2024

A Shift to Neutral Principles: Why Tort Liability is Growing for Religious Institutions

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I. Introduction

The paper will describe the trends in constitutional interpretation of the Religion Clauses of the First Amendment[1] with regard to the imposition of tort liability on religious institutions, with particular emphasis on torts arising in the context of clergy sexual abuse. When one considers both older and more recent case law, it is clear that the circumstances where immunity exists are still far-reaching but gradually shrinking over time. However, the likelihood of finding a religious institution liable varies greatly depending on the conduct alleged and the claims brought by plaintiffs.

The Religion Clauses prevent any civil court from entertaining claims that effectively ask the court to answer a "religious question" or make an ecclesiastical determination.[2] If any part of tort litigation involves ecclesiastical principles or authority under the religious institution, courts must take extreme care to avoid delving into matters of religious belief.

The case law in this area demonstrates a gradual, but significant shift away from church immunity over the last few decades, as religious organizations become more intertwined with secular life and therefore begin to accept the norms of transparency and accountability to church members and society. While tort liability used to be limited because of concerns over religious questions, it is more common now because many courts have found a way to adjudicate a case while avoiding those religious questions.

Given the tug between church autonomy and neutral principles, courts are wary of doctrines that could involve unavoidable religious questions. For this reason, in claims regarding sexual abuse, plaintiffs succeed when they can demonstrate the applicability of neutral

[1] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I.
[2] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 711 (1976).

principles. In contrast, however, when faced with claims of negligent counseling or clergy malpractice, courts are rightly concerned about adjudication of religious questions. Plaintiffs have mixed levels of success in bringing claims for negligent hiring, retention, and supervision. In these scenarios, the court will often look to the relevant standard of conduct regarding the unique relationship between the church and its employee and then determine whether any question of religious or spiritual doctrine may be implicated.

Likewise, in employment-related suits brought by former employees of the church, the court will look to the nature of the employment relationship, as well as the specific actions taken by the defendant institution and whether they involve any religious doctrine.

Given the complex nature of this issue, this paper will parse the various theories underlying tort liability for religious institutions and the different types of tort liability they face. Part II will discuss the constitutional foundations of both theories of church autonomy and neutral principles in analyzing the Religion Clauses. Part III will discuss torts involving sexual abuse where liability has been imputed to the religious institution, including those claims where plaintiffs are generally successful and those where they are often not.

II. Constitutional Framework: Church Autonomy and Neutral Principles

The Religion Clauses of the First Amendment explicitly prohibit the government from making any law "respecting an establishment of religion or prohibiting the free exercise thereof."[3] The Supreme Court has long recognized the importance of these Clauses in providing autonomy for religious institutions. The Establishment Clause, applied to the states through the Fourteenth Amendment, does not merely create a wall of separation between church and state, but also mandates accommodation of and prohibits hostility toward religion and religious

[3] U.S. Const. amend. I, § 1.

groups.[4] Employing this Clause, the Court has held that the government "may not coerce anyone to support or participate in religion or its exercise," or attempt to establish a state religion or religious faith.[5] In the past, the Establishment Clause has been interpreted to prevent state action that lacks a secular purpose or a principal effect that either advances or inhibits religion,[6] but more importantly for this subject, it is aimed preventing excessive entanglement of government with religion.[7]

The Free Exercise Clause does not give unchecked immunity to religious institutions and their actions, however. The government maintains its inherent police power to regulate activities, including religious activities, in a reasonable manner and in the interest of "public safety, peace, comfort or convenience."[8] Even when courts apply strict scrutiny to burdens on religious practice, the government may justify those burdens with laws that are narrowly tailored to advance important state interests.[9]

The Court has gradually developed a doctrine of church autonomy arising from both the Establishment and Free Exercise Clauses. The Clauses together permit religious institutions to create their own rules and regulations for discipline and governance, and courts must give significant deference to the institutions' adjudication processes when disputes in these settings arise.[10] The concept of church autonomy guided James Madison, a strong proponent of the First Amendment, who opined that the "scrupulous policy of the Constitution in guarding against a

[4] Lynch v. Donnelly, 465 U.S. 668, 673 (1984).
[5] Lee v. Weisman, 505 U.S. 577, 587 (1992).
[6] Edwards v. Aguillard, 482 U.S. 578, 585 (1987).
[7] Lemon v. Kurtzman, 403 U.S. 602, 624 (1971).
[8] Employment Div. v. Smith, 494 U.S. 872, 902 (1990); Cantwell v. Conn., 310 U.S. 296, 306-307 (1940).
[9] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021); Sherbert v. Verner, 374 U.S. 398, 422 (1963).
[10] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

political interference with religious affairs" prevented the State from disputing the "selection of ecclesiastical individuals."[11]

The Supreme Court first addressed the issue of church autonomy under the Constitution in *Kedroff*, where it recognized that a church's freedom to select its clergy, "where no improper methods of choice are proven," is part of its First Amendment free exercise right.[12] The dispute in this case arose out of competing claims to use a Russian Orthodox Cathedral in New York City by both the Supreme Church Authority in Moscow and the North American sect of the Church, which had concerns about Soviet influence from the Authority.[13] A New York court held that a state law required every Russian Orthodox church to recognize the North American churches as the authoritative, governing body in the state.[14] The Supreme Court reversed, finding that the New York law violated the First Amendment by "pass[ing] the control of matters strictly ecclesiastical from one church authority to another" and intruding into a forbidden area of religious freedom.[15] As later echoed in criticisms of such broad autonomy, Justice Jackson's dissent argued that the mere fact that property is dedicated to a religious use cannot justify "sublimating an issue over property rights into one of deprivation of religious liberty."[16]

