

Liability of Religious Charities: A New Frontier: Accountability of Religious Persons and Institutions in Tort*

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I. 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. Fewer people go to church,¹ and the “collective picture was not a good one for Canada’s religious groups”²—this in spite of the fact that children tend to adopt the religion of their parents (enshrined in law as the maxim “*religio sequitur patrem*,” the “father’s religion is prima facie the infant’s religion”³).

Legal issues involving established churches have done little to encourage confidence in religious institutions. Bibby observed in 2002 that “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 (See also Stauffer and Hyde.⁵)

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 emanating from a religious tradition.

Other activities are not so obviously religious. When a religious institution

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operates a religious school, the official supervising may be acting under the authority of an established religious governing body when supervising the content of religious instruction, but when hiring or firing secular staff, the activity is not religious. Marriage counselling may be offered to the community at large as a public service (in one case, 50% of such counselling by a church was to non-members⁶). Sometimes, the religious official goes “beyond the normal and accepted interactions” of a strictly religious role.⁷

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 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 article, 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.

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 may have no standing to sue or be sued and may 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 trusteeship or corporation established to hold property. A bishop as a corporation sole constitutes a “corporation capable of suing and being sued in all courts,” while as to the Catholic Church itself the Supreme Court of Canada declined, on the limited record before it, to deal with the thornier aspects of the “nature of its status.”¹⁴

Once standing is determined, 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 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.¹⁹ There are exceptions.²⁰ Second, membership in a religious institution is voluntary in Canada (unlike some jurisdictions with a state church), imparting a contractual dimension. The Supreme Court of Canada applied this principle to a religious association in *Hofer*,²¹ adopting Lord Atkin.²² Third, religious institutions and individual members are entitled to protection of the Canadian Charter of Rights and Freedoms;²³ 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.

In family law disputes (also private law matters), courts observe a constitutional neutrality in considering religious evidence: "it is not for the court to decide between two religions"²⁷ and "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, that the "religious beliefs of the parents was causing, or was likely to cause . . . 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, the Canadian lawyer must approach these cases cautiously. The similarity in language of common law tort doctrine and equitable remedies should not lull one into ignoring that there is a fundamentally different constitutional framework.

That being said, we should not throw the baby out with the bathwater. There is still sound reason to consider that United States cases will be persuasive in Canada; one commentator concluded that there are at least four reasons 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.”³⁰ We might add the fact that virtually all Canadian religious institutions have American counterparts, in many cases sharing governing bodies, so that 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.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 and has not been adopted; it will be discussed in more detail below.

It is more productive to look at what the Supreme Court of Canada has said in considering the application of the U.S. Constitution to religious activities.

It is true that corresponding freedoms in section 2 of the Canadian Charter are subject to a section 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.”³⁴ The Supreme Court of Canada describes these freedoms as “absolute.”³⁵

Chief Justice Dickson compared the First Amendment and section 2 of the Charter,³⁶ observing 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 agreed “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.

In *Amselem*,³⁹ 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 *Amselem*, 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 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 that "State sponsored inquiries into any person's religion should be avoided wherever possible."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 only further obfuscate an already difficult area of the law."⁴³

That is not to say that there are no variations in procedure between the two countries that flows from the different constitutional frameworks: "*A priori* exclusions of 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, the so-called "the contextual approach".⁴⁵ In short, the section 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 expect that the response by a Canadian court to objections at trial under section 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.

II. 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 that the law will redress by an award of damages.⁴⁷ Torts are broadly divided into two categories: intentional torts and unintentional torts (or negligence). Unintentional torts, or negligence, are a relatively recent legal development authorities date to the beginning of the 19th century.⁴⁸

Religious persons or institutions, as Professor Ogilvie noted in discussing *Gruenke*⁴⁹ and *Church of Scientology*,⁵⁰ “enjoy no absolute protection or exclusion from the law of the land . . .”⁵¹ 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 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 that occurred solely in the course of a religious activity.

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. While, as Justice MacLeod observed in *Bell*, this tort is actionable if there is a visible and provable illness that 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.⁵⁹ 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.

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. This case will be discussed below.

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.

