer alleged between the minister and the plaintiff. The action was brought for breach of fiduciary duty, resulting trust, fraudulent conveyance and intentional infliction of mental suffering.

The court dealt at length with the damages available for breach of fiduciary duty. Unfortunately, the court considered the fiduciary duty claim first and the tort claim second. The decision would have been less confusing if the court had followed the correct approach and required the plaintiff exhaust common-law remedies before recourse to equity.

The court determined that:

> "a fiduciary duty should be ascribed to a broad range of professionals, including clerics and marriage counselors . . . I find that when the plaintiff and her husband sought counseling in relation to their marriage problems, Frid was in a fiduciary relationship with the plaintiff. Also, that when he entered into a sexual relationship with the plaintiff he was in breach of

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[240] *Deiwick* supra ftn.63

his fiduciary duty. The commercial cases may not always fit into a marriage counselor type of relationship. This is not a case where there is any evidence that Frid disclosed to others any information imparted to him in confidence. It is obvious that he was not in a fiduciary relationship with the plaintiff after the period of time when the plaintiff claims that sexual relations were terminated and she had installed dead-bolt locks at Morgandale; both events occurred in 1983. It seems to me that the liability for damages to be imposed upon Frid, if any, arises by reason of events that occurred between Christmas of 1979 and January 1, 1980 and some time in 1983; and not for events that occurred thereafter."[241]

The court focussed not on the spiritual relationship between the parties, but the role of marriage counsellor. This is a role that American courts have found to be fiduciary - even absent a religious role on the "neutral-principles doctrine".

Relying upon *Szarfer,*[242] an Ontario case of a lawyer who misused his position of confidence with a part-time secretary to have an adulterous affair that resulted in damages, the court found:

"While it may be that Frid did not contribute to the marriage breakdown, he learned that the marriage was breaking down. He was in a position of trust and confidence and the plaintiff was vulnerable to him. The evidence supports the inference that there was a breach of confidence in the sense that the defendant used confidential information to foster a sexual relationship with the plaintiff for his own purposes. Undue influence was not specifically argued. I have no difficulty in finding the defendant liable to the plaintiff in damages for breach of fiduciary duty where there was also a breach of confidence.[243]

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[241]Id p.13

[242]*Szarfer v. Chodos* [1988]O.J.No.1861; (1988)66O.R.(2d)350; (1988)54D.L.R.(4th)383

[243]*Deiwick* supra ftn.63p.18

As with the U.S. heart balm statutes, in Ontario the Family Law Reform Act bars actions for adultery.[244] However, in *Szarfer* the trial court (approved on appeal) distinguished abolished damages for adultery from damages for emotional or physical harm caused by a breach of confidence by a lawyer, irrespective of whether it arises in the context of adultery:

> "In this case the injury to the plaintiff was not caused by the adultery. The injury was caused by the defendant's use of confidential information for his own purposes. While the adultery forms part of the core facts of this claim, and is admitted, the action itself is founded on the allegation that the plaintiff's mental and emotional status was adversely affected by the defendant's misuse of confidential information and that, in my view, constitutes a viable cause of action for damages."[245]

Accordingly in *Deiwick,* the court awarded general damages to the plaintiff of $20,000.00 concluding that the breach of fiduciary duty resulted in emotional and mental stress. This is confusing, in that the court then went on to consider damages for intentional infliction of mental suffering, and stated that "this claim for damages should be considered in the alternative to a claim for damages for breach of fiduciary duty and breach of confidence", but that "the evidence does not support a finding of intentional infliction of mental suffering."[246]

It is inconsistent with principles of equity to find a tort claim to be an alternative to an equitable claim. It is, however, correct that mental or emotional damages which are not an intended result do not meet the test for the tort in intentional infliction of mental suffering.

It is also difficult at first to see how in either *Deiwick* or *Szarfer* an action for damages arising from adultery, which in each both courts accepted was statute barred, could be resurrected

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[244] *The Family Law Reform Act* R.S.O.(1980)c.152, s.69(1)

[245] *Szarfer* supra ftn.242

[246] *Deiwick* supra ftn.63

as a breach of fiduciary duty. Equity, after all, is supposed to follow the law. Perhaps it is because there was also, on the facts, a breach of confidence.

While breach of confidence and breach of fiduciary duty may be "intertwined", they are still "distinct". Some of the distinctions between the law of confidence and the law of fiduciaries were pointed out by LaForest, J. in *LAC*:

> "However, the facts giving rise to an obligation of confidence are also of considerable importance in the creation of a fiduciary obligation. If information is imparted in circumstances of confidence, and if the information is known to be confidential, it cannot be denied that the expectations of the parties may be affected so that one party reasonably anticipates that the other will act or refrain from acting in a certain way. A claim for breach of confidence will only be made out, however, when it is shown that the confidee has misused the information to the detriment of the confidor. Fiduciary law, being concerned with the exaction of a duty of loyalty, does not require that harm in the particular case be shown to have resulted.
> There are other distinctions between the law of fiduciary obligations and that of confidence which need not be pursued further here, but among them I simply note that unlike fiduciary obligations, duties of confidence can arise outside a direct relationship, where for example a third party has received confidential information from a confidee in breach of the confidee's obligation to the confidor: see *Liquid Veneer Co. v. Scott* (1912), 29 R.P.C. 639 (Ch.), at p. 644. It would be a misuse of the term to suggest that the third party stood in a fiduciary position to the original confidor. Another difference is that breach of confidence also has a jurisdictional base at law, whereas fiduciary obligations are a solely equitable creation. Though this is becoming of less importance, these differences of origin give to the claim for breach of confidence a greater remedial flexibility than is available in fiduciary law. Remedies available from both law and equity are available in the former case,

equitable remedies alone are available in the latter."[247]

From LaForest, J.'s comments it is clear that not every breach of a fiduciary duty is a breach of confidence, nor is every breach of confidence a breach of fiduciary duty. When, as in *Szarfer* and *Deiwick*, the confidential information concerning the plaintiff's respective marital difficulties was passed on in a confidential relationship (in one case a lawyer and the other a minister of religion/marriage counsellor), it came attached with a duty not to use it for selfish advantage. Both the lawyer and the minister did so. The trial judge in *Deiwick* realized the importance of the confidential information when he said:

> "I have no difficulty in finding the defendant liable to the plaintiff in damages for breach of fiduciary duty where there was also a breach of confidence."[248]

In addition, in *Deiwick* the defendant reneged on promises of property transfers that gave rise to resulting trusts - and the plaintiff was even evicted by defendant's wife. This conduct also caused damage.

Deiwick was referred to in *Cairns*, but not on the fiduciary duty issue.

The court in *Cairns* did consider a claim for breach of fiduciary duty. It avoided the defining issue of whether the religious defendants were in a fiduciary relationship or not, by backing into the question. The court decided first that no damages for breach of fiduciary duty could lie, so that determining the existence of the duty in the case before it was not required. It found this because, on the facts, "there was no element of betrayal or bad faith on the part of any

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[247] *LAC Minerals Ltd. v. Int Corona Resources Ltd.* [1989]S.C.J.No.83;[1989] 2 S.C.R.574 par.161,162; (1989)61 D.L.R.(4th)14; (1989)101 N.R.239; (1989) J.E.89-1204; (1989)36 O.A.C.57; (1989)44 B.L.R.1; (1989)26C.P.R.(3d)97;(1989)35 E.T.R.1; (1989)6R.P.R.(2d)1

[248] *Deiwick* supra ftn.63

of the defendants",[249] which following *Critchley,*[250] would be a necessary element of a breach of fiduciary duty.

So it would appear from *Deiwick* that in Canada damages could be available for breach of fiduciary duty by marriage counsellors who misuse confidential information to their personal benefit. When a cleric steps from the pulpit and assumes the role of counsellor in a non-pastoral sense, damages may also result.

What about situations wherein a religious institution acts as a fiduciary, to the damage of a beneficiary, but without personal benefit?

An explosion of litigation occurred in the 1980's with claims against residential schools. Under contract with the federal government, certain religious institutions in Canada accepted native students into boarding schools they operated. Student attendance was mandatory and the students were not necessarily members of the operating church, although they might be instructed in the tenets of that faith. In some of the schools physical or sexual abuse occurred. Actions for negligence resulted. In addition to the claims in tort, plaintiffs alleged breach of fiduciary duty on the part of the government and the churches.

These cases must be approached with caution before applying their principles to broader litigation involving the fiduciary duty of religious defendants. Unique factors distinguish them from general application. For example, the law required student attendance and that alone created a corresponding duty. The church's activities were educational and more analogous to child welfare agencies than religious bodies. The relationship between the religious defendant and the cestui qui trustent could be stripped of all religious character and on neutral principles still establish a fiduciary duty. The pastoral/religious nature of the defendant's activities was more of an

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[249] *Cairns* supra ftn.22 par.113,117

[250] *Critchley* supra ftn.188

aggravating factor in increasing damages rather than the basis for fiduciary liability. Nevertheless, the approach of the courts is instructive.