Later, a case involving a dispute over the control of the American-Canadian Diocese of the Serbian Orthodox Church brought a similar "religious question" to the Court.[17] Milivojevich brought a civil action in state court because he was removed as bishop as a result of his defiance of the church hierarchy.[18] The Illinois Supreme Court's holding aimed to reinstate him as bishop

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[11] Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *reprinted in* 20 RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY 63-64 (1909).
[12] Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 116 (1952).
[13] *Id*.
[14] *Id*. at 96-97.
[15] *Id*. at 119.
[16] *Id*. at 130.
[17] Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich, 426 U.S. 696 (1976).
[18] *Id*.

on the grounds that his removal violated the Church's laws and regulations, but the U.S. Supreme Court reversed.[19] The Court held that the lower court's inquiry into whether the Church had followed its own procedures violated the constitution by resolving "quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals" of the Church.[20] Citing *Kedroff*, the Court emphasized the importance of allowing religious bodies freedom from state interference in matters of faith and doctrine, along with matters of church government.[21] Both cases involve questions that are much more explicitly religious than some of the later, more successful employment-related claims, but the Court's writing on church autonomy is helpful to understand the changing interpretations over time.

In a similar vein, the Religion Clauses' theory of church autonomy has led the Court to invalidate statutes which may raise religious questions through their enforcement. In *NLRB v. Catholic Bishop of Chicago*, the Court held that the National Labor Relations Act[22] violated the First Amendment in its grant of jurisdiction over teachers in religious schools who teach both religious and secular subjects.[23] The National Labor Relations Board had previously held that it would exercise jurisdiction over religious sponsored organizations that were not "completely religious," but instead only "religiously associated."[24]

The Board found that the schools in this case were not "completely religious," as they both sought to provide a traditional secular education which was oriented to the tenets of the Catholic faith.[25] Ultimately, the Court, concerned over entanglement, held that the Board could not exercise jurisdiction over teachers in church-operated schools without a clear expression of

[19] *Milivojevich*, 426 U.S. at 708.
[20] *Id*. at 720.
[21] *Id*. at 721-722.
[22] 29 U.S.C. §§ 151-69.
[23] NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).
[24] Roman Catholic Archdiocese of Baltimore, 216 N. L. R. B. 249 (1975).
[25] *NLRB*, 440 U.S. at 493.

intent from Congress.[26] Calling back to *Lemon*, the Court here asserted that government aid channeled through teachers in this setting "creates an impermissible governmental entanglement" in church affairs.[27]

As the Court's jurisprudence in this area evolved, there were new challenges which asked how far the doctrine of church autonomy could stretch to protect religious institutions. In *Hosanna-Tabor*, the Court decided that when an employee serves a ministerial role in a religious institution, that employee is precluded from suing the institution under anti-discrimination laws. This "ministerial exception" was grounded in the idea that "requiring a church to accept or retain an unwanted minister" intrudes not only upon the church's employment decisions, but deprives "the church of control over the selection of those who will personify its beliefs."[28] The Court held that the exception did apply here because although the individual in question (Perich) was not the head of a religious congregation, she was "held out as a minister," had a significant degree of formal religious training, and was commissioned as a minister by her congregation, among other factors considered.[29] The Court noted that, as a source of religious instruction, Perich was an instrumental player in conveying the Lutheran faith.[30] As such, she could not sue her church employer for violating anti-discrimination laws.

While the Court in *Hosanna-Tabor* refused to adopt a rigid formula for deciding when an employee qualifies as a minister, it outlined several factors which were utilized in this case's determination. The Court granted the church deference and autonomy in this case, but not before conducting a thorough examination of the specific facts to determine whether the individual

[26] *Id*. at 507.
[27] *Id*. at 501.
[28] *Id*. at 188.
[29] *Id*. at 191.
[30] *Id*. at 174.

qualified as a minister and should be exempt from the employment challenge.[31] An earlier Court may have recognized that Perich was a commissioned minister, deemed this an inherently ecclesiastical dispute, and dismissed the case for lack of jurisdiction.

A similar analysis to *Hosanna-Tabor* occurred a few years later when the Court granted teachers at a Catholic elementary school the ministerial exception even though they were not given the title of minister and had less religious training.[32] In *Our Lady of Guadalupe*, the Court simplified the test to determine who is a minister, asking only whether the employee performs a religion function, simplifying the multi-factor test employed in *Hosanna-Tabor*.[33] In simplifying the test, the court maintained the importance of the ministerial exception, which allows the church to prevent a "wayward minister's preaching, teaching, and counseling" which does not align with the church's tenets.[34]

