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Sexual Molestation within America's Parishes and Congregations; Should the Church be Thy Priest's Keeper

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SEXUAL MOLESTATION WITHIN AMERICA'S PARISHES AND CONGREGATIONS; SHOULD THE CHURCH BE 'THY PRIEST'S KEEPER'?

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I. INTRODUCTION

In recent years, American churches and religious societies have found themselves the subject of several emerging theories of tort. Although the protections of the first amendment once sheltered acts performed in the practice and belief of religion from civil liability, this shield between American religious practice and the legal system began to disintegrate in the late nineteenth century.[1] Church members have since been held subject to myriad civil claims for acts performed in the name of religion, including intentional tortious activity,[2] severe discipline of children,[3] and refusal of medical treatment.[4] Additionally, with the downfall of the charitable immunity

1. *Reynolds v. United States*, 98 U.S. 145, 166 (1878) was the first case to hold that while the government cannot interfere with religious belief, it may interfere with practice.
2. Turner v. Unification Church, 473 F. Supp. 367 (1978).
3. *In re* Edwards, 126 Cal. App. 3d 193, 178 Cal. Rptr. 694 (1981).
4. Jensen v. Juvenile Department of Lynn County, 54 Or. App. 1, 633 P.2d 1302 (1981).

doctrine[5] the church itself has come under fire. Included among those actions which have been aimed specifically at churches and church leaders are the theories of clergy malpractice,[6] intentional infliction of emotional distress,[7] respondeat superior,[8] and negligent hiring.[9]

There has been, over the past two decades, a marked increase in the number of clergy malpractice claims. These claims cover a broad range of actions[10] and have been referred to as an epidemic with no "foolproof vaccine in sight."[11] The most recent addition to this epidemic has been that of sexual molestation committed by religious leaders and priests. The facts of several recent cases graphically illustrate this growing problem and the questions it raises concerning the churches' liability for the acts of its agents.

Rita Milla, age 16, decided that she wanted to become a nun.[12] She was a devout Roman Catholic who respected the parish priests that heard her confessions.[13] In January, 1980, seven priests that Rita trusted persuaded her to have sexual intercourse with them, telling her that such activity was ethically and religiously permissible.[14] The sexual relationship between the priests and the young woman spanned a period of two years and culminated in Rita's

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5. 15 Am. Jur. 2d *Charities* § 190 (1976); Restatement (Second) Trusts § 402, comment d.; Restatement (Second) Torts § 895E.

6. Nally v. Grace Community Church, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (Cal. App. 2d Dist. 1987).

7. *Turner*, 473 F. Supp. 367; *Nally*, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215.

8. Jeffrey Scott E. v. Central Baptist Church, 243 Cal. Rptr. 128, 197 Cal. App. 3d 721 (Cal. App. & Dist. 1988).

9. John Does 1-9 v. Compare, Inc., 763 P.2d 1237 (Wash. App. 1988).

10. *In re Edwards*, 126 Cal. App. 3d 193, 178 Cal. Rptr. 694 (1981) dealt with child abuse, *Destefano v. Grabian*, No. 84-CV 0773 (Colo. P. Ct. El Paso Co., July 26, 1984 (unreported opinion), *aff'd*, No. 84-CA 0973, dealt with misconduct during marriage counseling, *Nally v. Grace Community Church*, 194 Cal. App. 3d 1057, 240 Cal. Rptr. 215 (Cal. App. 2 Dist. 1987), dealt with suicide and several cases have dealt with sexual molestation including *Jeffrey Scott C. v. Central Baptist Church*, 243 Cal. Rptr. 128, 197 Cal. App. 3d 718 (Cal. App. 4 Dist. 1988); *John Does 1-9 v. Compcare, Inc.*, 763 P.2d 1237 (Wash. App. 1988); and *Milla v. Tamayo*, 232 Cal. Rptr. 685, 187 Cal. App. 3d 1453 (Cal. App. 2 Dist. 1986).

11. R. W. McMenamin, Clergy Malpractice 5 (William S. Hein Co. 1986).

12. Milla v. Tamayo, 232 Cal. Rptr. 685, 687, 187 Cal. App. 3d 1453, 1467 (Cal. App. 2 Dist. 1986).

13. *Id.*

14. *Id.* at pp. 687-88, 187 Cal. App. 3d at 1457.

pregnancy.[15] Rita and her parents subsequently brought suit against the individual priests and the Archbishop of the Roman Catholic Church on grounds of civil conspiracy, negligence, fraud and deceit, professional malpractice and clergy malpractice.[16]

Since 1967, Ernest Schwobeda had been a Sunday school teacher at Central Baptist Church in California. He became somewhat of a "second father" to second grader Jeffrey Scott who attended the church.[17] Jeffrey's mother thought Schwobeda was a perfect man and initially found nothing objectionable about his relationship with her son.[18] In fact, Schwobeda carried on a sexual relationship with the boy for two years. In 1984, Schwobeda was charged with 47 counts of child molestation, nine counts involving Jeffrey.[19]

Father Robert Fontenot was ordained as a priest by the Lafayette, Louisiana Diocese on December 6, 1975.[20] After he admitted to sexual misconduct with minors, the Diocese suspended him of his priestly duties on January 18, 1984 and ordered that he obtain treatment and counseling at the House of Affirmation in Massachusetts.[21] Upon Father Fontenot's discharge from the House of Affirmation, the Diocese received a report regarding his progress which stated that "because of a long pattern of secrecy and denial concerning his sexual behavior . . . it is important that for the protection of himself and adolescents . . . he refrain from ministry that would involve work with adolescent boys."[22] Father Fontenot was nonetheless employed in the adolescent unit of the Deaconess Medical Center.

In 1986, criminal charges were brought against Father Fontenot on the theory that he had sexually abused former patients while employed in the adolescent care unit.[23] The nine plaintiffs alleged

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15. *Id.*
16. *Milla*, 232 Cal. Rptr. 685, 187 Cal. App. 3d 1453.
17. *Jeffrey Scott E.*, 243 Cal. Rptr. at 129, 197 Cal. App. 3d at 721.
18. *Id.*
19. *Id.*
20. John Does 1-9 v. Compcare Inc., 763 P.2d 1237 (Wash. App. 1988).
21. *Id.*
22. *Id.* at 1240.
23. *Id.*

that the Diocese maintained and negligently supervised the Father while aware of his dangerous tendencies.[24] The Lafayette Diocese, in fact, financially maintained Father Fontenot during, as well as after, his stay at the House of Affirmation and paid a portion of his criminal defense costs.[25]

These cases are but a few of those involving molestation by priests or pastors which are occurring across the country.[26] Of course, priests and pastors who become involved in sexual misconduct with minors are subject to criminal sanctions to the same extent as any other church member or members of the public at large.[27] This Note, however, specifically explores those circumstances in which a church that employs ministers or other religious leaders who engage in such conduct can be held civilly liable in tort. In exploring this issue, this Note first considers the gradual breakdown of traditional religious protections in both the law and in public policy. Secondly, it analyzes the various causes of action which have been asserted against the church for the acts of its ministers and religious leaders. Finally, it seeks to make some prediction regarding the likelihood and scope of tort liability against the church for the sexual misconduct of these individuals.

II. The Breakdown Of Traditional Barriers To Liability

In the past, the first amendment to the United States Constitution, the doctrine of charitable immunity, and traditional notions of morality and religion have placed a heavy burden upon those who have advocated for church liability in tort. Despite these factors, however, there has been a gradual breakdown in the special protections once provided the church in terms of civil liability. First, the fundamental right of freedom of religion provided for in the

24. *Id.*

25. *John Does 1-9*, 763 P.2d at 1241.