*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 whom 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 resulting 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. There is 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. Wide ranging over the grounds of liability in *Deiwick* contributed to similar confusion in a later judgment relying upon it, *Cairns*, which 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. 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, in cases with religious defendants in which an action for what in Canada would be styled “intentional infliction of mental suffering,” American courts 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 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 are normally done without the knowledge (and contrary to the policy) of the church who might be the employer or supervisor of a tortfeasor minister or priest, the church, if liable, is liable 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.”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 has already taken place.⁷³ In the United States, on the other hand, the enormity of the outrage may “dispense 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.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 for breach of fiduciary duty and outrageous conduct, and an equal 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.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 that 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 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 Supreme Court of Florida recognized that 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 while it is “usually applied to such conduct by doctors, lawyers, and accountants. . . . 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.

But even within such well-regulated, established and universally recognized professions as law, medicine, or accountancy, the term is used gingerly. Picard cautioned that “the scope of its meaning is not clear. Until the term is adequately defined by the legislature or the courts, its use is best avoided.”⁸⁰

If the generality of the term “malpractice” troubles experts contemplating accepted professions, it should come as no surprise that 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.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 that clergy malpractice raises vexatious questions, one of which is the definition of malpractice itself.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.”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 that may well be as unconstitutional in Canada as it is in the United States.⁸⁶

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.

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 that 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 \$5,000.⁸⁸ The case has not yet been adopted as authority for allowing clergy malpractice by any other court⁸⁹ and was not appealed.⁹⁰

In the unusual facts of this case, the act complained of was not ignoring or hiding the 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 that 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. There 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 on the exact type of “state-sponsored inquiry” that 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

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 mem-

bers. 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 to which 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 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 sorts 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 that in 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 that a religious organization 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 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 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 “wilful 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.

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.¹⁰⁶

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. The court adopted *Schmidt*¹⁰⁷ and dismissed the case.¹⁰⁸

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 that 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.

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 cases, 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*.

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, an intermediary appeal court twice, and a state Supreme Court once. Each of the five trial and appeal proceedings resulted in fulsome reasons.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 encouraged him to maintain his pastoral counsellors as his sole advisors. 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.

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

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 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 foreseeability and certainty of harm, the closeness of the connection between the conduct and injury, the 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 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 foreseeability 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 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 foreseeably 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. The third reason was that the appeal court, as is usual, deferred to the principle that appellate courts respect 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 United States

Supreme Court 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.

The effect of the *Nally* decision was powerful. In no case that followed in various U.S. jurisdictions has any appeal court ever accepted that 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 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 succinctly summarized the problematic nature of the tort of clergy malpractice.¹³⁴

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" as "it would be redundant to simultaneously hold the cleric liable for 'clergy malpractice'."

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.

As to vicarious liability against the Seventh Day Adventist Church itself, the court considered the doctrine of *respondeat superior*. 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 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 in *Scott*,¹⁴⁰ a Sunday school teacher had assaulted a minor. 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. In *obiter* the court observed that it required plaintiff plead operative facts with particularity, which results in the state becoming involved in "serious entanglement problems" under the First Amendment, so therefore "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 12-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 12 years old until she was 41 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. The court concluded that to “the extent that the plaintiff’s 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 defendant’s 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’s¹⁴⁵ article published in the *Valparaiso Law Review*, one of defendant’s counsel in *Nally*). After noting “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,” it concluded:

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 that 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 also regarded “this is as unconstitutional as it is impossible.”¹⁴⁷

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 instil 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 concluded as to *respondeat superior* that it would be "inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop."¹⁴⁹

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 Illinois 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.¹⁵¹ So, by 1999, the Court of Special Appeals of Maryland was able to conclude that "no other courts in the United States (including New Jersey) have recognized the tort of clergy malpractice."¹⁵²

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 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 “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 *Odenhall*,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*.

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 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 that “Providing faith-based advice or instruction, without more, does not create a special relationship. . . . Because there is no special relationship, there is no duty” and plaintiff’s institutional negligence claims were not allowed to proceed.

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 as part of that activity itself?

Secular issues (such as negligent clearing of sidewalks, or in operation of a motor vehicle) can “be framed for the trier of fact in secular rather than

sectarian terms”¹⁵⁹ (sometimes described as the “neutral-principles doctrine”¹⁶⁰).