While recognizing a religious institution's right to autonomy provided by the Religion Clauses, the Court sometimes uses a theory of "neutral principles of law" to resolve a dispute in a religious setting. In *Jones v. Wolf*, the U.S. Supreme Court resolved a dispute over the ownership of church property between a local church and its hierarchical church organization.[35] In the past, the Georgia Supreme Court had applied a theory of "implied trust," where "the property of a local church affiliated with a hierarchical church organization was deemed to be held in trust for the general church," so long as the general church did not substantially abandon their tenets of faith and practice.[36] In that case, *Presbyterian Church v. Eastern Heights Church*, the Georgia Supreme Court held that this resolution created too much entanglement between the

[31] *Id*.
[32] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
[33] *Id*. at 2068.
[34] *Id*. at 2060.
[35] Jones v. Wolf, 443 U.S. 595, 597 (1979).
[36] *Id*. at 599.

church and the court, reversing the lower decision.[37] Here, in *Jones*, the U.S. Supreme Court determined that it could resolve this dispute on the basis of neutral principles without offending the First Amendment or the authority of the hierarchical church's tribunal.[38]

In *Jones*, the Court outlined some of the advantages to application of the neutral-principles approach: It is "completely secular in operation," yet "flexible enough to accommodate all forms of religious organization and polity."[39] As applied in *Jones*, the Court was able to use well-established concepts of trust and property law which have succeeded outside of the religious context for decades.[40] The application of neutral principles allows the parties to share in the benefits of the private law system – "flexibility in ordering private rights and obligations to reflect … intentions."[41] The neutral principles approach may sometimes actually allow a religious organization a stronger guarantee that disputes over ownership of church property will be resolved as desired.[42]

Some of the disadvantages of neutral-principles application have to do with the level of entanglement that still exists between the church and the court system. In many cases, the court may be required to examine certain religious documents, like a church constitution, to ascertain language regarding ownership and property rights.[43] The *Jones* Court notes that there may also be situations where the deed, corporate charter, or other legally binding document may incorporate religious concepts in the provisions regarding ownership of property.[44] Through the application of neutral principles in adjudicating a dispute, a court must still refrain from

[37] *Id*. (citing *Presbyterian Church v. Eastern Heights Church*, 225 Ga. 259, 167 S. E. 2d 658 (1969)).
[38] *Jones*, 443 U.S. at 597.
[39] *Id*. at 603.
[40] *Id*.
[41] *Id*.
[42] *Id*. at 603-604.
[43] *Id*. at 604.
[44] *Id*.

resolving a religious controversy. While the issue in *Jones* revolved around property ownership, the neutral-principles approach has been applied in various settings, as illustrated by later, lower court decisions based on tort. The balance between applying a neutral principles approach and any problems that may arise in the process usually weighs in favor of application.[45]

Although the Court has at times spoken on employment disputes within the church – often refusing to mediate such disputes to avoid interpretation of the church's belief system – this paper focuses more specifically on the categories of cases brought which are (1) based in conduct rather than belief and (2) result in some sort of harm to a third party.[46] These cases involve claims, brought by those who have suffered harm, against religious institutions or individuals. The previously mentioned cases outlined the Court's jurisprudential shift from a theory of "church autonomy", where religious institutions are granted more deference under the Religion Clauses, to a "neutral principles" approach, applied in some circumstances where a seemingly "religious question" may be adjudicated appropriately using neutral principles of law.

Justice Rehnquist has stressed the distinction between "matters of ecclesiastical cognizance … in adjudicating intrachurch disputes" and the disputes on topics such as tort liability as seen in the cases discussed below.[47] He noted the constitutional limitations that exist on court inquiries into the former, while firmly stating neither he, nor the Court, has "suggested that those constraints similarly apply outside the context of such intraorganizational disputes."[48] The Court has long held this belief, holding that it could not imply that "under the cloak of religion, persons may, with impunity, commit frauds upon the public."[49]

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[45] *Jones*, 443 U.S. at 604.
[46] Marci A. Hamilton, *Foundations of Church Autonomy: Article: Religious Institutions, the No-Harm Doctrine, and the Public Good*, B.Y.U. L. REV. 1099, 1114 (2004).
[47] General Council on Fin. & Admin. v. Cal. Superior Court, 439 U.S. 1369, 1372 (1978).
[48] *Id*.
[49] Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

As illustrated in the following cases, conflict most often arises in this space when congregants bring suit against religious institutions and clergy for their alleged misconduct. Although it appears that much of this conduct is protected by the First Amendment so tort actions are barred, this paper points to the trend that constitutional protection from tort claims against religious institutions is slowly eroding and will continue to do so in the coming years. The trend is outlined through analysis of case law involving tort claims against religious institutions for allegations of clergy sex abuse.