In 1997 in *Pornbacher*[251] an 11-year old student at a catholic boy's school was sexually assaulted by a priest assigned to his school. The priest pleaded guilty to criminal charges and an action was brought against the priest, the school and the catholic bishop. The bishop had been advised prior to the assaults on this plaintiff of complaints that the priest had abused other children, but did nothing. The court found against the priest for assault and the bishop (and the catholic church) as vicariously liable as the priest's employer. The action against the school was not pursued and dismissed.

While the action against the church was framed in tort, the court used the fiduciary relationship of the church and the plaintiff to establish the duty of care necessary to establish negligence. It found:

> "Here the plaintiff and defendants were in a fiduciary relationship based on the trust reposed in the church and its representatives as spiritual leaders of the catholic community. In addition the plaintiff was a child at the time of the assaults. There was no question that in 1975 it was understood that the sexual abuse of children, whether by priests or others, was not acceptable behaviour. This is particularly true for priests of the Catholic Church in light of their vows of celibacy. The bishop had a duty to take care of his flock and to ensure that his priests maintained their vows."[252]

While it may be true that there was a fiduciary relationship, was it necessary in order to establish a duty of care? After all, the bishop was the "employer" of the priest, and operated the

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[251] *Pornbacher* supra ftn.189

[252] Id par.45

catholic school. It held itself out as a place to come for spiritual and moral direction. Surely having assumed that role, the duty of care could be inferred without reaching out of common-law and into equity. That this was what the court really intended can be seen from what followed:

> "It was foreseeable that if nothing was done to try and prevent priests from sexually abusing children there could be further instances of abuse and the children would be harmed as a result. Although there may have been no appreciation that the problem of institutional child sexual abuse was widespread and that no one else had yet taken formal steps to deal with the problem, that circumstance is irrelevant to a consideration of the question as to whether the bishop was negligent in taking no steps to deal with a problem of which he was aware. The fact that the bishop did nothing is prima facie evidence of a breach of the duty of care. In the absence of any evidence to rebut that presumption I conclude that the bishop breached his duty of care to Mr. K. As a result of that breach Mr. K. was injured. The injury suffered by Mr. K. was precisely that which was foreseeable in the absence of any steps being taken to prevent it."[253]

Clearly the trial judge reached the right result. The bishop had a duty of care to the student to protect him, and once he was aware of a situation of risk (the other abuse reports) he had a specific duty to act which he breached by non-feasance.

The trial judge did not need to use fiduciary duty to establish the duty of care, since the remedy and damages pleaded and available were in common-law.

In 1998, another British Columbia trial judge decided a similar case *Plint*[254] and met head-

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[253]Id par.46

[254]*W.R.B. v. Plint* [1998]B.C.J. No.1320;(1998)161D.L.R.(4th)538; [1999]1W.W.R.389; (1998)52B.C.L.R.(3d)18; [1998]4C.N.L.R.13

on the claims of breach of fiduciary duty.

Former students at the Alberni Residential School established that the school's dormitory supervisor, Plint, had sexually assaulted them. Plint's liability was not denied. The school was operated by the United Church of Canada and the Minister of Indian Affairs. Both defendants denied that they were vicariously liable for Plint. Unlike *Pornbacher*, there was no actual knowledge of the risk to the plaintiffs on the part of the defendants.

In the first phase of the trial, the court concluded:

> ". . .there was sufficient joint control and a co-operative advancement of the respective interests of the parties in this case that the term joint venture is apt. This conclusion is not only supported on the facts and law, but it also coincides with the language used by the parties themselves to describe their relationship. Accordingly I conclude that both the Church and Canada are vicariously liable for the sexual assaults committed against the plaintiffs by Plint."[255]

In 2001, phase two of the trial[256] considered liability for perpetrators other than Plint, negligence, statutory duty and third party claims along with fiduciary duty, and determined damages.

As to negligence, the court found the defendants owed a duty of care. It concluded that the United Church and Canada did not have knowledge of the assaults and dismissed the claims for, in essence, negligent supervision.[257] The court found that Canada breached its statutory duty of

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[255]Id par.151

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[257]Id par.232

"special diligence" to the plaintiffs under the Indian Act.[258] Damages were awarded.

Although damages were awarded in common-law, the court proceeded with an analysis of fiduciary duty, beginning with the hallmarks of a fiduciary relationship as set out by the Supreme Court in *Norberg:*[259] (1) the fiduciary has a scope for the exercise of some discretion or power (2) the fiduciary can unilaterally exercise that power to affect the beneficiary's legal or practical interests and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding discretion or power.

Applying this criteria, the United Church and Canada were clearly in a fiduciary position. Did that mean that their negligence, or vicarious liability, in the actions of Plint constituted a breach of that duty?

To answer that question, Justice Brenner considered the British Columbia Court of Appeal decision in *Critchley*,[260] which, as we have seen, raised concerns about the application of fiduciary duty to inappropriate cases.

Critchley confined breach of fiduciary duty to cases where, once the fiduciary relationship is established, the "defendant personally takes advantage of a relationship of trust or confidence for his or her direct or indirect advantage."[261] That was the case in the view of the court in *Deiwick*.[262]

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[258] Id par.259

[259] *Norberg* supra ftn.232

[260] *Critchley* supra ftn.188

[261] Id par.85

[262] *Deiwick* supra ftn.63

Justice Brenner also considered the case of *H.(J.)*[263] which applied *Critchley.* The court in that case observed that:

> "the existence of a fiduciary relationship does not mean that any and all wrongdoing on the part of the fiduciary that may adversely affect the interests of the beneficiary amounts to breach of a fiduciary duty",

and concluded that:

> "in the absence of disloyalty that could amount to a breach of fiduciary duty, cases of this kind are to be governed by the law of negligence."[264]

Brenner, J. then dismissed the claim against the United Church and Canada for breach of fiduciary duty:

> "As stated by Lowry J., the standard of care to be applied is not what others would do as in negligence law. Rather the fiduciary duty is breached when a defendant acts dishonestly or personally takes advantage of a relationship of trust or confidence for his or her own direct or indirect personal advantage.
> "Plint was clearly taking advantage of a relationship of trust for his own benefit by committing his atrocious assaults. While this is an example of a breach of fiduciary duty his conduct also demonstrates the limits of fiduciary liability in a case of this nature.
> "To find a breach of fiduciary duty there must be conduct that is dishonest or is perpetrated for personal advantage in a relationship of trust and confidence. On the evidence in the case at bar is this what either Canada or the Church really did?

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[263] *J.H. v. British Columbia* [1998]B.C.J.No.2926par.37

[264] Id par.41,42

> "In my view the answer is 'no'. There is simply no evidence of dishonesty or intentional disloyalty on the part of Canada or the United Church towards the plaintiffs which would make it permissible or desirable to engage the law relating to fiduciary obligations. I include in this conclusion the more general complaints of the plaintiffs relating to linguistic and cultural deprivation. In my view the plaintiffs have failed to demonstrate that either Canada or the Church were acting dishonestly or were intentionally disloyal to the plaintiffs.
> "This is not to suggest that the Indian Residential School policy in this country was not flawed. Many have concluded retrospectively, with ample justification, that the policy was badly flawed. However even a badly flawed policy does not necessarily equate to a breach of fiduciary duty in law. It is only when the flawed policy contains within it the necessary indicia of dishonesty or disloyalty that the breach of fiduciary cause of action is engaged. Such indicia with respect to Canada or the Church is simply not present in the case at bar."[265]

Plint established that a religious person or institution, merely because it acts in its religious capacity, is not liable for breach of fiduciary duty unless there is evidence of a personal benefit or indicia of "dishonesty or disloyalty" (what Southin, J. called the "stench of dishonesty.")[266]

Between the time of Justice Brenner's decision in phase one of *Plint* in 1998 and phase two, including his determination with regard to fiduciary duty in 2001, yet another British Columbia court approached the same issue in a case involving the Anglican Church, with different results, in *F.S.M.*[267] This time - unlike *Plint* - there was "dishonesty or disloyalty" amounting to a "stench of dishonesty".

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[265] *Plint* supra ftn.254par. 244-248

[266] *Girardet v. Crease & Co.*[1987]B.C.J.No.240; (1987)11B.C.L.R.(2d) 361 at 362

[267] *F.S.M.* supra ftn.168

F.S.M. was 8 years old when he became a crown ward and an elementary student in the St. George's Indian Residential School in 1973. St. George's was a non-sectarian school run by the Anglican Church in Lytton, British Columbia in similar circumstances to the United Church school in *Plint*.

Clarke was a dormitory supervisor who sexually abused F.S.M. over at least a 2 year period. The principal of the school, who conducted the religious education and was directly supervised by the Anglican bishop, learned of the abuse of F.S.M. and other children in 1973. He let Clarke resign and while he eventually advised the local and supervising Anglican representatives and the Department of Indian Affairs, he never reported the abuse to the police or the parents.

It turns out that the principal, Harding (who later himself became an Anglican priest) also sexually assaulted children. The parents or police again were never informed.