26. *Jeffrey Scott E.*, 243 Cal. Rptr. 128, 197 Cal. App. 3d 718; *Milla*, 232 Cal. Rptr. 685, 187 Cal. App. 3d 1453.

27. R. W. McMenamin, *supra* note 11, at 129; 21 Am. Jur. 2d *Crim. Law* § 140 (1981). As a general rule, religious belief can not be accepted as a justification for an act made criminal by the law of the land. *Reynolds*, 98 U.S. 145 (1878).

First Amendment[28] has, through an evolution of case law, been determined not to be absolute. Additionally, the once majority rule doctrine of charitable immunity for religious organizations has fallen into the minority in modern times.[29] Finally, several arguments which have been grounded in morality have recently been asserted in order to penetrate the protective shield once provided religious organizations against allegations of civil liability. For the reasons which will be explored in the following sections of this Note, none of these theories which once served as a shield against civil liability should be considered an absolute bar against future tort liability on the part of the church.

A. *The First Amendment*

The first amendment to the United States Constitution provides that "Congress shall make no law regarding the establishment of religion or prohibiting the free exercise thereof . . . ."[30] It has been stated that the purpose of this amendment was to create a wall of separation between church and state.[31] It has also been suggested that both the text of the first amendment and the very nature of democratic pluralism is western political theory provide strong arguments for the judicial recognition of a sphere of autonomy for religious organizations.[32]

The mandate of the first amendment embodies two prohibitions: that of the establishment of religion and that of the free exercise thereof.[33] It is the free exercise clause with which this Note is concerned, and it is under this clause that the church has often been sheltered from civil liability.

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28. U.S. CONST. amend. I, states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

29. *See supra* note 5.

30. U.S. CONST. amend. I.

31. R. W. MCMENAMIN, *supra* note 11, at 28; Reynolds v. United States, 98 U.S. 145, 164 (1878); Leman v. Kurtzman, 403 U.S. 602, 637; 16A AM. JUR. 2D *Const. Law* § 466 (1979). This prohibition applies also to the states by means of U.S. CONST. amend. XIV, In *Cantwell v. Connecticut*, 310 U.S. 196, it was held that the fundamental concept of liberty included those liberties guaranteed by the first amendment with regard to religion.

32. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1, 8 (1986).

33. United States v. Ballard, 322 U.S. 78 (1944); Cantwell v. Connecticut, 310 U.S. 296 (1940).

The free exercise clause of the first amendment itself embodies two doctrines: the freedom to believe and the freedom to act.[34] In 1878, the first of these principles, the freedom to believe, gained a foothold in the American legal system in *Reynolds v. United States*.[35] In *Reynolds*, the appellant defended himself against a charge of bigamy on the basis of religious belief. Reynolds was a member of the Church of Jesus Christ of Latter-Day Saints and, as a male member of the Church, believed that he had to practice polygamy or be subject to damnation. The United States Supreme Court held that no matter how bizarre or irrational the individual's religious belief, it was nonetheless protected by the free exercise clause of the first amendment.[36]

Since *Reynolds*, the protection of religious belief or opinion has consistently been affirmed by the United States Supreme Court.[37] This protection is conditional, however, and is protected only insofar as one's beliefs or opinions are not manifested in actions that are harmful to others. Indeed, it has been stated that "the First Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but in the nature of things, the second cannot be."[38]

Several cases illustrate the courts' unwillingness to tolerate church members who act on religious beliefs or opinions in such a way as to cause injury or harm to others.

In *Jenson v. Juvenile Dept. of Lynn County*, the Oregon Court of Appeals held that the practice of religion by the parents of a child suffering from hydrocephalus[39] was not shielded by the first amendment. In *Jenson*, the parents refused to get medical treatment

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34. *Ballard*, 322 U.S. at 86.

35. *Reynolds*, 98 U.S. 145.

36. *Id.*

37. *Cantwell*, 310 U.S. 296; Prince v. Massachusetts, 321 U.S. 158 (1944); *Ballard*, 322 U.S. 78.

38. *Cantwell*, 310 U.S. at 303-04.

39. Hydrocephalus is an abnormal increase in the amount of cerebrospinal fluid within the cranial cavity that is accompanied by expansion of the cerebral ventricles, enlargement of the skull, especially the forehead, and atrophy of the brain. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 589 (1987).

for their child and instead chose to rely solely on prayer.[40] The court stated that "[w]hile the parents' right to provide religious training for their children is constitutionally protected, the right does not include as a necessary adjunct the right to jeopardize their children's health or safety."[41] Similarly, the California Court of Appeals in *In re Edwards* refused to protect the exercise of religious belief when a father, in the name of religion, severely disciplined his children to the point of causing injuries to one child.[42]

The courts have, however, protected the freedom to religious action under certain circumstances. The test which must be applied in order to determine whether such protection should be invoked is one of a balancing of the interests involved.[43] In this balancing test, the importance of the individual's conduct to his or her religious practice must be weighed against the interest of the state in curtailing it.[44]

In applying these first amendment principles to the growing problem of sexual molestation by religious leaders, it becomes apparent that the first amendment should not serve as a barrier to church liability for such conduct. Freedom to act is not absolute.[45] Even under the extreme view that one's religious beliefs might possibly permit some type of perverse or illegal sexual misconduct as a part of that belief, the state's strong compelling interest in protecting its citizens could easily override the freedom to act clause of the first amendment.

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40. Jensen v. Juvenile Department of Lynn County, 54 Or. App. 1, 633 P.2d 1302 (1981).

41. *Id.*

42. *In re Edwards*, 178 Cal. 697 (Ct. of App. 1 Dist. 1981).

43. Wisconsin v. Yoder, 406 U.S. 205 (1972).

44. *Yoder*, 406 U.S. 205. It has been suggested that at least four factors should be taken into consideration in making the determination as to whether the government may interfere with religious freedom to act. First, the interference must be in the furtherance of a compelling State interest. Secondly, it must be necessary to burden the religious conduct. Third, the burden imposed must be the minimum necessary to further the state's interest. Finally, the interference must not discriminate against a particular religion. Nally v. Grace Community Church, 194 Cal. App. 3d 1147, 1179-80, 240 Cal. Rptr. 215, 231 (Cal. App. 2d Dist. 1987); United States v. Lee, 255 U.S. 252, 257-260 (1982); *Yoder*, 406 U.S. at 214. Gillette v. United States, 401 U.S. 437, 462 (1971); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

45. 5 n.38.

B. *The Doctrine Of Charitable Immunity*

Another protection from liability historically provided to religious organizations has been the doctrine of charitable immunity. At one point, this immunity was almost universal.[46] Today, there are at least four theories which have been adopted with regard to the doctrine of charitable immunity: complete immunity, intermediate "trust-fund" immunity, partial immunity, and no immunity.[47]

The minority of jurisdictions follow the complete immunity view for organizations of a charitable nature.[48] The rationale for the total immunity view rests upon the argument that, as a matter of public policy, the trust funds of charitable organizations should not be diverted to pay tort claims.[49] In *Vermillion v. Women's College*,[50] the South Carolina Supreme Court stated that "public policy . . . forbid[s] the crippling or destruction of charities which are established for the benefit of the whole public to compensate one or more individual members of the public for injuries inflicted by the negligence of the corporation itself or of its officers or servants."[51] The argument has been challenged, however, on the ground that matters of public policy are within the realm of legislative powers and not for the courts to decide.[52]

Under the complete charitable immunity view, a church's protection from civil liability for the actions of its priests or pastors would appear to be total, regardless of the status of the person injured or the negligence of the church in employing priests with a history of criminal sexual behavior. Complete charitable immunity is the minority view, however, and the doctrine of complete charitable immunity is, therefore, not a sound basis upon which to protect religious organizations from the tortious acts of their priests or pastors.