There are several reasons for the erosion of this First Amendment protection. First, consider that tort litigation against religious organizations has increased in recent years, accompanied by a growing awareness of clergy misconduct and resulting sympathy for those harmed.[50] The process is "self-generating: the perceived willingness of some victims to bring suit may prompt still others themselves to bring suit," especially as more plaintiffs prevail.[51] Furthermore, suits against religious organizations are usually brought in state court rather than federal, so there is not so great a looming constitutional presence on judgments decided in this area.[52] Finally, it is important to consider the evolving constitutional framework for tort cases and the increasing trend under the Religion Clauses toward formal neutrality, resulting in the application of general principles to tort claims, even in the religious space.[53]

Yet the reluctance to adjudicate remains. The prohibition on adjudicating a tort claim against a religious institution can often be triggered by even the slightest implication of a religious question, which the court would have to answer in order to properly adjudicate the

[50] Scott C. Idleman, *Article: Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219 (2000).
[51] *Id*. at 241.
[52] *Id*.
[53] *Id*.

claim. Per the Establishment Clause, religious questions are to be avoided to prevent excessive entanglement, which may occur "when judicial review of a claim requires "a searching … inquiry into church doctrine."[54] The question in these cases is often "where to draw the line between the constitutional right to preserve the autonomy of religious organizations … and the individual's interest in vindicating secular rights."[55] Courts have no jurisdiction over spiritual matters or the administration of religious affairs, but still must resolve matters of a religious organization which affect civil, contract, or property rights.[56] Questions which initially seem purely secular can soon become religious when they ask the court to analyze a decision that was part of a religious practice or expression of faith and doctrine.

Courts are similarly hesitant to adjudicate claims against religious institutions and clergy for violating a standard of care under the law of negligence. It is difficult to establish an objective standard of reasonableness (or the reasonably prudent person in the case of the clergyman) because the reasonableness of conduct in a religious setting is "inexorably intertwined with … religious beliefs, and any inquiry into the appropriateness of the conduct would necessarily involve an inquiry into the legitimacy of the underlying religious beliefs.[57] For example, in *Kubala v. Hartford Roman Catholic Diocese*, a plaintiff churchgoer filed suit against her diocese after she fell and suffered an injury at a healing service, but the court refused to apply neutral principles of law because it would be impossible to create a standard of care for religious "healing services."[58] Similarly, adjudication in the space of hiring or supervision of a church

[54] *Milivojevich*, 426 U.S. at 723.
[55] Klagsbrun v. Va'ad Harabonim, 53 F. Supp. 2d 732, 737 (D.N.J. 1999).
[56] *Id*. at 738.
[57] In re Pleasant Glade Assembly of God, 991 S. W.2d 85, 90 (Tex. App. 1998).
[58] Kubala v. Hartford Roman Catholic Diocese, 41 A.3d 351 (2011).

employee may cause excessive entanglement with church operations in order to determine the "reasonable" church procedures in those processes.[59]

The remaining analysis in this paper will focus on the various types on negligence claims brought against religious institutions and clergy, including those issues involving hiring, supervision, and any duty of care that may be owed to religious congregants. The analysis will focus on the more highly publicized clergy sex abuse cases, which have gained significantly more attention in the last two decades, contributing to the erosion of First Amendment protection from tort liability for religious institutions, particularly the Catholic Church.

III. Torts Associated with Sexual Abuse

The evolution of tort liability for religious institutions is illustrated no more clearly than through jurisprudence in the area of sexual misconduct by the clergy, where tortfeasors, leaders of religious institutions, have taken advantage of their authority and taken advantage of their congregants, who are often children. Liability may be imputed to religious institutions for the sexual misconduct of their clergy through theories of respondeat superior and agency, imputed negligence, direct negligence, and negligent hiring and supervision.[60]

A. Successful Tort Claims

Despite robust church autonomy and prohibitions on entanglement, tort claims are generally allowed to proceed against religious institutions for the sexual abuse of minors by their clergy members. This is furthered by an increased cultural awareness of clergy and church misconduct in relationships with both minor and adult congregants. Coinciding with this

[59] Ayon v. Gourley, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998).
[60] Marjorie A. Shields, *Liability of Church or Religious Organization for Negligent Hiring, Retention, or Supervision of Priest, Minister, or Other Clergy Based on Sexual Misconduct*, 101 A.L.R.5th 1 (2023).

awareness is a growing willingness to apply an objective set of principles in negligence claims, regardless of the religious context in which they are brought.

i. Negligent Hiring and Supervision

Theories of church autonomy have prevented claims in the areas of negligent hiring, as well as supervision, retention, and other torts to be discussed in the following subsections. Historically, courts have found that consideration of the hiring policies of religious institutions would "inevitably require examination of church policy and doctrine."[61] Courts note that the choice of a religious institution to select its clergy is "one of the most important exercises of a church's freedom from government control," and government insertion into this process would substantially burden the defendant church.[62] The defendant church's argument "about how their relationships with their priests differ from that of a normal employer-employee relationship" is intended to show a level of entanglement between the church and the court.[63] To delve into the merits of the supervision model offered by the church would cause excessive entanglement beyond the court's authority.[64]

The alleged misconduct which brings about a claim for negligent hiring may have an impact on whether the religious institution is shielded from the tort claim. In *Doe v. Evans*, the Florida Supreme Court held that the First Amendment did not provide protection for a church against liability for harm caused to a third party from the alleged sexual misconduct by a clergy member.[65] The court reasoned that the plaintiff could bring claims for negligent hiring and

[61] *Ayon*, 47 F. Supp. 2d at 1250.
[62] *Id*.
[63] *Id*. at 1250.
[64] *Id*.
[65] Doe v. Evans, 814 So. 2d 370, 371 (Fla. 2002).

supervision because these claims were based in neutral principles of tort law and did not violate either of the Religion Clauses.[66]