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 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 article¹⁶³ 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. The Court tersely decided, “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 Episcopal Diocese, and the 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 church and bishop asked the court to overrule its 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 Episcopal 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 Episcopal Church had negligently supervised the offending priest, knowing that he had a propensity towards sexual abuse under the "neutral-principles" doctrine.¹⁷¹

In summary, in the *Moses* case, the Supreme Court of Colorado had the opportunity to reconsider its 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 tort of negligent supervision. The court considered limited evidence to establish the hierarchical 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 that 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 Colorado Court of Appeal, 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, that expert witnesses regarding standards for professional counselling should not have been admitted, and that the jury awards were duplicative.

The Court of Appeal's instruction was that the jury should have been instructed that if the

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* it 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 it 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 Colorado Court of Appeal in *Bohrer*.¹⁷⁶ This case involved the United Methodist Church, which was sued after a minister commenced a sexual relationship with a minor during counselling of the minor.

By now the principles had 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 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 (excommu-

nication 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:

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 section 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 lawsuit 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.

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 its 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 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 tortfeasor priest, the Supreme Court applied the test adopted by it in *Bazely*¹⁹² for determining if intentional torts should be vicariously imposed. 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. It ruled, “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 that had been illuminated by *obiter* opinions in the *Schmidt* and *Pritzlaff* cases and ultimately adopted those decisions.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.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 refused to impinge upon it.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 determining liability of churches for negligent supervision are similar 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 have 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.

III. 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. *For a discussion of this topic, please refer to the unabridged version of this article, available online at www.thephilanthropist.ca.*

IV. Conclusion

Inevitably, the increase in litigation and changes in attitude towards religious institutions result in the clash of values discussed in this article. 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 section 2 of the Charter that 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 that 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.²⁰⁶

Similar tests are applied in Canada.²⁰⁷

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 that 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.²⁰⁸

Malpractice actions against the clergy open a "Pandora's box" that is as unconstitutional in Canada as it has been found to be 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.²⁰⁹ (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 members cannot be treated in the law as though they were common law employees.²¹⁰

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*²¹¹ and *Allen*²¹² 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. 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, that 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.²¹³

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.²¹⁴

NOTES

1. Brian Bergman, "Returning to Religion" *Maclean's* (April 1, 2002) at 48.
2. Reginald W. Bibby, *Restless Gods: The Renaissance of Religion in Canada* (Toronto: Stoddart, 2002) at 25.
3. *Black's Law Dictionary*, 5th ed. (West Pub., 1979) at 1161.
4. Bibby, *supra* note 2 at 57.
5. Ian R. Stauffer & Christian Bourbonnais Hyde, "The Sins of the Fathers: Vicarious Liability of Churches" (1993) 25 *Ottawa Law Review*.
6. Mark A. Weitz, *Clergy Malpractice in America* (Lawrence, Kansas: University Press of Kansas, 2001) at 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.
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. (Oxford University Press, 1946) at 706.
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" (1998) 77 Canadian Bar Review 73.
13. Flannigan, *ibid.* at 83.
14. *Residential Schools (Re)* *supra* note 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* note 3 at 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 ABQB 578; 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.
18. *Byrd et al v. Faber* 57 Ohio St.3d 56, 565 N.E.2d 584 (1991).
19. *Ash*, *supra* note 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* fn 17; *Mott-Trille*, *supra* note 17.
21. *Hofer*, *supra* note 20.
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* note 9.
25. *Saumur*, *supra* note 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 note 20; [1940]3D.L.R.670.
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* note 15.
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.
31. *United States Constitution*, Amendment I.
32. *Worth*, *supra* note 17.
33. *Cairns*, *supra* note 22.
34. *Charter*, *supra* note 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* note 9.
37. *Braunfeld v. Brown*, 366 U.S. 599 (1961).

38. Later in this article, 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. *Ibid.* at para. 52.
41. *Ibid.* at para. 55.
42. *Edwards Books*, *supra* note 9.
43. *Big M*, *supra* note 9.
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* note 35.
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* note 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) at 1.
48. *Ibid.* at 97.
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) at 147.
52. *Bennett*, *supra* note 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.
54. *Hill v. Church of Scientology of Toronto* [1995]S.C.J.No.64;[1995] 2 S.C.R. 1130; (1995) 240.R.(3d)865; (1995)126D.L.R.(4th)129; (1995)184N.R.1; (1995)J.E.95–1495; (1995) 840.A.C.1; (1995)25C.C.L.T.(2d)89; (1995)30C.R.R.(2d)189.
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.
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 para.189–191.