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46. R. W. McMenamin, *supra* note 71, at 37.
47. 15 Am. Jur. 2d *Charities* § 197 (1976), 66 Am. Jur. 2d *Religious Societies* § 60 (1973).
48. 15 Am. Jur. 2d *Charities* § 197 (1976).
49. *Id.*
50. *Vermillion*, 104 S.C. 197, 88 S.E. 649 (1916).
51. *Id.* at 198, 88 S.E. at 650.
52. 15 Am. Jur. 2d *Charities* § 197 (1976).

An intermediate theory of the doctrine of charitable immunity is that of trust fund immunity. This is the view of a small minority based largely upon one of the rationales of the complete immunity view. The rationale of the trust fund immunity view is that funds or property held in trust for a charitable organization should not be used to execute judgments in tort against the charity.[53] As in the case with the complete immunity doctrine, the trust fund immunity theory has been criticized by the courts.[54] This may stem from the fact that, rather than organizations of small financial means as was the case when immunity first became an issue, many charities today are "big business."[55] The trust fund immunity doctrine has been rejected in the majority of jurisdictions as well as by the Restatement of Trusts.[56]

The third view of the charitable immunity doctrine is that of partial immunity. In this view, immunity is not based upon the nature of the organization as charitable, but rather upon either the status of the person injured or upon the status of the particular defendant.[57] A distinction is made in some states between "corporate negligence" and "subordinate negligence."[58] Either the negligence is chargeable against the organization itself (corporate negligence) or against the negligent employees only (subordinate negligence).[59]

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53. 15 AM. JUR. 2D *Charities* § 199 (1976). Charitable immunity had its origins in England in 1946 in *Feoffees of Heriot's Hospital v. Ross*, 12 C & F 807, 8 Eng. Rep. 1508, where it was held that trust funds in the hands of a charity could not be subjected to the payment of tort claims since they would thus be diverted from the purpose for which they were intended by the donor.

54. University of Louisville v. Hammock, 127 Ky. 564, 106 S.W. 219 (1907); Bruce v. Central Methodist Episcopal Church, 147 Mich. 230, 110 N.W. 951 (1907); Geiger v. Simpson Methodist Episcopal Church, 174 Minn. 389, 219 N.W. 463 (1928); Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951), *sugg. of error overruled* 214 Miss. 940, 56 So. 2d 709 (1952); Hamburger v. Cornell University, 240 N.Y. 328, 148 N.E. 539 (1925); Avellone v. St. John's Hospital, 165 Ohio St. 467, 60 Ohio Ops. 121, 135 N.E.2d 410 (1956); Flagiello v. Pennsylvania Hospital, 417 Pa. 486, 208 A.2d 193 (1965); Hospital of St. Vincent v. Thompson, 116 Va. 101, 81 S.E. 13 (1914); Adkins v. St. Francis Hospital, 149 W. Va. 705, 143 S.E.2d 154 (1965).

55. 15 AM. JUR. 2D *Charities* § 199 (1976).

56. *Geiger*, 174 Minn. 389, 219 N.W. 463, 62 A.L.R. 716; *Hospital of St. Vincent*, 116 Va. 61, 81 S.E. 13; Foster v. Roman Catholic Diocese, 116 Vt. 124, 70 A.2d 230, 25 A.L.R.2d 1 (1950); *Adkins*, 149 W. Va. 705, 143 S.E.2d 154; RESTATEMENT (SECOND) TRUSTS § 402.

57. 15 AM. JUR. 2D *Charities* § 203 (1976).

58. 15 AM. JUR. 2D *Charities* § 201 (1976).

59. *Id.*

Another distinction which results in partial immunity in some jurisdictions is that which exists between the status of the person injured as either a stranger or a beneficiary of the charity.[60] The general rule is that a charity is immune for injuries which occur to those who benefit from the services of the charity, as opposed to being subject to liability for injuries which occur to individuals who are strangers to the charity.[61] The rationale asserted for granting immunity to a charity as against its beneficiaries is that there is an implied waiver of liability involved in the acceptance of the benefits or, alternatively, that the beneficiary assumed the risk.[62] In essence, the jurisdictions maintaining the partial immunity view would apparently take the position that the church would not be liable for injury caused by the negligence of the church where the person harmed was a faithful member of the church but would be held liable as against a total stranger.

Finally, the fourth view, that of no charitable immunity, is the most popular and is followed by the majority of jurisdictions. This view encompasses the belief that there should be no immunity to organizations for their liability in tort simply because they are charitable.[63] Reasons for the abolition of charitable immunity include the fact that the declaration of such immunity should be within the realm of legislative power as a matter of public policy and not for the courts to decide.

The "no charitable immunity" theory has been accepted by the Restatement of Torts: "one engaged in a charitable, educational, religious or benevolent enterprise or activity is not for that reason immune from tort liability."[64] The Restatement further states that "the great majority of jurisdictions . . . have forthrightly abolished the immunity. The other jurisdictions have placed substantial res-

60. 15 AM. JUR. 2D *Charities* § 203 (1976).

61. 15 AM. JUR. 2D *Charities* § 200 (1976).

62. *Id.*

63. 15 AM. JUR. 2D *Charities* § 200 (1976); Sullivan v. First Presbyterian Church, 260 Iowa 1373, 152 N.W.2d 628 (1967); Hillard v. Good Samaritan Hospital, 348 S.W.2d 939 (Ky. 1961); Foster v. Roman Catholic Diocese, 116 Vt. 124, 70 A.2d 230, 25 A.L.R.2d 1 (1950); Adkins v. St. Francis Hospital, 149 W. Va. 705, 143 S.E.2d 154 (1965).

64. RESTATEMENT (SECOND) TORTS 2d § 895E (1965).

trictions upon it and may be regarded as in a transitional stage."[65] Under the modern trend of no charitable immunity, a religious organization is liable for the negligence of its priests or pastors in the same manner as any other organization whose members are negligent in the performance of their roles or responsibilities.

Thus, the protection from tort liability historically provided the churches through the doctrine of charitable immunity has, like the once steadfast protection provided religion by the first amendment, been severely restricted.

III. Causes of Action Against the Church

As noted in the foregoing sections of this Note, the barriers which once protected religious organizations from liability have weakened. As a result, over the past two decades, various causes of action against organizations have been asserted. Thus far, several key factors run throughout the cases which have been brought against the church. Specifically, a review of applicable decisions indicates that in order to assert liability against the church, the church must have acted recklessly in that it knew or should have known that injury would result therefrom.[66] The following section of this Note focuses on the various causes of action which have to date been asserted against religious organizations, the circumstances involved in those cases, and the future likelihood of prevailing against the church in similar circumstances.

A. *Respondeat Superior*

The doctrine of respondeat superior as it relates to the liability of churches for the acts of its agents is connected to the varying theories of charitable immunity. Specifically, the position that a jurisdiction holds with respect to charitable immunity generally determines its position on the doctrine of respondeat superior as well.