In *Doe*, the majority claimed the question at issue was not whether a religious institution could negligently hire and supervise, but whether the seemingly secular conduct which occurred between plaintiff and defendant created an actionable tort.[67] In *Malicki v. Doe*, decided in the same year, the Florida Supreme Court likewise held that a plaintiff who alleged sexual abuse and misconduct could bring claims of negligent hiring and supervision against church defendants based upon claims that the claimant was "fondled, molested, touched, abused, sexually assaulted and/or battered."[68] Following a general theory of negligence as applied in any workplace, the claim alleged that the Church Defendants "knew, or in the exercise of reasonable care, should have known" that the tortfeasor was unsuited for his role based on previous conduct.[69]

Significantly, this holding also overturned a previous Florida framework, "which would allow negligent hiring and supervision cases to proceed only if the underlying conduct of the clergy member was criminal."[70] A version of this framework has historically been used in various states to limit tort liability in hiring and supervision for religious institutions. The Maine Supreme Court, for instance, in *Swanson v. Roman Catholic Bishop*, recognized the limited authority for permitting such claims when the plaintiff alleges that the "church knew that the individual clergyman was potentially dangerous."[71] However, the court refused to allow such a claim when defendant church's priest encouraged a counselee to postpone her marriage ceremony and initiated a sexual relationship with her.[72]

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[66] *Id*. at 373.
[67] *Doe*, 814 So. 2d at 381.
[68] Malicki v. Doe, 814 So. 2d 347, 353 (Fla. 2002).
[69] *Id*. at 352.
[70] *Id*. at 360.
[71] Swanson v. Roman Catholic Bishop, 692 A.2d 441, 445 (1997).
[72] *Id*. at 442.

In the context of negligent supervision, the *Malicki* court stressed that the church defendants did not claim that they failed to exercise control over the alleged tortfeasor because of sincerely held religious beliefs or practices.[73] The Free Exercise Clause was not implicated in adjudicating the plaintiff's negligent hiring and supervision claims because the church's alleged negligence was not based in religious belief or doctrine.[74] The common law for these torts in Florida combined the elements of hiring and supervision, so the court looked to the plaintiff's claims: (1) The church negligently failed to inquired about the tortfeasor's background, qualifications, and reputation; and (2) the church negligently placed the parishioners under the supervision of the tortfeasor, when the church knew or should have known that he had the propensity to commit sexual acts.[75] These allegations form the basic elements of a claim for negligent hiring and supervision, and adjudication of the facts applied to the law does not require excessive entanglement with the church's religious beliefs or doctrine.[76] The court's application of the neutral principles approach allows it to answer a question in a religious setting while avoiding any adjudication of explicitly religious matters.

Sometimes, the court may utilize an outside expert to determine the nature of a church's relationships and avoid further entanglement. In *Moses v. Diocese of Colorado*, the Colorado Supreme Court focused on the scope of employment, holding that a parishioner could bring claims for negligent hiring and supervision, along with breach of fiduciary duty.[77] The *Moses* court employed the opinion of Gary Schoener, an expert in pastoral counseling and treatment of

[73] *Malicki*, 814 So. 2d at 361.
[74] *Malicki*, 814 So. 2d at 361.
[75] *Id*. at 363.
[76] *Id*.
[77] The Moses court held that the church could not be held vicariously liable for the clergyman's sexual acts with the parishioner because he wasn't acting within the scope of his employment. This distinction from the negligent hiring and supervision claims (which were successful) showed the importance of the relationship between the church and the tortfeasor. Moses v. Diocese of Colorado, 863 P.2d 310, 314 (Colo. 1993).

priests who have had sexual contact with parishioners, to determine the structure of the Episcopal Church and its liability in negligent hiring and supervision.[78] Schoener testified that the Diocese had "substantial control over hiring, compensation, counseling by priests, and discipline of priests," and concluded that the Diocese was represented by its bishop.[79] This information was used by the court to form its opinion that "every part of the form of the priest's counseling is regulated by the Diocese," and the jury found there to be an agency relationship between the tortfeasor and the Diocese, so the Diocese could be liable for negligent hiring and supervision.[80]

Later, in *Roman Catholic Diocese of Jackson v. Morrison*, the Mississippi Supreme Court refused to shield a defendant church administration from liability for negligent hiring, retention, and supervision of a priest based on the Free Exercise Clause.[81] In *Morrison*, the plaintiff's sons were sexually molested by their parish priest, and Morrison informed the Diocese, which allowed the priest to stay for over a year, where he continued to abuse children.[82] The Diocese moved to dismiss Morrison's claims for negligent hiring, retention, and supervision on the grounds of the Religion Clauses and the theory of church autonomy under the First Amendment.[83] Responding to the Diocese's Establishment Clause defense, the court allowed jurisdiction over this matter, stating that "the tort laws of Mississippi are valid, neutral laws which regulate conduct the State is free to regulate," and those laws must be upheld against the

[78] *Moses*, 863 P.2d at 325-326.
[79] *Id*. at 326.
[80] *Moses*, 863 P.2d at 327.
[81] Roman Catholic Diocese v. Morrison, 905 So. 2d 1213 (2005).
[82] *Id*. at 1220.
[83] *Id*. at 1221.