Years later Harding met F.S.M. again and tried to initiate sexual conduct. Eventually matters came to light. Clarke was charged criminally, arrested and jailed. While the civil action named Clarke, the trial judge observed:

> "This case is not about him. The Anglican defendants and Canada deny any responsibility for Clarke's actions. Each blames the other, claiming that it was the other who was 'on watch'. Damages have been agreed. This case is about liability of the Anglican Church and the Government of Canada."[268]

Given that Clarke was an employee of the Anglican Church, the trial court adopted *Bazley*[269] and *Jacobi*[270] and found that the Anglican Church in co-operation had created a situation

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[268]Id par.2

[269]*Bazley* supra ftn.192

[270]*Jacobi* supra ftn.228

where Clarke was "the most powerful influence in the children's lives"[271] and found them jointly vicariously liable for Clarke's intentional torts. The court also found them jointly liable for negligent supervision. It then considered fiduciary duty.

The trial judge recognized that the tort claims had already been dealt with and the court had not been asked for equitable relief.[272] The court instructed itself on the pejorative consequences of a finding of breach of fiduciary duty (the "stench of dishonesty" issue).[273] It recognized that while committing the tort of negligent supervision was not itself a breach of fiduciary duty, failure to report and investigate the reports of Clarke's abuse on F.S.M. was.

Adopting the Colorado decision in *Moses*,[274] and applying the Supreme Court of Canada's test in *Frame*,[275] the court ruled:

> "The Anglican Church through the principal of the residence was in a position to exercise power over the plaintiff as it pertained to his moral and emotional well-being and dignity. It did so daily by imposing religious practices and influence which involved an interaction that created trust and reliance. The plaintiff absolutely trusted that he would be properly cared for, especially because this was an Anglican institution. The fact of Anglicanism lent a superior moral tone to the residence that created an additional level of assurance. The Bishop of the Diocese knew that dormitory supervisors were in a position to affect the plaintiff's intimate personal and physical interests and encouraged this position of trust through

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[271] *F.S.M.* supra ftn.168 par.138

[272] Id par.185

[273] Id par.186

[274] *Moses* supra ftn.160

[275] *Frame* supra ftn.56

> insistence that child care workers be Anglican and follow Anglican practice. When Clarke breached this trust, Harding told the plaintiff that he would bring the matter to the appropriate authorities. The Anglicans took control of the matter and took no action. The Anglicans assumed a duty to act on behalf of the plaintiff in this circumstance and did nothing. Although the behavior of diocesan personnel lacks detailed particularity in this case, the substance of the decisions and who made them are apparent. The Anglican Church was in a fiduciary relationship with the plaintiff when it undertook to look after his interests to the exclusion of the federal Crown following the disclosure of Clarke's abuse.
> "The Anglican defendants are responsible to the plaintiff for breach of fiduciary duty."[276]

The damages under the head of fiduciary duty were the "amount that would be payable as damages to F.S.M. for exacerbation of the effects of the sexual assaults by the failure to obtain proper rehabilitative care immediately after the disclosure".[277] The damages had been agreed prior to trial so they could not be calculated. But the court correctly followed the rule that the equitable damages could not allow a double recovery.

The trial judge recognized that in *Moses*[278] the defendant bishop had failed to act after personally undertaking to the plaintiff to do so, unlike the case at bar. Still, he said:

> "is helpful to an appreciation that the conduct of religious personnel is not only about pure spirituality as was suggested before me,... Further, it shows that undertakings made within

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[276] *F.S.M.* supra ftn.168par.196,197

[277] Id par.202

[278] *Moses* supra ftn.160

the religious realm can have implications within fiduciary relations."[279]

Unfortunately, those words were made in obiter and without any consideration of Charter issues; no constitutional objection was made to the inquiry and evidence of the internal workings of the Anglican church.

That may be understandable in the dynamics of that case. The tortfeasor, Clarke, was an employee, not a spiritual advisor. The principal (while later a priest) acted in a typical employer-employee relationship as the hired supervisor. As a school principal Harding was the agent of the employer of Clarke; there was actual knowledge of abuse by the principal. Acting in essence in the role of a typical child welfare authority as surrogate parent, which the Anglican church effectively was, it is easy to see how the *Frame*[280] test was met.

But by her comments that "undertakings made within the religious realm can have implications within fiduciary relations", the trial judge cannot reasonably have intended to brand all internal church activities as necessarily susceptible of claims of fiduciary character in court. A more sensible reading of her words is that she intended to mean "when within a religious realm undertakings are made they can trigger fiduciary relations". Once anyone in authority undertakes to act in the best interests of a party under disability (irrespective of the nature of their relationship with the cestui qui trustent), they may be liable in equity.

F.S.M. and *Plint* stand for the proposition that while a religious institution may be a fiduciary, and also breach a tort duty of care and cause damage, it is only when there is the "necessary indicia of dishonesty or disloyalty that the breach of fiduciary cause of action is engaged".[281] Where there is a personal involvement by an official of a church, the undertaking or

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[279] *F.S.M.* supra ftn.168 par.195

[280] *Frame* supra ftn.56

[281] *Plint* supra ftn.254par. 248

relationship of the official can also trigger the fiduciary relationship: the facts will indicate whether or not that results in finding of a breach.

In *Plint*, no knowledge had come to the United Church and so its liability was limited to vicarious liability in tort as an employer. In *F.S.M.* and *Pornbacher* the churches had knowledge but failed to act on it; in both cases, the failure to act was "disloyal" and incurred liability not only in tort but also for breach of fiduciary duty.

F.S.M. and *Pornbacher* do not open the door to claims in equity against religious defendants unless there is some actual undertaking on behalf of the beneficiary or disloyal or dishonest conduct. This proposition holds true through other cases involving religious defendants. But can fiduciary duty be vicariously imputed?

This issue was addressed by the Nova Scotia Court of Appeal decision in *Mombourquette*[282] a case factually similar to *Plint.*

At trial a Catholic priest was personally found liable for his sexual abuse of a 9-year-old altar boy. His employer church corporation was liable vicariously and for breach of fiduciary duty. The church corporation appealed. The Court of Appeal overturned the decision on appeal as against the corporate church and ruled that there was no vicarious liability as the church had not exercised control or power - or had knowledge of the abuse - and that there was no fiduciary relationship between the church itself and the plaintiff.

The decision, expressly distinguished *Moses* (which had been relied on by the trial judge in *F.S.M.*), in that in *Moses* there was "evidence that the bishop directly interceded in the matter".[283]

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[282]*Mombourquette* supra ftn.53

[283]Id par.54

The Court of Appeal rejected the trial judge's imposing a vicarious fiduciary duty on the priest's employer-church. The trial judge had ruled:

> "It is easy to commence a list of relationships that are fiduciary in nature. Heading any such list would likely be the relationship between a spiritual advisor and a child, and the relationship of a child and a parent and the list would include many professionals, social workers, school teachers, counselors, coaches, choir masters, big brothers, big sisters, etc. etc. In addition, relationships between executors, trustees, doctors and others, are fiduciary in nature, and sometimes a fiduciary relationship is established by statute. In any and all fiduciary relationships, there is the element of vulnerability of one party in relation to another party. A fiduciary relationship exists between the Diocese by its servant or agent, the parish priest and the parishioners. This is particularly so when the parishioner is a child.
> "The relationship of a priest to a child parishioner gives rise to a duty of care, the breach of which constitutes the tort of negligence. There is, however, a fiduciary relationship. The hallmark of a fiduciary relationship is trust. The high degree of trust was clearly described in the evidence of Mr. F.M."[284]

The Court of Appeal observed that, contrary to the confident assertions of the trial judge, "the courts have not defined what constitutes a fiduciary relationship. At best there has been an attempt to define some of the characteristics."[285]

And concluded:

> "It is clear that one must examine all aspects of the relationship between the parties. There was no direct relationship in this case between the appellant and Mr. F.M.

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[284]Id par.48

[285]Id par.49

> There is no suggestion of any contractual or other undertaking on the part of the appellant towards the respondent. The respondent was simply a member of the church. The appellant as such exercised no discretion or power over him which it could unilaterally exercise so as to affect his legal or practical interests. Assuming that Mombourquette was in a fiduciary relationship to the respondent his improper conduct was clearly outside the scope of employment and no evidence has been adduced to relate his actions to any fiduciary duty owed by the appellant to the respondent."[286]

In contrast, in *Reed*[287] an Ontario decision in 2000, the court attached a fiduciary duty to a catholic diocese due to the fact that the plaintiff was, as in *Mombourquette,* "simply a member".

Reed was an action against the insurer of a Roman Catholic diocese. A priest had sex with a woman in a relationship that began when she was young and was more dependant upon him than was usual in a normal priestly role, the defendant taking "on the more onerous responsibilities of providing personal guidance and counselling".[288] Abuse took place. The plaintiff, defendant priest and diocese (as well as a treating psychotherapist) settled during trial. The religious defendants claimed over against their insurers, some of whom denied liability.

The court found that the personal role of the priest as counsellor vitiated the plaintiff's consent in a classic breach of fiduciary duty and constituted battery. The issue was whether the diocese was liable so that the insurer would have had a duty to defend.