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65. *Id.*

66. Butler, *Church Tort Liability in Spite of First Amendment Protection*, 12 S.U. L. Rev. 46 (1985).

Under the doctrine of respondeat superior, a church may be held liable in the same manner as corporations generally.[67] In *Foster v. Roman Catholic Diocese*, the plaintiff sought damages for the injuries which he sustained due to allegedly negligent construction and maintenance of church premises.[68] In *Foster*, the Vermont Supreme Court soundly rejected the doctrine of charitable immunity. The *Foster* court held that the doctrine of respondeat superior should apply to charitable institutions and that a privately conducted charitable institution is not entitled to immunity from liability for injury caused by negligence of its servant or agent.[69] *Foster* is but one of the jurisdictions that reject the doctrine of charitable immunity, and hold that the doctrine of respondeat superior, whereby an employer may be held vicariously liable for the torts of its employees, applies to charitable organizations.

Another view of respondeat superior as it relates to charitable organizations is consistent with the partial immunity view of the charitable immunity doctrine. Under this view, a church may be held immune from liability for the acts of its employees which occur incident to its charitable activity, although it still may be held liable for personal injuries which occur to strangers.[70] The final view regarding the liability of a church for the torts of its employees under the doctrine of respondeat superior is that of negligent hiring and supervision. Under this view, a religious organization will be immune from liability except in those circumstances in which it fails to use reasonable care in the selection and retention of its employees.[71] The majority of jurisdictions have held that charities are not immune from liability for the intentional acts of negligently hired employees.[72]

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67. 66 Am Jur. 2d *Religious Societies* § 62 (1973); Geiger v. Simpson Methodist Episcopal Church, 174 Minn. 389, 219 N.W. 463, 62 A.L.R. 716 (1928); *Foster*, 116 Vt. 125, 70 A.2d 230, 25 A.C.K.2d 1 (1950).

68. *Foster*, 116 Vt. 124, 70 A.2d 230.

69. *Foster*, 116 Vt. 124, 70 A.2d 230; Bruce v. Central Methodist Episcopal Church, 147 Mich. 230, 110 N.W. 951 (1907); Hordern v. Salvation Army, 199 N.Y. 233, 92 N.E.626 (1910).

70. *Bruce*, 147 Mich. 230, 110 N.W. 951; *Hordern*, 199 N.Y. 233, 92 N.E. 626; *Foster*, 116 Vt. 124, 70 A.2d 230; 66 Am. Jur. 2d *Religious Societies* § 62 (1973).

71. 66 Am. Jur. 2d *Religious Societies* § 62 (1973); Bianchi v. South Park Presbyterian Church, 123 N.J.L. 325, 8 A.2d 567 (1939).

72. Evans v. Lawrence & Memorial Associated Hospitals, Inc., 133 Conn. 311, 50 A.2d 443

In some jurisdictions, respondeat superior has been held to be inapplicable to charities based upon the notion that charities derive no profit from their activities as do commercial employers who are subject to the doctrine. This reasoning is summarized in the Restatement of Torts which states in part:

> The fundamental reason why a charitable organization should not be held liable under the doctrine of respondeat superior is . . . based upon . . . the inherent . . . distinction between such charitable corporations organized, as they are, with the primary and principle purpose of assisting the poor, sick, unfortunate or needy . . . without provision for an expectancy of receiving financial returns for such particular service, compared with corporations which are primarily and principally organized for or in expectation of private gain.[73]

This proposition could be rebutted by the fact that, today, many charitable organizations are "big business." Nevertheless, even in jurisdictions which do not apply the doctrine of respondeat superior to charitable organizations, charities are not totally immune from the doctrine in that they still retain liability for lack of due care in the selection of the offending employee.[74]

In those jurisdictions where the theory of respondeat superior is applied to charitable organizations, it has nonetheless proven difficult to successfully sue a church for the intentional torts of its priests or pastors. The underlying theory of the respondeat superior doctrine is that an employer should be responsible for the acts of an employee who is acting within the scope of his or her employment.[75] However, in the early case of *Joel v. Morrison*,[76] it was held

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(1946); Bader v. United Orthodox Synagogue, 148 Conn. 449, 172 A.2d 192 (1961); Hipp v. Hospital Authority of Marietta, 104 Ga. App. 174, 121 S.E.2d 273 (1961); Fox v. Mission of Immaculate Virgin, 202 Misc. 478, 119 N.Y.S.2d 477 (1952); Matthews v. Wittenberg College, 113 Ohio App. 387, 178 N.E.2d 526 (1960); Yost v. Texas Christian University, 362 S.W.2d 338 (Tex. Civ. App. 1962); Davidson v. Methodist Hospital of Dallas, 348 S.W.2d 400 (Tex. Civ. App. 1961); Hill v. Leigh Memorial Hospital, Inc., 204 Va. 501, 132 S.E.2d 411 (1963); Fisher v. Ohio Valley General Hospital Ass'n, 137 W. Va. 723, 73 S.E.2d 667 (1952), *overruled on other grounds*, Adkins v. St. Francis Hospital, 149 W. Va. 705, 143 S.E.2d 154 (1965).

73. RESTATEMENT (SECOND) OF TRUSTS § 402 comment b.

74. *Bader*, 148 Conn. 449, 172 A.2d 192 (1961); *Hipp*, 104 Ga. App. 174, 121 S.E.2d 273 (1961); Burgess v. James, 73 Ga. App. 887, 38 S.E.2d 637 (1946); Grant v. Touro Infirmary, 254 La. 204, 223, So. 2d 148; *Matthews*, 113 Ohio App. 387, 178 N.E.2d 526 (1960).

75. R. W. MCMENAMIN, *supra* note 11, at 67; PROSSER, WADE & SCHWARTZ, TORTS, 684 (7th ed. 1982).

76. G. C. & P 501, 172 Eng. Rep. 1338 (1834).

that an employer is not liable for the acts of his employee who is "going on a frolic of his own" rather than performing acts which are incidental to the employer's business.[77] It is upon this premise that religious organizations have, to date, often escaped liability for the sexual escapades of their religious leaders.

For example, in *Jeffrey Scott E. v. Central Baptist Church*, the California Court of Appeals held that the church was not liable for repeated acts of sexual assault perpetrated on a minor by a Sunday school teacher.[78] In *Jeffrey Scott E.*, the court held that the test to determine whether an employee's conduct was within the realm of respondeat superior is twofold. The first consideration is whether the act performed was required or "incident to [the employee's] duties," and the second is whether the employee's misconduct could be reasonably foreseen by the employer.[79] The court then concluded that there was no liability on the church's part given that the defendant was not employed to molest young boys. Therefore, the court held that the acts were not within the scope of the Sunday school teacher's employment.[80] As simplistic as this conclusion might seem, this line of reasoning has been followed by most courts which have addressed the question of respondeat superior in instances of sexual molestation in the church.[81]

Though it is a difficult task to obtain liability against the church for the acts of its employees, it is a still more difficult task to obtain liability against an individual religious leader or bishop. The responsibility of individual religious leaders for the torts of their subordinates lies within their participation in or ratification of the acts. Specifically, a bishop will not be subject to liability for negligent actions of the priests below him unless such actions were approved

77. PROSSER & KEETON, TORTS, 500 (5th ed. 1984).

78. Jeffrey Scott E. v. Central Baptist Church, 243 Cal. Rptr. 128, 197 Cal. App. 3d 718 (Cal. App. 4 Dist. 1988).

79. *Id.* at 130, 197 Cal. App. 3d at 721.