Diocese.[84] The court's decision to apply a neutral-principles approach was based in the decisions of the *Malicki* and *Bear Valley Church of Christ* courts.[85]

The analysis conducted in *Moses* and *Morrison*, along with the shift in perspective from the holdings in *Doe* and *Malicki*, represent a larger trend in jurisprudence toward an application of neutral principles in the torts of negligent hiring and supervision. As stated in *Morrison*, the application of neutral principles allows the church to use civil and criminal laws "to protect children from abuse and allow those who are abused to be compensated for the damage they suffer."[86] Because these laws are neutral and generally applicable, and they have, at most, a de minimis effect on any religious organization's internal matters, many courts favor application in order to bring justice for wronged plaintiffs.[87]

Courts are beginning to realize that, although there may be a religious question implicated in the decision to hire an individual, neutral principles still apply which exist within and outside of the religious context. Did the employer know that the individual they hired was a dangerous person, or should they have known? A question like this can be answered in both secular and religious contexts because a religious employer must have both secular and religious considerations in hiring.

ii. Fiduciary Duties

The issue of fiduciary duty often operates in tandem with those torts of negligent hiring and supervision. Courts have long held the opinion that analysis of whether a fiduciary relationship existed requires a court to determine (1) if there is a duty owed to individuals by their clergy and (2) what the scope of that duty may include, issues which are both fundamentally

[84] *Id*. at 1234.
[85] *Id*.
[86] *Id*. at 1248.
[87] *Id*.

connected to church organization and governance.[88] Following this line of thinking, one approach would require the court's "excessive entanglement in church matters by evaluating religious tenets and internal affairs of the church," in violation of the Establishment Clause.[89] In contrast, however, the *Malicki* and *Doe* courts allowed claims for breach of fiduciary duty along with negligent hiring and supervision. Those courts looked to the alleged misconduct and determined that the misconduct and church's relationship to it were not religious in nature.

How does the nature of the relationship between the tortfeasor and the religious institution affect the success of the claim? In *Moses v. Diocese of Colorado*, the Colorado Supreme Court did not allow a claim for breach of fiduciary duty, holding that a church could not be vicariously liable for its clergyman's sexual acts with a parishioner because the acts did not fall within the scope of his employment.[90] This case demonstrated the importance of an agency or employment relationship in establishing a fiduciary duty, which could not be proven here as the facts were in dispute.[91] Although plaintiffs were unsuccessful in *Moses*, the type of analysis conducted to reach the opinion is that which may have been considered "excessive entanglement" or adjudication of a religious question by an earlier court.

Just as in cases for negligent hiring and supervision, the court can utilize an expert opinion to ascertain the relationship between the tortfeasor and the religious institution. For example, in *Bear Valley Church of Christ v. DeBose*, a mother and son alleged that the son was inappropriately touched by a pastor during his counseling sessions and brought suit for breach of fiduciary duty against the church.[92] Only a few years after deciding *Moses*, the Colorado

[88] Ivers v. Church of St. William, no. C2-98-519, 1998 WL 887536, at 9 (Minn. Ct. App. Dec. 22, 1998).
[89] *Id*.
[90] *Moses*, 863 P.2d at 314.
[91] *Id*.
[92] Bear Valley High Church of Christ v. DeBose, 928 P.2d 1315 (Colo. 1996).

Supreme Court held that a fiduciary duty did exist, the church had breached it, and the trial court had not erred in permitting expert testimony regarding a professional standard for pastoral counseling.[93] The court permitted the testimony because it did not speak to any religious question, and the pastor's choice to use massage in counseling had no biblical justification or underpinning.[94]

The decisions in *Moses* and *Bear Valley*, although handed down by the same Colorado Supreme Court, are significant in that they apply a form of reasoning which was unheard of in the early-to-mid twentieth century. The neutral principles theory applied in these cases allows the court to parse the alleged misconduct and determine what does and does not implicate the First Amendment, rather than just refusing to adjudicate altogether because a religious institution is a party.

B. Unsuccessful Tort Claims

i. Where Charitable Immunity Remains

Religious institutions are further protected from tort liability in certain cases under the theory of charitable immunity. The charitable immunity doctrine was first recognized in the United States in 1876 by the Massachusetts Supreme Judicial Court.[95] Many states eventually adopted the common law doctrine of charitable immunity, borrowed from English common law. Over time, charitable immunity was expanded to include various religious, educational, and philanthropic organizations as exempt from tort liability. Today, most states have abolished the doctrine of charitable immunity entirely, and "impose tort liability on a charitable organization to the same extent as a profit-making institution."[96] These jurisdictions impose the same liability on

[93] *Id*. at 1324.
[94] *Id*. at 1326.
[95] McDonald v. Mass. Gen. Hosp., 21 Am.Rep. 529 (1876).
[96] 24 Personal Injury--Actions, Defenses, Damages § 117.01 (2024).

religious institutions that they would on profit-making institutions, regardless of whether the activity conducted was charitable in nature.[97]

For example, the New Jersey Charitable Immunity Act (1959) bars negligence claims against a nonprofit corporation organized exclusively for religious, charitable, education or hospital purposes.[98] The Act states that no organization or its agents shall be liable to respond in damages to any individual who suffers damages "from the negligence of any agent or servant … where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation."[99] The Act, however, was amended in 2006 to explicitly preclude immunity for those charitable actors who willfully commit an act or omission, including sexual assault and other crimes of a sexual nature."[100] Those organizations otherwise protected by the Act will lose immunity from any claim that "negligent hiring, supervision or retention of any employee … resulted in a sexual offense being committed against a person who is a beneficiary of the nonprofit organization."[101]