The court lumped the priest and the church as an institution together in analyzing the duty of care:

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[286]Id par.55

[287]*Reed* supra ftn.7

[288]Id par.1

> "Looking at the relationship as a whole, both the Church and Reed were clearly placed in positions of power in respect of the plaintiff. This power was unquestionably unilateral and discretionary. Furthermore, given the plaintiff's family background, her religious background, her age and all of the problems in her family, she was peculiarly vulnerable and at the mercy of the Church and Reed when she asked for guidance and counseling.
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> "It must be remembered that Reed was not just a periodic advisor or counsellor. He remained at all times a priest of the Roman Catholic Church. He, at all material times, held that office and that position in the plaintiff's mind. Given the plaintiff's background and training in religion, she was particularly vulnerable to the exercise of power on the part of Reed. Under cross-examination, the plaintiff made it clear that she found the sexual relationship with Reed to be stimulating and exciting, but at the same time horrifying, and that she could not break away from it. The evidence of Dr. Hoffman was to the effect that a certain dependency evolved as a result of which the plaintiff was unable to terminate the relationship. It was Dr. Hoffman's opinion that, to some extent, E.M. would have been in part responsible for the wrong decisions which she made and which furthered the continuation of the relationship. Operating at the same time, however, was the power, control and dependency which dominated her and emanated from Reed as a priest."[289]

The plaintiff and priest's sexual relationship began when she was an adult. The court found that "[h]ad Reed not been in such a position of authority, however, the evidence would strongly support a finding of consent".[290] The finding of a fiduciary duty was necessary to establish a tort and therefore an insurable risk:

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[289]Id par.52,53

[290]Id par.54

> **"**The vitiation of consent by reason of the breach of fiduciary duty by Reed makes his conduct a form of battery which is sexual in nature but nonetheless, battery.[291]

But because the priest's breach of fiduciary duty vitiated consent and constituted a battery, it should not have followed that there was a fiduciary duty by the church.

True, the church may have been vicariously liable for battery, if established, and the church may also, conceivably, have been in a fiduciary relationship. But the fiduciary duty of the church was not breached unless there was some factual elements present such as a personal involvement by the church as an institution by either knowledge or undertakings, to be consistent with the principles of *F.S.M.* or *Moses*.

The court in *Reed* did allude to a sort of "willful blindness":

> **"**I am satisfied that the exclusions relied upon by the Great American do not apply to the facts of this case. Acting as a priest and in the performance of his duties for the Diocese, Reed developed a relationship with the plaintiff. Many of the acts complained of followed or were in part associated with the duties and functions performed by a priest. It was the position of priest which gave Reed the dominance and control in the relationship, and it was during the performance of his functions as a priest that the opportunity to commit the batteries arose. As far as the Diocese is concerned, it is more than apparent that it placed Reed in a position where he would come in contact with young women such as the plaintiff, under circumstances where there might well be a necessity to deal with them privately and confidentially. Similarly, it would be understood by the Diocese that, in fulfilling the role of priest, it would be important for Reed to develop a relationship of trust, as well as some form of dependency, with a youthful parishioner seeking advice,

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[291]Id par.54

> counseling and help at home. In the absence of confidence, trust and some sense of dependency, it would be almost impossible for a priest to perform his duties properly. It was out of the misuse of this very position that the breach of fiduciary duty took place. The evidence before me further disclosed that Reed lived in a Rectory with other clergy. This was a time in which Reed was progressing towards alcoholism. Many of the clandestine meetings between E.M. and Reed took place in various parts of the Church and in the Rectory. Having regard to all of the circumstances of the case, there is every reason to believe that an independent finding of liability against the Diocese would have been amply supported had this action not been settled."[292]

However, we are left uncertain. Was the "independent finding of liability" based on a tortious, negligent failure to supervise? Or was the court describing an independent liability for breach of fiduciary duty? It appears as though the court had the former in mind, for it continued:

> "As I have indicated above, the Diocese has placed Reed in a position where he would be exposed to the very things that allegedly took place. Though the Diocese might not have known of Reed's specific conduct, it would be aware that circumstances such as those in the case at bar are the very things which can arise out of the special relationship priests have with their parishioners. The role of the priest in respect of a person in the plaintiff's circumstances is such that, even when the priest is no longer the actual parish priest, he is still functioning as a Church representative. He is still in a position of power and domination. Throughout the currency of the insurance coverages afforded by the Great American, Reed never ceased to be a priest in the eyes of the plaintiff and, as testified by Dr. Hoffman, this harmful aspect of the relationship was ongoing throughout that time."[293]

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[292]Id par.114

[293]Id par.117

These comments echo those of Justice Brenner in *Plint*, that it is negligent for a church to do nothing when they ought to know something rotten is afoot. It seems unlikely in *Reed* that Justice Wilkins really intended that the church be directly liable for breach of a fiduciary duty when a straightforward finding of the tort negligent supervision was easily at hand and fit his findings of fact.

Compared with the clear distinctions set out in *Plint, Mombourquette, F.S.M.* and *Moses*, *Reed* demonstrates the need for courts to be clear in stating whether the basis for liability arises in tort or equity. Of course, in fairness to Justice Wilkins, the issue at bar was the church's potential liability under any head of damages, rather than making fine distinctions among potential heads, in order to determine the insurer's duty.

In any case, while the facts in support of institutional knowledge were more slender than *F.S.M.* or *Moses*, there was some evidence of awareness by the church that was absent in *Mombourquette* or *Plint*.

Setting a solid factual underpinning before finding of a breach of fiduciary duty is important in order to avoid trivializing the fiduciary finding. Merely because a person is in a position of religious authority should not necessarily trigger a fiduciary finding or consequential equitable liability.

Courts must also be wary of extending a fiduciary duty to an institution because of its vicarious liability. For example, in *Bennett,*[294] the diocese admitted that a priest had violated his fiduciary duty. While this admission triggered a vicarious liability, and damages, it did not follow that the diocese breached a fiduciary duty. In similar facts, in *Allen*, Lissaman, J. found a diocese vicariously liable for a priest's breach of fiduciary duty but not in breach of fiduciary duty itself.[295]

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[294] *Bennett* supra ftn.14

[295] *Allen* supra ftn.88

In many cases - such as the trial decision in *Mombourquette* - the trial court does not conduct a careful analysis to determine if the fiduciary relationship exists at law, and then whether there is a breach. Haste to label a relationship as "fiduciary" can have adverse consequences.

For example, in *A.K.*[296] Cunnigham, J. of the Ontario Superior Court heard the unusual case of a female plaintiff who had made friends with a male student while both were at university together.

Seventeen years later, after the male friend had become a Presbyterian minister and both had married, they met again and the plaintiff confided in the minister who made improper sexual advances.

The two had occasional contact over another ten years until they met again. The woman was very distraught and the minister took advantage of the situation and assaulted her. The woman complained to the minister's church, who disciplined him. She then sued.

The case was obviously one which could have been framed solely in tort. If the court found that the minister had committed a sexual assault, the plaintiff would recover damages. But the plaintiff added a claim for breach of fiduciary duty and the court found in her favour on that claim. Damages were awarded of $100,000.00.

The court's entire consideration of the fiduciary duty issue was the following:

> "The defendant had a duty as a Minister, a fiduciary duty, and he failed to fulfill it and the sexual abuse which occurred in this case was a breach of this duty."[297]

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[296] *A.K. v. D.K.* [2002]O.J No.351;[2002]O.T.C.71

[297] Id par.63

This is an example of a finding of fiduciary duty which is superfluous to the case. There had been no consent to the assault. The plaintiff established her claim in tort. Finding a fiduciary duty, or recourse to equity, was unnecessary.

What is more, the facts seem to be contrary to the existence of such a duty. There was no religious relationship between plaintiff and defendant - she was not even a parishioner. The defendant just happened to be a minister, a vocation he assumed after he had already developed a friendship with the plaintiff, one which, in the facts, had endured over 25 years, at least ten of which continued after the unwelcome sexual advances.

Being a minister does not create a fiduciary duty between the cleric and the world at large. *A.K.* is an example of what Southin, J. (as she then was) observed in *Girardet*:

> "The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. . . I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty".[298]

Having recourse to fiduciary duty to characterize the defendant's conduct in *A.K.*, merely because he was a minister, is inappropriate. Perhaps the decision resulted from the defendant's self-representation.

On the other hand, consider *Greves*[299] a 1997 British Columbia decision. An adult woman sued an Anglican priest for breach of fiduciary relationship and for negligence after she became involved with him in a romantic relationship while, she alleged, he was her counsellor. He abruptly broke it off. The court found in favour of the defendant on both counts. The mere fact that the defendant was a priest did not create a fiduciary duty.

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[298] *Girardet* supra ftn.266

[299] *Greves v. Batten* [1997]B.C.J.No.1059

Nevertheless, the position of fiduciary can be an important consideration in allowing meritorious actions to proceed which might otherwise be frustrated.

Bennett[300] was one of 36 Newfoundland actions against catholic priests and the catholic church for negligence and breach of fiduciary duty. The claims arose from sexual assaults against altar boys by a priest while acting in the course of his duties. The priest pleaded guilty in criminal court. The assaults occurred out of time for bringing a civil action.

The defendant Roman Catholic Church and other defendants brought an interlocutory motion in 1999 before Wells, J. to dismiss the action under the Newfoundland limitation of actions legislation. There was an exception within the Act that permitted bringing an action out of time if the claim was for sexual misconduct against a person "under the care or authority" of or the "beneficiary of a fiduciary relationship with another person, organization or agency".