80. *Id.*

81. Alma W. v. Oakland Unified School District, 123 Cal. App. 3d 133, 142, 176 Cal. Rptr. 287, 289 (1981); Milla v. Tamayo, 232 Cal. Rptr. 685, 187 Cal. App. 3d 1457 (Cal. App. 2d Dist. 1987).

or in some manner ratified by him.[82] This is a difficult standard of proof to meet for those plaintiffs who seek relief from the head of a religious society.

In *Magnuson v. O'Dea*, certain officials of the Catholic Church were charged with abducting the plaintiff's daughter.[83] The Bishop was also included as a defendant in the suit because he did not compel the return of the child upon learning of the abduction.[84] Based upon the thesis that Bishops are not responsible for the torts of their brethren unless participated in or ratified and approved by him, the *Magnuson* court held that, although the bishop had authority over the spiritual welfare of the rector, he had no control over his temporal affairs.[85] The court stated "he has committed no legal wrong and the sins of others cannot be visited upon him."[86] In essence, in instances such as that facing the *Magnuson* court, heads of religious societies are not expected to be their brother's keeper.

In an early sexual molestation case, *Carini v. Beaven*, the Massachusetts court held that a bishop was not liable for the rape of a parish member by a priest whom the bishop had appointed despite having knowledge of the priest's bad character.[87] It was alleged that the priest in question was "of low moral character, of vicious and degenerate tendencies and gross sexual proclivities."[88] It was also alleged that when the plaintiff, then 18 years of age, was engaged in a religious service with the priest, he dragged her from the alter to the vestry and raped her. A child was born of this assault. Nevertheless, the *Carini* court determined that there was no legal liability on the part of the bishop because, the court posited, the bishop could not have foreseen the priest's actions.[89] The Massachusetts court stated that the defendant had no reason to foresee that the

82. 66 AM. JUR. 2D *Religious Societies* § 63 (1973); Magnuson v. O'Dea, 75 Wash. 574, 135 P. 640 (1913).
83. 75 Wash. 574, 135 P. 640.
84. *Id.* at 575, 135 P. at 641.
85. *Id.*
86. *Id.*
87. Carini v. Beaven, 219 Mass. 117, 106 N.E. 589 (1914).
88. *Id.*
89. *Id.* at 118, 106 N.E. at 590.

priest would commit rape because it is not "according to human experience and the natural and ordinary course of events that a parish priest should commit so flagitious and atrocious a crime."[90]

B. *Negligent Hiring and Supervision*

Perhaps a more successful theory of liability against churches which employ priests or pastors who commit sexual offenses is the doctrine of "negligent hiring." The classic negligent hiring situation occurs in the typical employer/employee relationship when an employer knowingly hires or retains an incompetent, unfit or dangerous employee.[91] As discussed previously, the premise has also been applied to charitable organizations.[92]

Negligent maintenance and supervision was the charge in one of the most recent cases of sexual misconduct by a priest. In *John Does 1-9 v. Compcare Inc.*, eight adolescent males and one adult male brought suit against Deaconess Hospital and Compcare, the Diocese of Lafayette, Louisiana, its bishop and Vicar General.[93] The Louisiana Diocese suspended Father Robert Fontenot January 18, 1984 when he admitted to sexual misconduct with minors. The Diocese continued to financially support Father Fontenot during the time he was a patient in a treatment facility.[94] Upon the release of Father Fontenot from treatment, the Diocese received a summary from the facility concerning his condition. It suggested in part that "for the protection of himself and adolescents [he should] refrain from ministry that would involve work with adolescent boys."[95] Shortly thereafter, the Spokane Diocese requested that the Lafayette Diocese lift Father Fontenot's suspension so that they could hire him in their Diocese. The Lafayette Diocese refused.

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90. *Id.* at 118 106 N.E. at 590.

91. Evans v. Morsell, 289 Md. 160, 395 A.2d 480 (1978); Pontican v. K.M.S. Invs., 331 N.W.2d 907, 38 A.L.R. 4th 225 (Minn. 1983); Di Cosala v. Kay, 91 N.J. 159, 450 A.2d 508 (1982); Welsh Manufacturing v. Pinkerton's, Inc., 474 A.2d 436, 44 A.L.R. 4th 603 (R.I. 1984).

92. *See supra* n. 72 and accompanying text.

93. 763 P.2d 1237 (Wash. App. 1988).

94. *Id.* at 1240.

95. *Id.* at 1241.

Father Fontenot was eventually employed as a technician in the adolescent care unit of Deaconess Medical Center. He did not inform the Monsignor that he was working with adolescents although he was later transferred by the medical center into the adult unit as an alcohol/drug counselor. Eventually, Father Fontenot was terminated due to complaints by former patients alleging sexual abuse while the patients were in the care of Father Fontenot in the adolescent care unit. When Father Fontenot was arraigned on criminal charges, the Diocese paid a portion of his defense costs.[96]

At the time of this writing, a decision has not been made regarding the liability of the Lafayette Diocese for negligent supervision. However, the Washington Appeals Court discussed the principles of negligent supervision in a pretrial hearing.[97] The court stated that, with respect to negligent supervision, an employer may in fact be held liable for acts which are beyond the scope of employment because of the employer's prior knowledge of an employee's dangerous tendencies.[98] This view is in direct contradiction with the requirement of the respondeat superior doctrine that in order for an employer to be held liable for the actions of his or her employee, such actions must be within the scope of employment rather than beyond such scope.[99] Nonetheless, the Diocese asserted the traditional respondeat superior argument that Father Fontenot's misconduct was beyond the scope of his employment because it did not arise out of his normal priestly activities and, thereby, the Diocese should be absolved of liability. Interestingly, this argument ignores canonical law which states that the duty of obedience owed by a priest to a diocese encompasses all facets of life.[100]

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96. *Id.*

97. John Does 1-9 v. Compcare, Inc., 763 P.2d 1237, 1241 (Wash. App. 1988).

98. *John Does 1-9*, 763 P.2d 1237, 1241 (Wash. App. 1988); Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986); LaLone v. Smith, 39 Wash. 2d 167, 234 P.3d 893 (1951); RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

99. *John Does 1-9*, 763 P.2d 1237, 1242 (Wash. App. 1988).

100. *John Does 1-9*, 763 P.2d 1237, 1242 (Wash. App. 1988); Code of Canon Law, Canons 265, 273, 290, 1333, 1350, 1395 (1985). The *John Does* court further stated with respect to failure to warn, liability may be premised on a special relationship existing between the defendant and either the third party or a foreseeable victim of the third party's conduct, Peterson v. State, 100 Wash. 2d 421, 671 P.2d 230 (1983); RESTATEMENT (SECOND) OF TORTS § 315 (1965).