A Massachusetts statute similarly limits tort liability, stating that if a tort was committed in the course of an activity directly related to the charitable purposes of a charitable organization, liability may not exceed the sum of twenty thousand dollars.[102] In the context of medical malpractice claims against a nonprofit organization providing healthcare, liability may not exceed the sum of $100,000.[103] In 2022, the State's highest court held that in a clergy sex abuse case, charitable immunity insulated the Bishop from claims for negligent hiring and supervision, but not from claims alleging sexual assault, as the allegations do not involve conduct related to a

[97] *Id*.
[98] N.J. Stat. § 2A:53A-7.
[99] *Id*.
[100] N.J. Stat. § 2A:53A-7.
[101] *Id*.
[102] Mass. Ann. Laws ch. 231, § 85K.
[103] *Id*.

charitable mission.[104] In *Doe v. Roman Catholic Bishop of Springfield*, a plaintiff brought suit for the sexual abuse by church leadership that he allegedly endured as a child in the 1960s.[105] The Massachusetts Supreme Judicial Court held that common law charitable immunity did not apply to the claim alleging sexual assault, as that immunity only extended to wrongdoing "committed in the course of activities carried on to accomplish charitable activities."[106]

Applications of the charitable immunity doctrine in New Jersey and Massachusetts show that the doctrine is evolving over time, and while it once served as a hinderance to those bringing suit for clergy sex abuse, many states have now carved out exceptions for certain torts or abandoned the doctrine altogether. Some proponents of charitable immunity favor the concept because charitable funds are held in trust, and therefore cannot be used to pay tort liability judgments.[107] They would argue that one must look to the purpose of the donor and thus try to avoid diverting funds from their intended purpose. Others would argue that donors cannot used charities to "confer immunity" upon their funds by donating them to a charitable organization, since the funds would not be exempt from tort claims if they continue to hold them as their own.[108]

Proponents of charitable immunity, including those organizations that tend to benefit from it, also contend that the doctrine is good public policy because the possibility of tort liability dissuades potential donors from giving their funds to a charity.[109] Although the doctrine of charitable immunity is applied in varying degrees across the country, religious institutions,

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[104] Doe v. Roman Catholic Bishop of Springfield, 490 Mass. 373 (2022).
[105] *Id*. at 374.
[106] *Id*. at 385 (citing *Keene v. Brigham & Women's Hosp., Inc.*, 439 Mass. 223, 239-240 (2003)).
[107] Samantha K. LaBarbera, *Note: Secrecy and Settlements: Is the New Jersey Charitable Immunity Act Justified in Light of the Clergy Sexual Abuse Crisis?*, 50 VILL. L. REV. 261, 280-281 (2005).
[108] *Id*.
[109] *Id*. at 284.

which function as charitable organizations, have often been excluded from the dwindling number of states which have yet to repeal their charitable immunity statutes.

ii. Clergy Malpractice

Emblematic of the reluctance to adjudicate in this space is the almost universal refusal by courts to recognize a tort of "clergy malpractice." Malpractice requires the establishment of a standard of reasonable care in a particular practice area, and doing so in the religious space would require the interpretation of religious doctrine.[110] The Free Exercise Clause prohibits courts from considering any claims which would require the interpretation of said doctrine, and to adjudicate a clergy malpractice claim would be to do just that.[111] Courts are wary of using this term in a claim, regardless of the underlying conduct alleged, with many courts uniformly refusing to recognize clergy malpractice as a cause of action even in cases of sexual misconduct by a cleric.[112] In a claim resulting from misconduct in church-sponsored marriage counseling, the Minnesota Supreme Court dismissed claims for clergy malpractice, but concluded that a negligence claim against the church and its clergy was not prohibited by excessive entanglement under the First Amendment.[113]

For another example of a court refusing to recognize clergy malpractice, see *Nally v. Grace Community Church*, where a 24-year-old committed suicide after attending pastoral counseling programs, and his parents filed a wrongful death action against the Church alleging "clergyman malpractice" or negligence and outrageous conduct in failing to prevent the suicide.[114] At trial, the plaintiffs provided expert testimony regarding the general standard of care

[110] Amato v. Greenquist, 670 N.E.2d 446, 450 (Ill. App. Ct. 1997).
[111] *Id*.
[112] H.R.B. v. J.L.G., 913 S.W.2d 92, 99 n.4 (Mo. Ct. App. 1995).
[113] Odenthal v. Minn. Conference of Seventh-Day Adventists, 649 N.W.2d 426 (Minn. 2002).
[114] Nally v. Grace Community Church, 763 P.2d 948 (Cal. 1988).

exercised by the counseling community when dealing with a suicidal individual, but the suggested standards are "vague and dependent on the personal predilections of the individual counselor or denomination."[115] The California Supreme Court concluded that the plaintiffs had not persuaded it that the duty to prevent suicide or the general professional duty of care should be extended in this case, stressing the status of the defendant counselor as a non-therapist, non-professional counselor.[116]