61. Cairns, *supra* note 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.
63. *Deiwick v. Frid* [1991]O.J. No. 1803.
64. Cairns, *supra* note 22.
65. *Fleming*, *supra* note 47 at 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)1560.A.C.201; (2002)20B.L.R.(3d)165; (2002)35C.C.L.I.(3d)1; [2002]1L.R.I-4048 *Hill v. Church of Scientology of Toronto*, *supra* note 54.
68. *Petten v. E.Y.E. Marine Consultants, a division of CSE Marine Services Inc.* [1998] N.J. No. 371 para. 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)97 para.75; (2000)138O.A.C.201; (2000)42C.P.C.(5th)65.
69. S.M.Waddams, *The Law of Damages* (Toronto: Canada Law Book 1st ed.1983) para. 998.
70. Bennett, *supra* note 14; *C(M) v. M(F)*, *supra* note 52.
71. *Norman v. Westcomm International Sharing Corp.* [1997]O.J. No. 4774 para. 150; (1997) 46O.T.C.321.
72. Waddams, *supra* note 69 at para. 979.
73. See notes 58 and 60.
74. *Fleming*, *supra* note 47 at 32.
75. See note 66.
76. *Destefano*, *supra* note 66.
77. *Bohrer*, *supra* note 66.
78. *Doe v. Evans* 814 So.2d 370 (2002).
79. *Black's*, *supra* note 3 at 864.
80. Ellen I. Picard, *Legal Liability of Doctors and Hospitals In Canada*, 2nd ed. (Toronto: Carswell, 1984) at 28.
81. *Mombourquette*, *supra* note 53.
82. *Ibid.* at para. 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* note 22.
85. *Schmidt v. Bishop* 779 F.Supp. 321 (1991) para. 8, 9.
86. *Franco v. The Church of Jesus Christ of Latter-Day Saints* 21 P.3d 198 (2001) para. 23; see also *F.G. v. MacDonell* 696 A.2d 697, 703(1997).

87. *Cairns*, *supra* note 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 para. 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.
91. *Cairns*, *supra* note 22 at para. 176.
92. *Ibid.* at paras. 56, 57, 62, 65.
93. *Edwards Books*, *supra* note 9.
94. *Cairns*, *supra* note 22 at para. 177.
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* note 22 at para. 177.
97. *Franco v. The Church of Jesus Christ of Latter-Day Saints*, *supra* note 88.
98. *Cairns*, *supra* note 22 at para. 130.
99. *Ibid.* at para. 134.
100. *Deiwick*, *supra* note 63.
101. *Allen*, *supra* note 88.
102. *Allen*, *supra* note 88 at para. 309.
103. *Ibid.* at para. 311.
104. *Mombourquette*, *supra* note 53.
105. *Jones v. Trane* 153 Misc. 2d 822 (1992).
106. *Mombourquette*, *supra* note 53 at para. 18.
107. *Schmidt*, *supra* note 85.
108. *Jones*, *supra* note 105.
109. *Ibid.*
110. *Destefano*, *supra* note 66.
111. *Glendinning*, *supra* note 12 at paras. 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* note 95.
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).
116. *Weitz*, *supra* note 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. *Ibid.* at 17.

118. *Ibid.* at 143.
119. *Ibid.* at 136.
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 Entities, 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 Sanctuary Crumbles: The Future of Clergy Malpractice in Michigan" (1997) 74 University of Detroit Mercy Law Review 493.
121. Ericsson, *ibid.*
122. Baker, *ibid.*
123. Weitz, *supra* note 6 at 206; Nally, *supra* note 115 at para. 5(e); Brooks, *supra* note 120 at 1300.
124. *Mason v. Peaslee* (1959) 173 Cal.App.2d 587,588.
125. *Fleming*, *supra* note 47 at 99.
126. *Nally*, *supra* note 115 at para. 4.