C. *Canonical Agency*

It is important at this point to make a brief note as to canonical agency and its implications. The opinions of courts and scholars are not in harmony concerning the breadth of importance of this concept. In the cases of *Ambrosio v. Price*[101] and *Stevens v. Roman Catholic Bishop of Fresno*,[102] parish priests were involved in automobile accidents causing injury or death to third persons.[103] Plaintiff's expert in both cases, John Noonan, recited the following definition of canonical agency:

> The priest takes the vow of obedience or the promise of obedience to his Ordinary and is subject to the command of the Ordinary. The Ordinary has the right to control the actions of the priest; to assign him, to reassign him, and generally to tell the priest what to do. A priest's duties require his attention 24 hours a day, seven days a week.[104]

A qualified canon lawyer, Dr. Noonan supported his position with Vatican II teachings and canon law.[105] Noonan expressed the view that the obligation of the priest extends to all men through all meetings of every kind with Catholics and non-Catholics alike, and that no matter what the priest is doing, he is on the business of the Catholic church.[106] Dr. Noonan's view of canonical agency, therefore, greatly broadens the scope of liability which might be successfully imposed on a church for the actions of its priests. In the typical employer/employee relationship, the line between an employee's personal life and his or her employment is easily discernable thereby making the point at which to draw the line in terms of liability of the employer for the acts of his or her agent apparent as well. However, under Dr. Noonan's theory of canonical agency, a priest's duties require 24 hour attention, and there is, therefore, no readily disenable line of distinction between priestly and personal functions. Arguably, under such a broad canonical agency view, the

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101. Unpublished District Court Opinion, Hotz, *Diocesan Liability for Negligence of a Priest*, 26 CATH. LAW. 228 (1981).

102. Stevens v. Roman Catholic Bishop of Fresno, 49 Cal. App. 3d 877, 123 Cal. Rptr. 171 (1975).

103. *Id.*

104. Hotz, *supra* note 101, at 231.

105. *Id.* at 231.

106. *Id.*

sexual misconduct of priests could be said to occur within the scope of their duties which, in turn, could establish liability on the part of the church. Under this line of reasoning, the position taken by a number of courts—that such misconduct is purely personal and that the church cannot be held liable—must fail.

This broad theory of canonical agency espoused by Dr. Noonan in which the Diocese remains liable for every facet of a priest's life, both personal and parochial, was accepted in *Stevens v. Roman Catholic Bishop of Fresno*.[107] In *Stevens*, while on a return trip from ministering to the needs of a parish family, a priest of the Diocese of Fresno was involved in an automobile accident which resulted in two fatalities. The California court placed great emphasis on Dr. Noonan's expansive theory of canonical agency. The court stated "it is plain . . . that the priest's responsibilities to represent the Bishop go beyond the territorial limits of the parish."[108]

The extension and application of canonical agency to civil litigation in situations such as that which occurred in *Stevens* has not been accepted in every jurisdiction, however.

In *Ambrosio v. Price*, a case like *Stevens* in which a parish priest was involved in an automobile accident causing injury to a third party, Archbishop Daniel E. Sheenan, expert for the defendant, who holds a doctorate degree in canon law from the Catholic University of America, stated his position on canon law as follows:

> The canon law theory which covers the relationship between pastors and bishops is accountability. Pastors are accountable to bishops while engaged in parochial functions related to the specific welfare of the parishioners in the definite area of their parishes . . . A pastor is not accountable to the bishop in his private, recreational and other secular activities unless these actions would be detrimental to his effective functioning as a pastor and would make it difficult for him to carry out his responsibility as a spiritual father of his parishioners.[109]

Under this more restrictive view of canonical agency, the sexual misconduct of priests would fall outside the scope of the churches

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107. Stevens v. Roman Catholic Bishop of Fresno, 49 Cal. App. 3d 877, 123 Cal. Rptr. 171 (1975).

108. Hotz, *supra* note 101, at 232.

109. *Id.*

liability in that such misconduct would be considered a private activity. Indeed, the *Ambrosio* court granted summary judgment which dismissed the Archdiocese from the lawsuit.[110] The more restrictive view of canonical agency is in line with the traditional position held by courts which have rejected any liability on the part of the church for the sexual actions of its priests on the theory that such actions are purely personal.[111] An argument may exist even under the restrictive theory of canonical agency, however, that a church should be held liable for such sexual misconduct of its priests in that such would make it difficult for the priest to "carry out his responsibility as a spiritual father of his parishioners."

Cases such as *Stevens* and *Ambrosio* reflect, therefore, that there is disharmony among the jurisdictions not only as to the applicability of canonical agency to civil litigation generally but also as to the scope of that agency in those jurisdictions which recognize the concept.

D. *Clergy Malpractice*

An emerging theory of negligence against the church and its officials is that of clergy malpractice. The Restatement of Torts states that "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."[112] The theory of clergy malpractice seeks to hold members of the clergy to such a standard.[113]

Thus far, *Nally v. Grace Community Church* is the only case which has actually adjudicated the merits of a clergy malpractice claim.[114] On April 1, 1979, after several years of depression and suicidal tendencies, Kenneth Nally put a gun to his head and pulled

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110. *Id.* at 232-33.

111. Jeffrey Scott E. v. Central Baptist Church, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (Cal. App. 4 Dist. 1988).

112. RESTATEMENT (SECOND) OF TORTS § 299A (1965).

113. RESTATEMENT (SECOND) OF TORTS § 285 (1965). It is not unreasonable to infer that the determination of the standard of conduct of a reasonable man should be applied to the reasonable professional.

114. 194 Cal. App. 3d 1057, 240 Cal. Rptr. 215 (Cal. App. 2 Dist. 1987).

the trigger. In 1974, Nally, who had been raised in the Catholic Church, converted to Protestantism and joined Grace Community Church.[115] Grace Community Church had an active pastoral counseling program of about thirty counselors.[116] In January, 1978, Nally requested "discipleship" from one of the church's pastors.[117] This counseling continued for the next six months. Nally continued to be depressed, however, and on the night of March 11, 1979, Nally took an overdose of Elavil and lapsed into a comatose state.[118]

While Nally was in the hospital, the pastors of the Grace Community Church visited their disciple and heard his story of sorrow and determination. Nally expressed sorrow that the suicide attempt had failed and determination to succeed in a second attempt. The pastors told no one of this revelation and, on March 17, 1979, Nally was released from the hospital and went to live with one of the church's pastors.[119] Upon his discharge from the hospital, several psychiatrists all recommended that Nally receive immediate psychiatric counseling. Nally objected to psychiatric treatment, however, because he felt that the psychiatric professionals could not help him because they were not "good Christians."[120] Nally remained suicidal. Indeed, one of the pastors of Grace Community Church stated that he believed that Nally had been "suicide prone" since 1978.[121]

Finally, on April 1, 1979, at the age of 24, Kenneth Nally killed himself. Subsequently, audio tapes regarding Grace Community Church's biblical counseling were discovered in Nally's home. These tapes expressed the acceptability of suicide as God's way of "calling home a disobedient believer."[122]

On March 31, 1980, Nally's parents filed suit against the Grace Community Church, its pastor and three other clergymen on the

115. Nally v. Grace Community Church, 204 Cal. Rptr. 303, 313 (Cal. App. 2 Dist. 1984).
116. *Nally*, 194 Cal. App. 3d at 1159, 240 Cal. Rptr. at 219; Griffith & Young, *Pastoral Counseling and Malpractice*, 15 BULL. AM. ACAD. PSYCHIATRY L., 257.
117. *Nally*, 204 Cal. Rptr. at 314.
118. *Id.* at 309, 314.
119. *Id.* 314.
120. *Id.* at 316.
121. *Id.* at 314.
122. *Nally*, 204 Cal. Rptr. at 316.

theories of negligent counseling and outrageous conduct. Nonsuit was entered and an appeal taken. Though the allegation of negligent counseling embodies the principles of malpractice, the California Court of Appeals did not view the cause of action as one of "clergy malpractice" but rather as the "negligent failure to prevent suicide" and "intentional infliction of emotional injury causing suicide."[123]

After determining that the first amendment did not immunize the church's counselors from liability, the *Nally* court held that religious counselors should not be distinguished from their secular counterparts in terms of standard of care.[124] The court held that both have a duty with regard to suicidal counselees[125] and that the appropriate standard of care could only be satisfied in certain cases by placing the suicidal counselee in the hands of a professional capable of preventing a suicide.[126] Nonsecular counselees have no duty to adhere to this standard, however, unless the suicide is actually foreseeable to them.[127] It was not a difficult determination for the *Nally* court to find that the Grace Community Church counselors indeed foresaw Kenneth Nally's suicide, and they failed to meet the minimum standard of care which required Nally's referral to professionals who were capable of minimizing the risk that he would carry out his suicidal plans.