The excessive entanglement required to adjudicate this claim makes it a great example for an area in tort law where the court is unwilling to venture now and unlikely to do so in the future. Because the duty of care by a clergyman would be a prima facie element of the tort, the court would be required to instruct the jury of the standard of care for a reasonably prudent Presbyterian clergy, for example.[117] This would then require the court and the jury to consider "the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination."[118] The type of entanglement draws a hard line which the court is unwilling to cross, providing guidance and perspective for the evolution of negligence adjudication in the religious space.

iii. Vicarious Liability

Courts dismiss respondeat superior claims for a number of reasons: (1) Sexual misconduct by clergy members is outside of the scope of employment, so the religious institution cannot be held liable; (2) the claim is time-barred; (3) the parties have settled outside of court; or (4) the clergy member and the religious institution do not have an employment or agency

[115] *Id*. at 953.
[116] *Id*. at 960-961.
[117] Schmidt v. Bishop, 779 F. Supp. 321, 328 (S.D.N.Y. 1991).
[118] *Id*.

relationship.[119] Some courts have held that a church may not be held liable for the torts of its agents under the theory of respondeat superior, but a church may be directly liable for damages resulting from its negligence.[120] However, as the doctrine of charitable immunity has been abandoned in many jurisdictions, a church may be held liable both for both the negligence of its employees who are acting within the scope of their employment and its own negligence.[121]

It is important for the court to determine the scope of the tortfeasor's employment because it will determine which claims can be brought successfully against the religious institution. In *Moses v. Diocese of Colorado*, the Colorado Supreme Court held that the church could *not* be held vicariously liable for the clergyman's sexual acts with the parishioner because he wasn't acting within the scope of his employment. This distinction from the negligent hiring and supervision claims (which were successful) showed the importance of the relationship between the church and the tortfeasor.[122]

IV. Conclusion

The relationship between a religious institution and its member is complicated, and only becomes even more so as the institution provides services that an otherwise secular institution would provide, including education, counseling, and social services. The courts have tried to navigate this complicated relationship with the First Amendment in mind, applying theories of church autonomy and neutral principles, depending on the circumstances. As illustrated in this paper, Supreme Court constitutional jurisprudence on the Religion Clauses has guided lower

[119] Danielle Bolong, *Whether Sexual Misconduct Falls Within Scope of Clergy Member's Employment to Support Theory of Vicarious Liability or Respondeat Superior Under State Law*, 68 A.L.R.7th 2 (2023).
[120] Lewis v. Bellows Falls Congregation of Jehovah's Witnesses, 95 F. Supp. 3d 762, 766 (D. Vt. 2015).
[121] Byrd v. Faber, 565 N.E.2d 584 (1991).
[122] *Moses*, 863 P.2d at 314.

courts to a modern-day approach in which the neutral principles theory is becoming favored over that of church autonomy.

It is worth noting the reaction by religious institutions, particularly the Catholic Church, to changes in immunity and increasing tort liability, especially in cases of clergy sex abuse. In recent laws, many states have enacted so-called "windows legislation," which allows a window of time for victims of child sex abuse to file lawsuits for damages, regardless of whether the statute of limitations has expired for their claim.[123] In 2023, a Louisiana court upheld a statute of this kind, despite opposition from the Diocese of Lafayette, which argued that the statute of limitations prevented the plaintiff's claim, and the "windows" law violated the organization's constitutional rights.[124] Dioceses across the country have lobbied against this type of legislation or even filed bankruptcy in order to avoid large payouts to victims seeking justice for sex abuse suffered by members of the church.[125] Filing bankruptcy can allow an organization to "limit claims and cap liability," which makes it a popular option for private institutions who want to continue operations while avoiding potential lawsuits and discovery.[126]

Since "windows" have opened across the country for victims of child sex abuse, plaintiffs have had widespread success in bringing claims against perpetrators. In California alone, Catholic dioceses have paid out more than $1.2 billion to settle sexual abuse lawsuits and released thousands of confidential documents since the window opened in 2003.[127] As states

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[123] Ramon Antonio Vargas, *Louisiana Court Upholds 'Lookback Window' in Win for Catholic Abuse Victims*, THE GUARDIAN (Aug. 19, 2023), https://www.theguardian.com/us-news/2023/aug/19/louisiana-court-catholic-abuse-victims-ruling.
[124] *Id*.
[125] Hallie Miller & Dylan Segelbaum, *How Institutions Like the Catholic Church Weaponize Bankruptcy*, THE BALTIMORE BANNER (Mar. 17, 2023), https://www.thebaltimorebanner.com/community/religion/archdiocese-of-baltimore-bankruptcy-QNGFGTTMFBEYTGL3RMNFSTHT3Y/.
[126] *Id*.
[127] Laura J. Nelson, *As Deadline Looms: California's Institutions Face Thousands of Childhood Sexual Abuse Claims*, L.A. TIMES (Dec. 28, 2022), https://www.latimes.com/california/story/2022-12-28/child-sex-abuse-lawsuits-california-deadline-ab218.

continue to pass this type of legislation, there will be further opportunities for victims to bring suit against the Catholic Church and other religious institutions where they may have suffered harm. The courts are beginning to recognize that, for many disputes between a religious institution and a private citizen, there are neutrally applicable laws dedicated to resolving the dispute which can be applied without creating excessive entanglement and answering a religious question.