Justice Wells ruled that on the facts, the plaintiffs as altar boys were under the authority of the defendant priest and vicariously, the church.

Relying on *Pornbacher*[301] and *Mombourquette*[302] he ruled:

> "I am satisfied, prima facie, that a fiduciary relationship existed between the plaintiffs and Mr. Bennett and an 'organization or agency' which in this case is capable of encompassing the remaining defendants, depending on my ultimate findings of fact."[303]

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[300] *Bennett* supra ftn.14

[301] *Pornbacher* supra ftn.189

[302] *Mombourquette* ftn.53

[303] *Bennett* supra ftn.14par.28

At trial, Justice Wells ultimately found the defendant priest (Bennett) directly liable, and the diocese of St. Georges, a bishop and an archbishop all liable but vicariously, in negligence. Claims against the catholic church itself and others were dismissed.

The Court of Appeal set aside the vicarious liability of the bishop, archbishop and diocese, but found the diocese directly negligent along with the priest.

At the Supreme Court of Canada the finding of vicarious liability against the diocese was reinstated. The Supreme Court's analysis was confined to the application of principles of vicarious liability, not fiduciary duty.[304] That aspect of the case is discussed elsewhere in this paper.

In summary, the courts, particularly in British Columbia and Nova Scotia, have gone a long way toward settling the criteria necessary to establish the fiduciary duty of religious institutions and successfully bring a claim for breach of that duty. While, as with any equitable claim, breach of fiduciary duty should be secondary to common-law tort liability, it can be found where appropriate.

Plaintiffs will succeed against individual clerics for breach of fiduciary duty when they can establish that there is a fiduciary relationship and the fiduciary obtains a personal benefit from a beneficiary, whether it be financial or sexual.

Plaintiffs will have to establish that the institution acted dishonestly, disloyally or breach an undertaking to the plaintiff.

In either case, once plaintiffs establish the criteria, they are entitled to all the remedies the Court of the Queen's Conscience has available as "Equity will not suffer a wrong to be without a remedy".[305]

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[304] *Bennett* supra ftn.14

[305] *Snell's* supra ftn.211 p.24

As has been seen, Canadian courts have relied on United States cases in the application of fiduciary duty to religious institutions. We will now look at the principles the American cases have developed.

B. In the United States

In *Bohrer*,[306] an action for breach of fiduciary was not permitted to proceed if it required an investigation into the internal doctrines of the church or a sincerely held religious belief.

All of this conforms with the governing principle in American constitutional law as enunciated by the Supreme Court of United States in *Cantwell*.[307] In the *Cantwell* case freedom to believe was described as absolute and the freedom to act could be limited only to the extent that it causes harm to a third party.

In contrast to the Canadian position with respect to fiduciary duty, in so far as it relates specifically to actions involving religious institutions, the U.S. courts have been far more methodical.

A good example is in *Langford*[308] in the Supreme Court of New York (Appellate Division).

In 1998 an adult parishioner sued a priest for damages allegedly sustained when her pastoral relationship with her priest developed into a sexual dalliance. The trial judge, observed that this was a question of first impression in New York although it had been raised in *Moses*,[309] *Destefano*[310] and *Schmidt*[311] in other jurisdictions, and that although *Jones*[312] in New York state had

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[306] *Bohrer* supra ftn.66

[307] *Cantwell v. Connecticut* 310 U.S. 296

[308] *Langford v. Roman Catholic Diocese* 271 A.D. 2d 494 (2000)

[309] *Moses* supra ftn.160

[310] *Destefano* supra ftn.66

[311] *Schmidt* supra ftn.85

[312] *Jones* supra ftn.105

dealt with a similar defendant, it involved a minor plaintiff.

Because there was no claim for assault, (an intentional tort), and the plaintiff was an adult the judge correctly observed that there would be no remedy available in the law of tort and that the plaintiff would have to petition in equity for a breach of fiduciary duty. The plaintiff launched a full barrage of claims, including clergy malpractice, which the court under the authority of *Schmidt* would not recognize in New York. The trial judge then ruled:

> "The secular rule to be applied in this case is the law of fiduciaries. This area of the law recognizes that there is an imbalance inherent in certain relationship which places one party at a disadvantage in its dealings with the other party. Courts have therefore imposed additional obligations upon the advantaged party to compensate for the disparity. Because the parameters of a fiduciary relationship have been vaguely defined and the range of relationships that can potentially be characterized as fiduciary is extensive, we are grateful for the guidance offered by one commentator who has distilled four elements that we believe are essential to the establishment of a fiduciary relationship: (1) The vulnerability of one party to the other which (2) results in the empowerment of the stronger party by the weaker which (3) empowerment has been solicited or accepted by the stronger part and (4) prevents the weaker party from effectively protecting itself."[313]

This succinct statement of the elements of the law of fiduciaries parallels that of the Supreme Court of Canada in *Frame*[314] and subsequent cases.

The judge then went on to observe that a case advancing a claim for fiduciary duty in the context of a suit for involving a religious organization or defendant can only be constitutionally

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[313] *Langford* supra ftn.308

[314] *Frame* supra ftn.56

acceptable if the trier of fact is "able to determine that a fiduciary relationship existed and premise this finding on neutral facts".[315]

The court then recognized that this raised an impassable obstacle for the plaintiff:

> "The insurmountable difficulty facing plaintiff, this court holds, lies in the fact that it is impossible to show the existence of a fiduciary relationship without resort to religious facts. In order to consider the validity of plaintiff's claims of dependency and vulnerability, the jury would have to weigh and evaluate, inter alia, the legitimacy of plaintiff's beliefs, the tenets of the faith insofar as they reflect upon a priest's ability to act as God's emissary and the nature of the healing powers of the church. To instruct a jury on such matters is to venture into forbidden ecclesiastical terrain. On the other hand, if we try to salvage plaintiff's claim by stripping her narrative of all religious nuance, what is left makes out a cause of action in seduction–a tort no longer recognized in New York–but not in breach of fiduciary duty. Accordingly, the defendants' motion is granted. The plaintiff's complaint is dismissed."[316]

The court reached this conclusion after reconsidering the plaintiffs account of the relationship with her priest and divesting it of any reference to her religious beliefs. Stripped to these basic elements, the relationship was nothing more than an intimate one based on her being ill, lonely and isolated and finding a willing and sympathetic "friend", who she alleged was able to use this to his advantage. Viewed from this distilled perspective, the court found:

> "This neutered account does not supply the facts necessary to support the existence of a fiduciary relationship because the most important element defining the fiduciary

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[315] *Langford* supra ftn.308 par.9

[316] d

> relationship, and distinguishing it from a merely confidential relationship–the inability of the weaker partner to resist the manipulation of the stronger partner–is missing from the neutered account. This element is present only in the religious account of their relationship in statements such as those pertaining to her belief that she would lose her lifeline to continued health is she resisted defendant's advances."[317]

The motion to dismiss came before the Supreme Court of New York Appellate Division and in a decision in April of 2000 a three-to-one majority upheld the dismissal of the claim.[318]

The majority stated that there was no difference between breach of fiduciary duty and the claim for negligent counselling or clergy malpractice in the way that the pleading had been framed, and as such could not be considered by the court under the reasoning in *Schmidt*. The appeal court agreed with the trial court that "any breach of [defendants] fiduciary duties can only be construed as clergy malpractice, since it would clearly require a determination concerning [defendants] duties as a member of the clergy offering religious counselling to the plaintiff."[319]

The dissent agreed with the majority that a clergy malpractice claim could not be advanced but disagreed with the majority's ruling that a claim of breach of fiduciary duty involving members of the clergy still entails an examination of ecclesiastical doctrine. The dissent tried to find authority in *Moses*[320] which (following *Destefano*[321]) allowed a cause of action for breach of fiduciary duty separate and distinct from the claim of clergy malpractice.

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[317]Id par.10

[318] d

[319]Id par.4

[320]*Moses* supra ftn.160

[321]*Destefano* supra ftn.66

Adopting the reasoning of the Connecticut court in *Martinelli*[322] the dissent argued that:

> "rather than being restricted to consideration of a standard of care to be followed by clergy persons or other religious entities, a court or jury can, in some circumstances, measure a religious organizations or officials conduct by preexisting secular standards of care to which all fiduciaries are held."[323]

The dissent saw this as an opportunity for the court to "establish a deterrent to conduct that inflicts immeasurable harm upon victims who are deceived and abused by the religious leaders that they are taught to trust and depend upon from early childhood".[324]

The fact that the majority rejected this approach clearly confines the remedies against clergymen and religious institutions in New York state, to liability in tort and does not permit fiduciary duty to be used as an "end run" to allow clergy malpractice or accomplish some larger societal purpose.