The dissent in *Nally* argued that a pastoral counselor should not be accountable for his or her failure to reveal the suicidal tendencies of his counselee.[128] The dissent found support for this proposition in *Bellah v. Greenson*.[129] In *Bellah*, a psychiatrist was held to be not subject to liability for his failure to inform the family of a patient about the patient's suicidal tendencies. This determination was made after balancing the statutory privilege of confidentiality between psychiatrist and patient against the need to reveal such information to the patient's family.[130] The majority in *Nally* countered

123. *Nally*, 194 Cal. App. 3d at 1157, 240 Cal. Rptr. at 219.
124. *Id.* at 1167, 240 Cal Rptr. at 229.
125. *Id.* at 1167, 240 Cal. Rptr at 229.
126. *Id.*
127. *Id.* at 1168, 240 Cal. Rptr. at 226.
128. *Id.* at 1191, 240 Cal. Rptr. at 243.
129. *Bellah*, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978).
130. *Id.*

this argument by distinguishing *Bellah* factually from the situation under consideration. First, concluded the court, there was no statutory privilege involved in *Nally*. Second, in *Bellah* the patient was already in the hands of an individual who was authorized to prevent suicide.[131]

A case more applicable to a church's potential liability for the sexual wrongdoing of its priests or pastors was *Destefano v. Grabrian*.[132] In *Destefano*, it was alleged that a Roman Catholic priest to whom a married couple had gone for spiritual counseling had engaged in a relationship with the wife. The action was filed against the priest as well as the Diocese and stated counts for breach of fiduciary duty, outrageous conduct and negligent counseling. The wife also made a claim against the Diocese for negligent supervision of the priest.[133]

The *Destefano* court dismissed the action based largely upon the position that first amendment constraints prevent the courts from entangling themselves in the affairs of a church or other religious organization. The *Destefano* court's reasoning is tenuous at best, however, since the seduction of a spiritual counselee should not be seen as even "arguably religious"[134] and should, therefore, invoke no entanglement dilemma at all.

E. *Intentional Infliction of Emotional Distress*

Another theory of liability in tort which has recently found its way into several cases involving the issue of church liability for the actions of its pastors or priests is that of intentional infliction of emotional distress or outrageous conduct.[135] This tort imposes lia-

131. *Nally*, 194 Cal. App. 3d at 1171, 240 Cal. Rptr. at 228.

132. Destefano v. Grabrian, No. 84-CV 0773 (Colo. D. Ct. El Paso Co. July 26, 1984) (unreported opinion), *aff'd*, No. 84-CA0973 (Colo. Ct. App. Aug. 8, 1986).

133. *Id.*

134. Esbeck, *supra* note 32, at 88.

135. Turner v. Unification Church, 473 F. Supp. 367 (1978); Lewis v. Holy Spirit Association for the Unification of the World Christianity, 589 F. Supp. 10 (1983); Destefano v. Grabrian, No. 84-CV 0773 (Colo. D. Ct. El Paso Co. July 26, 1984) (unreported opinion), *aff'd*, No. 84-CA0973 (Colo. Ct. App. Aug. 8, 1986); *Nally*, 194 Cal. App. 3d 1057, 240 Cal. Rptr. 215 (Cal. App. 2d Dist. 1987); Jeffrey Scott E. v. Central Baptist Church, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (Cal. App. 4 Dist. 1988); Milla v. Tamayo, 187 Cal. App. 3d 1453, 232 Cal. Rptr. 685 (Cal. App. 2 Dist. 1986).

bility for conduct which exceeds the bounds usually tolerated by society and which in turn causes very serious mental distress.[136] The elements of intentional infliction of emotional distress in the religious context include outrageous conduct on the part of the church or its agents which intentionally or recklessly cause injury to a third person and which manifests itself in mental or emotional distress.[137] If a special relationship exists between the injured party and the wrongdoer, such as that of clergy/parishioner, the likelihood of liability increases.[138] Arguably, a clergyman should be held to a greater degree of responsibility than should a lay person for outrageous conduct which is inflicted upon third parties given the position of high trust and confidence which the clergyman holds in the eyes of his parishioners.

Allegations of outrageous conduct against church officials have easily overcome the first amendment barrier. This tort falls within the freedom to act variable of the freedom to believe versus freedom to act dichotomy and, as stated previously, the freedom to act is not absolute.[139] Specifically, in *Nelson v. Dodge*, the Rhode Island Supreme Court held that the tort of outrageous conduct was not protected by a defense of religious belief or action.[140] In 1978, the United States District Court of Rhode Island in *Turner v. Unification Church* continued the progression toward holding churches and church members liable for intentional torts.[141] Although the *Turner* case was ultimately dismissed for failure to state a claim upon which relief could be granted,[142] the court did hold that "the free exercise clause of the First Amendment does not immunize the defendants from causes of action that allege . . . intentional tortious activity."[143] Additionally, in the 1983 case of *Lewis v. Holy Spirit*

136. R. W. McMenamin, *supra* note 11, at 79; Butler, *supra* note 66, at 46.

137. *Id.*

138. R. W. McMenamin, *supra* note 11, at 79.

139. Cantwell v. Connecticut, 310 U.S. 296 (1940); United States v. Ballard, 322 U.S. 78 (1944); Wisconsin v. Yoder, 406 U.S. 205 (1972).

140. Nelson v. Dodge, 76 R.I. 1, 68 A.2d 51 (1949). In *Nelson*, a church leader's repeated threats of eternal damnation, coupled with his writhing on the floor and feigned vomiting, caused the plaintiff distress to the extent that he became both emotionally and physically ill.

141. Turner v. Unification Church, 473 F. Supp. 367 (1978).

142. *Id.*

143. *Id.* at 371.

Association for the Unification of the World Christianity, the court held that, in order to prove a claim for intentional infliction of emotional distress, plaintiff would be required to prove that the defendant intended to inflict such distress upon the plaintiff or knew or should have known that such a result would occur, that the defendant's conduct did indeed cause emotional distress, and that no reasonable person could be expected to endure such conduct.[144]

The preceding cases specifically addressed the liability of a priest for his own outrageous conduct or intentional infliction of emotional distress rather than the liability of the church for the actions of its pastor or priest. In more recent cases, however, the cause of action has been aimed not only against the pastor or priest for his or her individual actions but also against the church or Diocese itself.[145] In the most often cited case dealing with church liability for intentional infliction of emotional distress, *Nally v. Grace Community Church*, the court found that under the circumstances presented it,[146] the first amendment did not immunize the church and its pastors from liability for the intentional or reckless infliction of emotional distress which ultimately led one of its members to suicide.[147]

Additionally, intentional infliction of emotional distress was one of the theories for which the plaintiff sought to hold the church liable in *Jeffrey Scott E.*[148] In that case, a Sunday school teacher had repeatedly sexually assaulted a minor who was a member of the church. The California Court of Appeals held the church was not liable for the acts of the Sunday school teacher since the acts were "independent, self-serving pursuits unrelated to the church activities" which were not foreseeable.[149]

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144. Lewis v. Holy Spirit Association for the Unification of the World Christianity, 589 F. Supp. 10 (1983).