127. *Nally*, *ibid.* at para. 5.
128. *Ibid.*
129. *Ibid.*
130. *Ibid.*
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.
133. *Strock*, *supra* note 83 at para. 3.
134. *Ibid.*
135. *Byrd et al v. Faber* 57 Ohio St.3d 56, 565 N.E.2d 584 (1991) para. 1.
136. *Strock*, *supra* note 83.
137. *Byrd*, *supra* note 35 at para. 4.
138. *Fleming*, *supra* note 47 at 348.
139. *Milla v. Roman Catholic Archbishop of Los Angeles* 187 Cal. App. 3d 1453 (1986).
140. *Scott v. Central Baptist Church* 197 Cal.App.3d 718 (1988).
141. *Byrd*, *supra* note 135 at para. 4.
142. *Ibid.* at paras. 7–8.
143. *Schmidt*, *supra* note 85; *Schmidt* was specifically not followed in *Cairns*, *supra* note 22.
144. *Ibid.* at paras. 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* note 120.
146. *Schmidt*, *supra* note 85 at paras. 6–8.
147. *Ibid.* at para. 9.
148. *Ibid.*
149. *Ibid.* at para. 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) para. 6.
152. *Ibid.*
153. *Teadt v. St. John's Evangelical Church* 237 Mich. App.567 (1999).
154. *Franco*, *supra* note 86.
155. *Ibid.* at para. 23.
156. *Odenthall*, *supra* note 84.
157. *Richelle L. v. Roman Catholic Archbishop* 106 Cal. App. 4th 257, 270 (2003).

158. *Meyer v. Lindala*, 675 N.W.2d 635 (Minn. App. 2004), cert. denied, (Minn. May 26, 2004) para. 640.
159. *Richelle*, *supra* note 157.
160. *Moses v. Diocese of Colorado* 863 P.2d 310 (1993)n.15.
161. *Destefano*, *supra* note 66.
162. *Ibid.* at para. 7.
163. *Ericsson*, *supra* note 120.
164. *Destefano*, *supra* note 66 at para. 27.
165. *Ibid.*
166. *Moses*, *supra* note 160.
167. *Mombourquette*, *supra* note 53.
168. *F.S.M. v. Clarke* [1999] B.C.J. No.1973; [1999]11W.W.R.301.
169. *Destefano*, *supra* note 66.
170. *Moses*, *supra* note 160 at n.28
171. *Ibid.* at n.15
172. *Bear Valley Church of Christ*, *supra* note 66.
173. *DeBose*, *supra* note 66 at Sec.II.A.
174. *Bear Valley Church of Christ*, *supra* note 66 at Sec. II.A.2.
175. *Ibid.* at Sec. III.C.
176. *Bohrer*, *supra* note 66.
177. *Berry*, *supra* note 38.
178. *Cairns*, *supra* note 22.
179. *Cairns*, *supra* note 22 at para. 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* note 22 at para. 130.
182. *Berry*, *supra* note 38 at 4–5.
183. *Cairns*, *supra* note 22 at para. 130.
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* note 184 at para. 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* note 184 at paras. 14, 16, 23, 52.
188. See *K.L.B.*, *supra* note 184, *E.D.G.*, *ibid.* 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.
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* note 168.
191. *Bennett*, *supra* note 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.
193. *O'Dell*, *supra* note 112.
194. *Evans*, *supra* note 78.
195. *DeBose*, *supra* note 66.
196. *Grabrian*, *supra* note 66.
197. *Bohrer*, *supra* note 66.
198. *Moses*, *supra* note 160.
199. *Pritzlaff v. the Archdiocese of Milwaukee* 194 Wis.2d 302 (1995)par.11
200. *Schmidt*, *supra* note 85.
201. *Swanson v. The Roman Catholic Bishop of Portland* 692 A.2d 441 (1997).
202. *Ibid.* at para. 10.
203. *Ibid.* at para. 12.
204. *Ibid.* at para. 13.
205. *Ibid.*
206. *Evans*, *supra* note 78.
207. *O'Dell*, *supra* note 112; *Bennett*, *supra* note 14; *.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.
208. *Schmidt*, *supra* note 85 at paras. 8–9.
209. *Franco*, *supra*, note 86 at para.a23; see also *F.G. v. MacDonell*, *supra* note 86.
210. *Schmidt*, *supra* note 85 at para. 12.
211. *Cairns*, *supra* note 22.
212. *Allen*, *supra* note 88.
213. *Olmstead v. United States*, 277 U.S. 479 (1928).
214. 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.