This does not deprive legitimate claims of success. It confines such claims in the first instance to the tort system. Equity need not concern itself that a remedy will be denied, for as we have seen religious organizations are not immune from tort liability. It was reiterated in *Kenneth,* a case involving an action for the tort of negligent supervision. The pleading had been struck at the trial level. On appeal the Supreme Court of New York accepted as law:

> "Moreover, while the First Amendment to the United States Constitution prohibits regulation of religious beliefs, conduct by a religious entity 'remains subject to regulation for the protection of society'. . . The First Amendment does not grant

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[322]*Martinelli v. Bridgeport Roman Catholic Diocesan Corporation* 196 F.3d 409

[323]*Langford* supra ftn.308 par.22

[324]Id par. 26

> religious organizations absolute immunity from tort liability . . . Therefore, religious entities must be held accountable for their actions, 'even if that conduct is carried out as part of the church's religious practices' . . . Religious entities have some duty to prevent injuries inflicted by persons in their employ whom they have reason to believe will engage in injurious conduct . . .[325] (citations omitted)

The dissent in *Langford* relied upon *Martinelli.*[326] In *Martinelli,* the Court of Appeal heard an appeal from a District Court of Connecticut judgment for compensation for child sexual abuse by a catholic priest.

The District Court held that the catholic diocese had breached a fiduciary duty and the First Amendment did not bar the plaintiff from presenting the factual basis for the fiduciary duty even though it was religious in nature. Since the facts evidencing fiduciary relationship existed the jury was free to find damages if there was a breach.

The catholic diocese argued before the Court of Appeal that in order to establish a fiduciary relationship the lower court was unconstitutionally relying on its own interpretation of a religious doctrine and therefore determining the nature of the duties which a church might owe to its parishioners.

The *Martinelli* case considered briefs from an impressive number of amici curiae, including the United States Catholic Conference, the Church of Jesus Christ of Latter Day Saints, the Presbyterian Church, the Seventh Day Adventists, the United Methodist Church, the First Church of Christ, Scientist and the Lutheran Church. The court said:

"Amici cite the teaching of the Supreme Court that under the Constitution, '[t]he

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[325]*Kenneth R. v. Roman Catholic Diocese* 229 A.D. 2d 159 (1997) par. 12

[326]*Martinelli* supra ftn.322

law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.' *Watson v. Jones*, 80 U.S.(13 Wall.)679, 728, 20 L.Ed. 666(1871). That is now an American truism, but it is unrelated to this appeal. Where a person's beliefs are alleged to give rise to a special legal relationship between him and his church, we may be required to consider with other relevant evidence the nature of that person's beliefs in order properly to determine whether the asserted relationship in fact exists. In doing so, we judge nothing to be heresy, support no dogma, and acknowledge no beliefs or practices of any sect to be the law.

"The obvious distinction between the proper use of religious principles as facts and an improper decision that religious principles are true or false bears a certain family resemblance to the more mundane rules of hearsay. Evidence of a statement made out of court may be inadmissible as hearsay to prove the truth of the facts asserted in it, but may be admissible for the non-hearsay purposes of proving that the statement was made or that other facts can be inferred from the making of the statement. See Fed.R.Evid.801(c). Similarly, the proposition advanced by a particular religion that "a bishop is like a 'shepherd' to the 'flock' of parishioners" cannot be considered by a jury to assess its truth or validity or the extent of its divine approval or authority, but may be considered by the same jury to determine the character of the relationship between a parishioner and his or her bishop.

"Finally on this score, we find no merit to the Diocese's claim that the judgment violated the First Amendment by determining the Diocese's obligations to its parishioners as a matter of church doctrine. Martinelli's claim was brought under Connecticut law, not church law; church law is not ours to assess or to enforce. Martinelli's claim neither relied upon or sought to enforce the duties of the Diocese according to religious beliefs, nor did it require or involve a resolution of whether the diocese's conduct was consistent with them. The jury's consideration of church doctrine here was both permissible under First Amendment principles and required by Connecticut law.

"In *Watson v. Jones*, a decision involving a dispute over church property that is relied upon by amici and quoted above, the Supreme Court made an observation that applies fully, we think, to the tort case now before us: '[T]he courts when so called on must perform their functions [in cases involving churches] as in other cases.'

> "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract [or, we would add, their liability arising from the commission of a tort], are equally under the protection of the law, and the actions of their members subject to its restraints....[W]e enter upon [the appeal's] consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision, are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us. 80 U.S. at 714."[327]

Since the Connecticut Supreme Court had specifically refused to precisely detail what constituted a fiduciary relationship, the church could be exposed to being found in a fiduciary relationship by the jury. Once in that relationship, the church or diocese would have a duty to represent the interests of the beneficiary.

This begs the question of to whom the duty is owed. Religious officials also have a duty to their larger religious association. What if the fiduciary duty to an individual conflicts with the duty to the association?

In *Richelle*[328] discussed above in connection with refusing to allow clergy malpractice, the California Court of Appeal also addressed the fiduciary duty argument. The court allowed a claim for breach of fiduciary duty against a catholic priest who was accused of sexual exploitation, but specifically limited its holding given the constitutional sensitivities of these types of claims. The

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[327]Id par.22

[328]*Richelle* supra ftn.157

court held:

> "Accordingly, we conclude that a pastor may be subject to tort liability for sexually inappropriate and injurious conduct that breaches a fiduciary duty arising out of a confidential relation with a parishioner, provided the alleged injurious conduct was not dictated by a sincerely held religious belief or carried out in accordance with established beliefs and practices of the religion to which the pastor belongs, and there is no other reason the issues cannot be framed for the trier of fact in secular rather than sectarian terms."[329]

First, it is noteworthy that the court allowed the breach of fiduciary duty claim against a pastor who was accused of sexual misconduct, but not against the religious organization itself. Second, the court expressly prohibited a fiduciary duty cause of action against a clergyman when the "alleged injurious conduct" was "dictated by a sincerely held religious belief."

Earlier in this paper two Canadian cases were discussed in which the internal policies of the church were introduced to establish negligence - the attempt succeeded in *Cairns*[330] but failed in *Allen.*[331] In one case in the United States, *Bohrer*,[332] similar internal policies were used to attempt to find breach of fiduciary duty, which did not succeed.

The plaintiff alleged that the Conference, or supervisory religious ecclesiastical body, breached a fiduciary duty to the plaintiff by not properly investigating the matter. Unlike the *Moses* case, where the church actually refused to disclose information causing damage, in *Bohrer* the

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[329]Id at 279

[330]*Cairns* supra ftn.22

[331]*Allen* supra ftn.88

[332]*Bohrer* supra ftn.66

plaintiff alleged that the Conference of the United Methodist Church in fact violated its own Book of Discipline. But the Court found that since such claim would require "the courts become embroiled in a religious dispute requiring the interpretation and weighing of that doctrine"[333] the court was required to abstain from doing so and no damages could be awarded.

This same tension occurs in matters involving the admissibility of evidence when ecclesiastical privilege (so-called clergy-penitent privilege) is claimed. In Canada this issue is considered one of balancing and is to be determined on a case by case basis.[334] So it should be in fiduciary duty cases.

At first blush, the legal face of the fiduciary liability of the clergy may appear confusing. For example, in *Schmidt*[335] the southern district of New York rejected a fiduciary relationship. In *Dausch*[336] the second circuit appellate court also rejected fiduciary duty. In *Schieffer*[337] the Supreme Court of Nebraska refused to allow claim of breach of fiduciary duty, relying on *Schmidt.*

On the other hand, *Destefano*,[338] *Moses*,[339] and *Erickson*[340] in the Court of Appeals of Oregon, allowed the claim for breach of fiduciary duty.

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[333]Id part 7

[334]*Gruenke* supra ftn.49

[335]*Schmidt s*upra ftn.85

[336]*Dausch* supra ftn.150

[337]*Schieffer v. Catholic Diocese of Omaha* 508 N.W. 2d 907 (1993)

[338]*Destefano* supra ftn.66

[339]*Moses* supra ftn.160

[340]*Erickson v. Christenson* 781 P.2d 383 (1989)

In the view of one commentator, the *Schmidt, Dausch* and *Schieffe*r cases suggest one approach to the controversy, namely, the court should not hold the clergy liable for breach of fiduciary duty because it violates the First Amendment, and more importantly "because other remedies are available, these courts will decline to hold any clergy member liable for any of their actions" in a fiduciary context.[341]

The same commentator suggests that the contrary decisions of *Destefano, Moses* and *Erickson* stand for the proposition that (1) the First Amendment only protects a defendant when the actions are according to a religious belief or practice, and (2) a clergy member is a fiduciary and can be liable when he or she breaches their duty.

It is possible to suggest a more unified explanation for the American decisions, and one that conforms with their traditional principles of equity: a plaintiff is required to advance his or her claim for a remedy under existing tort law principles and a court should not even entertain a claim for breach of fiduciary duty where a common-law remedy is available. Further, a cause of action which is not known to law may not, under cloak of equity, be pursued by transforming it into breach of fiduciary duty.

Under this approach, any sexual abuse by a cleric of a minor, or other legally incapacitated plaintiff, would be actionable under existing tort law. Negligent supervision by a religious institution by, for example, placing a cleric with a proclivity for sexually abusing children in a position of trust, might itself be actionable under the tort of negligent supervision. Even more egregious would be when a religious institution deliberately conceals a danger once it learns of it.

However, in either case the recovery of the plaintiff in tort would, or should, satisfy their entitlement to be compensated for their loss and a remedy in equity would not be necessary.