145. Jeffrey Scott E. v. Central Baptist Church, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (Cal. App. 4 Dist. 1988); Nally v. Grace Community Church, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (Cal. App. 2 Dist. 1987).

146. *Nally*, 194 Cal. App. 3d at 1184, 240 Cal. Rptr. at 219.

147. *Id.*

148. *Jeffrey Scott E.*, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128.

149. *Id.* at 721, 243 Cal. Rptr. at 129.

Thus, while no court has actually held a religious organization civilly liable for the actions of its priests on the theory of intentional infliction of emotional distress, the reasoning articulated by the courts in several recent cases suggests that such a claim may ultimately prevail.

IV. The Future

Within the Catholic Church the priest "is the proper shepherd of the parish entrusted to him; correcting them prudently if they are wanting in certain areas."[150] A review of Episcopalian doctrine reflects that the Episcopal Church is greatly concerned with the high moral standards of its clergy.[151] United Methodist ministers are responsible for maintaining the order of their local church.[152] One can assume, of course, that most, if not all, religions hold similar standards and expectations with respect to their religious leaders. A dilemma arises, however, when the "proper shepherd" is the one "wanting in certain areas," that is when the clergy lacks the necessary high moral standards, or when the ministers responsible for maintaining church order are themselves the cause of disorder within the church.

Who is responsible? In the Catholic Church, the local parish priest serves under the bishop's authority.[153] Within the structure of the Episcopalian Church, Diocesan bishops are limited in the exercise of authority to their own Dioceses.[154] Bishops in the Methodist Church appoint the local ministers and are to exercise "general oversight and promotion of the temporal and spiritual interests of the entire church."[155] In the Presbyterian Church structure, the Presbytery is responsible for examining, ordaining, installing, dismissing and

150. The Code of Canon Law (1983), Canon 529 at 426; Esbeck, *supra* note 32, at 64.

151. Esbeck, *supra* note 32, at 68-69.

152. The Book of Discipline of the World Methodist Church, para. 109, at 107; Esbeck, *supra* note 32, at 70.

153. Esbeck, *supra* note 32, at 63.

154. The Constitution and Canons of the Protestant Episcopal Church, art. II, § 3, at 3; Esbeck, *supra* note 32, at 67-68.

155. The Book of Discipline of the United Methodist Church, para. 59, art. X, at 37; para. 52, art. IV, at 35; Esbeck, *supra* note 32, at 70.

otherwise disciplining ministers.[156] Yet, churches and Dioceses which have been sued for the actions of their priests or pastors under theories such as respondeat superior and negligent hiring and supervision have denied responsibility and have been protected from liability for various reasons. Nonetheless, despite the fact that several of these theories of liability against the church have thus far proven less than a total success, each has merits which are worth considering.

In order to hold a church liable for the tortious acts of its ministers or other leaders under the doctrine of respondeat superior, an employer/employee relationship must exist and the negligent employee must be acting within the scope of his or her employment.[157] The determination of whether a priest is actually an employee of the church or is rather acting as an independent contractor may pose difficulties in assessing liability based upon the doctrine of respondeat superior.[158] The test invoked by the majority of courts to determine whether or not someone is an independent contractor is to determine whether the employer has the right to control the details of the work at issue.[159] It seems somewhat ridiculous to assume that a religious organization should not have the right to control the morality of the interaction between its ministers or priests and the church members for whom that individual is to serve as a spiritual and moral leader.

Another possible successful theory upon which to hold a church liable for the actions of its priests or pastors is that of negligence in the selection and supervision of church employees. The success of a cause of action for negligent selection and maintenance of employees, as well as under the respondeat superior theory, seems to lie within the issue of foreseeability. An employer may be held liable under a theory of negligent supervision for the acts of its employees which are beyond the scope of employment because of the employer's prior knowledge of the dangerous tendencies of the em-

156. The Plan for Reunion, § 6-11.0103, at 98; Esbeck, *supra* note 32, at 73.
157. PROSSER, WADE & SCHWARTZ, TORTS, 685 (7th ed. 1982).
158. R. W. MCMENAMIN, *supra* note 11, at 68.
159. RESTATEMENT (SECOND) OF AGENCY, § 220 (1958).

ployee.[160] In cases proceeding under a respondeat superior theory, however, it has been held that mere foreseeability is not enough. Instead, for the action to have been considered foreseeable to the degree necessary to impose liability upon the church, it must be characteristic of the activities involved in the employment.[161]

Additionally, the tort of intentional infliction of emotional distress has recently emerged as another possible theory upon which to hold churches liable for the actions of their leaders.[162] It certainly could not be disputed that the conduct of priests who sexually molest their underage parishioners is outrageous and it is certainly not unreasonable to expect religious organizations to appoint or select competent personnel. Indeed it has been predicted that "all religious figures and clergy personnel will be hearing more and more of the tort of outrageous conduct . . . on many occasions there will be large damages . . . insurance will rarely cover all the activity encompassed by this broad tort concept."[163]

V. Conclusion

Should the church be 'thy priest's keeper' in terms of civil liability? When the reprehensible factual situations involved in most of the sexual molestation cases are considered, an affirmative answer to this question is easily reached. Should the bishop of a Diocese who appoints a parish priest be 'thy priest's keeper' when one of the diocesan priests rapes a female member of the parish despite the bishop's knowledge of his "vicious and degenerate tendencies and gross sexual proclivities?"[164] Should the church be held accountable when a pedophile priest, suspended from his priestly duties for sexual misconduct with minors, is nonetheless employed in a position which requires frequent contact with young boys?[165] Finally,

160. 11 n.72.

161. Jeffrey Scott E. v. Central Baptist Church, 197 Cal. App. 3d 718, 721, 243 Cal. Rptr. 128, 130 (Cal. App. 4 Dist. 1988); Alma W. v. Oakland Unified School Dist., 123 Cal. App. 3d 133, 142, 176 Cal. Rptr. 287, 289 (1981).

162. *Jeffrey Scott E.*, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128; Nally v. Grace Community Church, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215 (Cal. App. 2 Dist. 1987).

163. R. W. McMenamin, *supra* note 11, at 81.

164. Carini v. Beaven, 219 Mass. 117, 106 N.E. 589 (1914).

165. John Does 1-9 v. Compcare, Inc. 763 P.2d 1237 (Wash. App. 1988).

should the Archbishop be held responsible when several priests form a conspiracy, the objective of which is to utilize their confidential relationship with a minor member of the parish in order to entice her into having sexual intercourse with them?[166]

Religious organizations and officials should be held accountable for the immoral behavior of the clergy they have employed or appointed. The question then becomes whether the church can actually be held to such a degree of accountability? In considering the history of church liability in tort, from once complete immunity to the present church tort litigation boom, the answer appears to be an eventual yes.

Stephanie D. Young

166. Miller v. Tamayo, 187 Cal. App. 3d 1453, 232 Cal. Rptr. 685 (Cal. App. 2 Dist. 1986).