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[341]Lindsey Rosen, "*Constitutional Law-In Bad Faith: Breach of Fiduciary Duty by the Clergy*" 71 Temple Law Review 743, p.3

Claims involving amatory actions which have been disallowed by statute or by the courts on grounds of public policy could not be pursued by resurrecting them as a breach of fiduciary duty, nor could a claim of clergy malpractice which is not actionable in the first instance be brought as a breach of fiduciary duty in an equitable court.

This approach would explain why in *Martinelli*, *Moses* and *Evans* the courts found that a fiduciary duty existed.

In *Martinelli*[342] the plaintiff was, at the time that he was sexually abused, a fourteen year old student at a catholic high school affiliated with the defendant diocese, who appointed the priest. The assaults occurred during a period of time that the priest was in a supervisory capacity, and the diocese later learned of sexual abuse of other younger people which it concealed. The educational relationship alone takes *Martinelli* out of the group of generally fiduciary duty cases.

Similar concealment took place in *Moses.*[343] The plaintiff was in an unusual situation because the local episcopalian church had become involved with assisting her during a period of mental illness and acted as supervisor for access to her children. The defendant priest, who came into the picture later, had access to these records and knew that she was vulnerable due to childhood sexual abuse. A church bishop later tried to induce the victim to conceal the sexual abuse at a meeting with the victim. The court found that not only was the episcopalian bishop defendant in a position of authority and power, his "role during the meeting was as a counsellor to [the plaintiff] not as a representative of the diocese..."[344] The church failed to do anything to help the plaintiff, and so unlike the other cases involving a fiduciary duty which was merely supervisory, in *Moses* the bishop (a representative of the diocese) became directly involved in a fiduciary relationship with the plaintiff.

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[342]*Martinelli* supra ftn.322

[343]*Moses* supra ftn.160

[344]Id par.32

In *Evans*[345] sexual misconduct by a clergyman occurred during the time that the plaintiff was undergoing marital counselling and the church had held itself out to be qualified to engage in marital counselling. The court was careful to state that "we thus stress that the liability in this case rests upon the assertion of an abuse of a marital counselling relationship through an inappropriate sexual relationship."[346]

The court then relied on *Martinelli* and agreed that since there was no necessity to look at any internal religious doctrine or belief in order to establish the fiduciary duty, the court should not do so.

In a way, the reliance by the Connecticut, Colorado and Florida courts on fiduciary duty as a remedy in *Martinelli,*[347] *Moses*[348] and *Evans* as exceptions to the rule, in fact proves the rule. The purpose of equity is to grant relief where the conscience of the court is troubled. In these cases, there were direct relationships either as teacher or marital counsellor, or deliberate concealment of a danger, and the plaintiffs were particularly vulnerable due to being minors, students or having psychiatric difficulties that made them dependant upon the defendants (provided the conduct did not arise from "a sincerely held religious belief"as in *Richelle*[349]).

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[345] *Evans* supra ftn.78

[346] Id par.4

[347] *Martinelli* supra ftn.322

[348] *Moses* supra ftn.160

[349] *Richelle* supra ftn.157

On the other hand, in *Schmidt,*[350] *Dausch,*[351] *Teadt*,[352] *Franco,*[353] *Langford,*[354] *Strock*[355] *Bryan*[356] and *Bohrer*[357] appeal courts recognized that finding a fiduciary duty where it would result in an indirect validation of an otherwise not justiciable claim would be improper.

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[350]*Schmidt* supra ftn.85

[351]*Dausch* supra ftn.150

[352]*Teadt* supra ftn.153

[353]*Franco* supra ftn.86

[354]*Langford* supra ftn.308

[355]*Strock* supra ftn.83

[356]*Bryan R. v. Watchtower Bible and Tract Society of New York Inc.* 738 A.2d 839 (1999)

[357]*Bohrer* supra ftn.66

V. Conclusion

Inevitably, the increase in litigation and changes in attitude towards religious institutions result in the clash of values discussed in this paper. How will Canadian courts deal with the resulting constitutional and evidential issues in the thousands of cases now pending before them?

It would be foolish not to take advantage of the development in the United States, over twenty years, of the law of "clergy malpractice" and breach of fiduciary duty.

This is particularly appropriate given the broad definition afforded religious activity, the reality of membership in international religious organizations and recognition by the Supreme Court of Canada of the congruent application of the Charter and the United States Constitution. A Canadian citizen should expect a Canadian court to accord him or her the same rights under s. 2 of the Charter his or her American cousin has under the First Amendment. Canadian courts appropriately relied on American decisions in this area.

In cases of intentional torts, religious persons who are tortfeasors are liable in damages. Once it is proven an intentional tort has been committed it should not be necessary to resort to unintentional torts or negligence. In the rare cases where a religious institution has committed an intentional tort it will also be held liable. In either case, there is nothing unique about religious defendants unless the activity giving rise to the tort was itself religious.

Where claims have been made for intentional infliction of mental suffering and outrageous conduct for conduct which has occurred solely in the course of a religious activity, the Florida Supreme Court articulated the principle to be applied:

> "[w]hether the priest's tortious conduct in this case involved improper sexual relations with an adult parishioner he was counseling or sexual assault and battery

> of a minor, the necessary inquiry in the claim against the Church Defendants is similarly framed: whether the Church Defendants had reason to know of the tortious conduct and did nothing to prevent reasonably foreseeable harm from being inflicted upon the plaintiffs."[358]

Similar tests are applied in Canada.[359]

Courts should recognize that "outrageous conduct" is synonymous with the "tort of intentional infliction of emotional distress," and that it is only available against an institutional religious defendant when a plaintiff can establish the institution knew of the conduct and did nothing. Canada is no different: only where there is knowledge will there be liability.

In negligence, the establishment of a duty of care will always be the most difficult aspect of any attempt to create a clergy malpractice action:

> "It would be impossible for a court or jury to adjudicate a typical case of clergy malpractice, without first ascertaining whether the cleric, in this case a Presbyterian pastor, performed within the level of expertise expected of a similar professional (the hypothetical "reasonably prudent Presbyterian pastor"), following his calling, or practicing his profession with the community."[360]

Malpractice actions against the clergy open a "Pandora's box" which is as unconstitutional in Canada as it has been found to be in the United States. As the Utah Supreme Court observed:

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[358] *Evans* supra ftn.78

[359] *O'Dell* supra ftn.112; *Bennett* supra ftn.14; *M.M. v. R.F.* [1997] B.C.J. No.2914; (1997)101 B.C.A.C.97; (1997)52 B.C.L.R.(3d)127

[360] *Schmidt* supra ftn.85 par.8,9

> "Indeed, malpractice is a theory of tort that would involve the courts in a determination of whether the cleric in a particular case–here an LDS Church bishop–breached the duty to act with that degree of "skill and knowledge normally possessed by members of that profession." Defining such a duty would necessarily require a court to express the standard of care to be followed by other reasonable clerics in the performance of their ecclesiastical counseling duties, which, by its very nature, would embroil the courts in establishing the training, skill, and standards applicable for members of the clergy in this state in a diversity of religions professing widely varying beliefs. This is as impossible as it is unconstitutional; to do so would foster an excessive government entanglement with religion in violation of the Establishment Clause."[361](Citations omitted)

The single Canadian case permitting clergy malpractice provides limited precedent to establish it as a tort in this country unless the constitutional ramifications are resolved. When the proper analysis is conducted, courts will carefully weigh American cases denying the viability of the cause of action.

Twenty years of appellate decisions establish a solid line of authority in the United States barring clergy malpractice actions, or any related action, that requires a judicial investigation of the internal doctrines of a church.

Religions, not just because they are constitutionally protected, but also because they occupy a unique and vital role in society, deserve the deference of courts. As *Schmidt* observed:

> "beliefs and penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants the court to probe the tort-law reasonableness of the church's mercy toward the offender. . . . because of the existence of these constitutionally protected beliefs governing ecclesiastical relationships, clergy

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[361]*Franco* ftn.86 par.23; see also *F.G. v. MacDonell* supra ftn.86

members cannot be treated in the law as though they were common law employees."[362] The court then concluded: "pastoral supervision is an ecclesiastical prerogative".

It remains to be seen whether, after careful consideration of the constitutional issues, courts will uphold or compromise religious liberty in Canada. The conflicting conclusions of trial courts in *Cairns*[363] and *Allen*[364] leave the question of clergy malpractice open, for the time being. Until resolution by an appellate court the uncertainty thus created may have a chilling effect on freedom of religion and association in Canada.

If claims do not succeed in tort, can plaintiffs then succeed in equity by describing the wrong complained of as a breach of fiduciary duty?

The fiduciary model imposed on physicians in *McInerney* is appropriate to a religious person or institution. Like the physician, a religious defendant has larger duties. He or she is there to "save the soul" of the penitent, and is expected to act in the penitent's best interests in doing so but also has a responsibility, and duty, as a servant to the religious constituency. The cleric may comfort the penitent spiritually. The cleric may also cause emotional distress or even expel the penitent from the religious community as a form of discipline to the penitent and under an obligation to the community. They are conflicting fiduciary duties.

Some Canadian cases do not carefully analyse the facts and law to determine if there is a fiduciary relationship and whether there is a causal breach, with confusing results.

But other courts have gone a long way toward settling the criteria necessary to establish the fiduciary duty of religious institutions and successfully bring a claim for breach of that duty.

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[362] *Schmidt* supra ftn.85par.12

[363] *Cairns* supra ftn.22

[364] *Allen* supra ftn.88

While, as with any equitable claim, breach of fiduciary duty should be secondary to common-law tort liability, it should be available where appropriate.

Under the principles articulated in these cases, plaintiffs will succeed against individual clerics for breach of fiduciary duty when they can establish that there is a fiduciary relationship, the fiduciary obtained a personal benefit from a beneficiary (whether financial or otherwise) and that the defendant acted dishonestly, disloyally or in breach of an undertaking to the beneficiary. The American decisions on breach of fiduciary duty enunciate similar principles.

In either country, a plaintiff must first advance his or her claim for a remedy under existing tort law and a court should not even entertain a claim for breach of fiduciary duty where a common-law remedy is available. A cause of action - such as clergy malpractice - which is not known to law should not be pursued.

Torts (including negligent supervision) are actionable under existing tort law. If damages in tort compensate, a remedy in equity is not necessary. Equity grants relief where the conscience of the court is troubled and a common law remedy is unavailable.

By showing constitutional respect for religious activities courts do much more than advance public policy. They ensure the most efficient use of judicial resources where most needed: compensating the weak, vulnerable and wronged.

The visceral reaction of the judge may be to open the door to any claim to “let the plaintiff have his day in court”. Such well-intentioned action may have the opposite result, as Brandeis, J. warned:

“The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-

meaning, but without understanding."[365]

Lack of discernment of the issues involved may embroil the court in unnecessary and costly detours into constitutionally protected areas. Sticking to solid, time-tested tort and equitable principles will result in not just the appearance of justice, but justice itself. By protecting religious freedom, courts strengthen all other fundamental rights:

> "A government that will coerce its citizens in the domain of the spiritual will hardly hesitate to coerce them in the domain of the temporal. If it will direct how they shall worship it will certainly direct how they shall vote. Certain it is that religious liberty is the progenitor of most other civil liberties. Out of victory in the struggle of freedom to worship as one's conscience dictates come victory in the struggle for freedom to speak as one's reason dictates. Freedom of the press comes from the struggle for freedom to print religious tracts, and freedom to assemble politically can be traced to the successful struggle for freedom to assemble religiously. Even procedural liberties incident to our concept of a fair trial grew largely out of the struggle for procedural fairness in heresy and other religious trials."[366]

March 28, 2005

Daniel Gordon Pole, LL.B.[367]

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[365] *Olmstead v. United States,* 277 U.S. 479 (1928)

[366] Leo Pfeffer, *The Liberties of An American, The Supreme Court Speaks* (1963) quoted in Roger E. Salhany, *The Origin of Rights*, (Carswell:Toronto 1986) 11

[367] Barrister and Solicitor, of the Bar of Ontario. I wish to express my thanks for the assistance of Stella Pole in the research, preparation and editing of this paper

VI. Appendix

A. Cases in Canada

B. Cases in the United States

C. Cases

D. Authorities

APPENDIX A

Year	Case/Court/Level	Type	Adult/ Child	Church fiduciary.	Personal Defendant Fiduciary.	Intent. Tort	Clergy Malpractice	Negligent Supervision	Vicarious Liability (church)	Comments
1991	Deiwick - Ontario - Trial	Tort	Adult	No	Yes	Yes	No	No	n/a	Amatory action
1996	Mombourquette - Nova Scotia - Appeal	Tort	Chid	No	Yes	Yes	No	No	No	Trial judge finding church liable overturned
1997	Greves - B.C. - Trial	Tort	Adult	No	No	NO	No	No	n/a	No fiduciary although a minister
1997	Pornbacher - B.C. - Trial	Tort	Child	Yes	Yes	Yes	No	Yes	Yes	Residential school; actual knowledge by employer; noted special risks of celibate priests
1998-01	Plint - B.C, - Trial	Tort	Child	Yes* but not liable	Yes	Yes	No	No	No	Residential school;Church a fiduciary but not liable; No actual knowledge; Gov. of Canada liable
1999	Clarke - B.C. - Trial	Tort	Child	Yes	Yes	Yes	No	Yes	Yes	Residential school; Anglican church had knowledge; damages were calculated not to duplicate tort award
2000	Reed - Ontario - Trial	Tort	Adult	Yes	Yes	Yes	No	Yes	Yes	Church claim against insurer; church was wilfully blind
2002	A.K. v D.K. - Ontario - Trial	Tort	Adult	No	Yes	Yes	No	No	n/a	Fiduciary just because was minister
2002	V.B. v. Cairns - Ontario-Trial	Tort	Adult	No	No	No	Yes	No	No	Elder erred in application of church court procedure
2003	Doe v. O'Dell	Tort	Child		Yes	Yes	No	No	Yes	
2004	P.D. V. Allen	Tort	Child	No	Yes	Yes	No	No	Yes	
2004	Glendinning	Tort	Child	Yes	Yes	Yes	Yes		Yes	
2004	Bennett - Nfld. - Trial-SCC	Tort	Adult	No	Yes	No	No	No	No	

APPENDIX B

ANALYSIS OF CLERGY SEXUAL ABUSE CASES

Year	Case/Court/Level	Type	Adult/ Child	Church fiduciar.	Per.Def fiduciar.	Intent. Tort	Clergy Malprct	Neglignt super	Comments
1988	*Nally - California - appeal*	*Suicide*	*A*		*No*	*No*	*No*	*No*	*First significant case*
1988	*Strock - Ohio - appeal*	*Amatory*	*A*	*No*	*No*	*No*		*No*	
1991	*Schmidt - New York - appeal*	*Sex abuse*	*C*	*No*	*No*	*Yes**	*No*	*No*	
1991	*Byrd - Ohio - appeal*	*Amatory*	*A*			*Yes*	*No*	*No*	
1993	*Dausch - Illinois - appeal*	*Amatory*	*A*	*No*	*No*	*No*	*No*	*No*	
1993	*Moses - Colorado - appeal*	*Amatory*	*A*	*Yes*	*Yes*		*No*	*No*	*No vicarious liability*
1995	*Pritzlaff - Wisconsin - appeal*	*Amatory*	*A*			*No*	*No*	*No*	
1996	*Bear Valley - Colorado - appeal*	*Sex abuse*	*C*			*Yes*	*No*	*Yes*	
1996	*Bohrer - Colorado - appeal*	*Sex abuse*	*C*	*No*	*Yes*	*Yes*	*No*	*Yes*	
1997	*Kenneth R - New York - appeal*	*Sex abuse*	*C*					*No*	
1997	*Swanson - Maine - appeal*	*Amatory*	*A*					*No*	
1998	*Langford - New York - appeal*	*Amatory*	*A*	*No*	*No*	*No*	*No*		
1998	*DeStephano - Colorado - appeal*	*Amatory*	*A*		*Yes*	*Yes*	*No*	*Yes*	
1999	*Martinelli - Connecticut - appeal*	*Sex abuse*	*C*	*Yes*	*Yes*		*No*	*No*	
1999	*Teadt - Michigan - appeal*	*Amatory*	*A*	*No*	*Yes*	*No*	*No*		
1999	*Borchers - Maryland - appeal*	*Amatory*	*A*			*No*	*No*	*No*	
1999	*Bryan - Maine - appeal*	*Sex abuse*	*C*	*No*		*No*		*No*	
2001	*Odenthal - Minnesota - appeal*	*Amatory*	*A*				*No*		
2001	*Franco - Utah - appeal*	*Sex abuse*	*C*	*No*	*No*	*No*	*No*	*No*	
2002	*Doe v Evans - Florida - appeal*	*Amatory*	*A*	*Yes*	*Yes*		*No*	*Yes*	
2003	*Berry - New Hampshire - trial*	*Sex abuse*	*C*	*No*	*No*	*No*	*No*	*No*	*Earlier order changed*
2003	*Richelle - California - appeal*	*Sex abuse*	*A*	*No*	*Yes*		*No*		
2004	*Meyer v Lindala - Minnesota - appeal*	*Sex abuse*	*A*	*No*			*No*		

Appendix C - Cases

Canadian and English Cases

347202BC Ltd. v. Canadian Imperial Bank of Commerce [1995]B.C.J. No.449

A.K. v. D.K. [2002] O.J No.351; [2002] O.T.C. 71

Ash v. Methodist Church (1901) 31 S.C.R. 497

Bazely v. Curry [1999]S.C.J.No.35; [1999]2 S.C.R.534; (1999)174 D.L.R.(4th)45; (1999)241 N.R.266; [1999]8 W.W.R.197; (1999)124 B.C.A.C.119; (1999)62; B.C.L.R. (3d)173; (1999)43 C.C.E.L.(2d)1; (1999) 46 C.C.L.T.(2d)1

Bell v. Intertan Canada Ltd. [2001] S.J. No. 377; 2001 SKQB 278

C.A. v. Critchley [1998]B.C.J. No. 2587; (1998)166 D.L.R.(4th)475; (1998)113 B.C.A.C.248; (1998)60 B.C.L.R.(3d)92; (1998)13Admin.L.R.(3d)157; (1998)43 C.C.L.T.(2d)223; (1998)42 R.F.L.(4th)427

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