Clergy Malpractice

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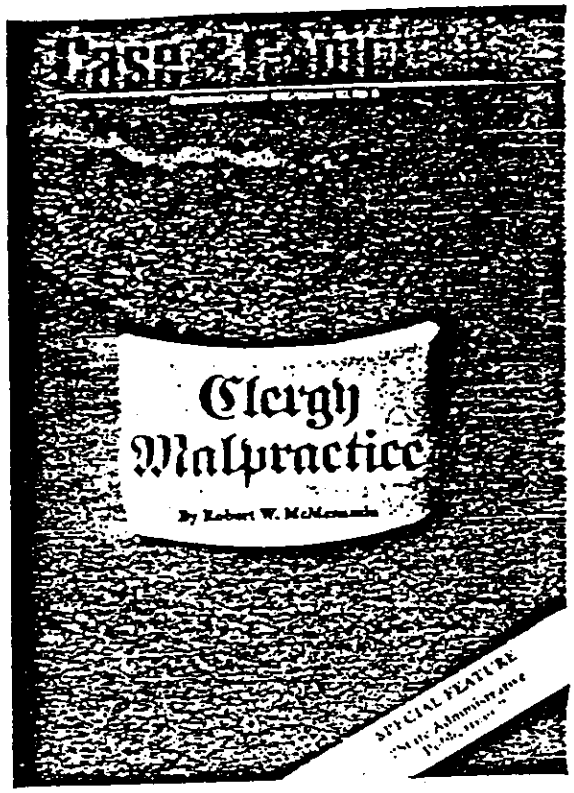

There has been an outpouring of claims and lawsuits against church corporations, church officials, and the clergy as a result of alleged wrongdoing. One hears the buzz words "clergy malpractice," but the malpractice allegation is but a part of the broader field which includes such items as child abuse, embezzlement, inadequate teaching, paternity, and improper counselling. Normally the clergy have little or no financial resources. Under the well-known "deep pocket" theory, claimants are attempting to assert liability upon the part of church organizations.

Clergy malpractice, like most emerging fields of law, is based upon some well-known legal principles and then ventures into the unknown with constitutional laws affecting, and at times limiting, tort actions. The constitutional questions under both state and federal constitutions can at times deny a cause of action because of alleged separation of church and state, and at other times can limit actions to church tribunals.

Background

For a period of many years, charitable groups and organizations including non-profit groups such as churches were immune from liability. In past years, there was also a governmental immunity from suit for fault of government officials. Both immunities are disappearing or in some cases have been completely thrown out. The immunity of the non-profit corporation to save their money for charitable purposes has given way to a social demand for redress and damages of an alleged wrong. The immunity of the government based upon the old concept that "the sovereign can do no wrong" and the fact that damages would come out of the taxpayer's pocket has given way to the same principle of social economic redress. Our law is moving towards the concept of no-fault, which we now find in divorce, worker's compensation, and other fields. Liability without fault is another concept which has emerged as an aspect of social justice.

Many claims against churches and church personnel are met with the defense that under the doctrine of separation of church and state, the church cannot be sued or held liable in a civil court. This alleged defense has been held valid in some older cases and is still valid when claims concern church doctrine, church rituals, and, sometimes, the ownership of church property.

This defense comes from language found in the First Amendment to the United States

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Constitution, which is a part of the Bill of Rights, and States, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Some legal scholars see an inherent conflict in this amendment between the first part of the sentence, known as the establishment clause, and the second part of the sentence, known as the free exercise clause.

Thomas Jefferson is credited with the language of "separation of church and state." The phrase started as a figure of speech in a letter written by him to a minister friend. The so-called separation doctrine was first construed in the United State Supreme Court case of Reynolds v United States (1878) 98 US 145, 25 L Ed 244. The language has been misconstrued ever since that date.

The authority of the civil courts over transgressions of the clergy is fairly well-stated in a 1948 United States Supreme Court case entitled, United States v Ballard (1944) 322 US 78, 88 L Ed 1148, 64 S Ct 882. In this case there was the following language,

> With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of this belief on these subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.

The famous Supreme Court Justice Benjamin N. Cardozo, stated in Adler v Deegan (1929) 251 NY 467, 167 NE 705: "If the moral and physical fibre of its manhood and its womanhood is not a state concern, the question is, what is?" Both quotations indicate simple answers are not available in church/state relations.

The day when the clergy were the only learned members of the community and were considered to be the ultimate authorities on both civil and church matters has long since passed. The honor and esteem in which the clergy were formally held has somewhat diminished and many persons are no longer reluctant to sue the clergy or the church if that person feels that some monetary benefit may result. The dollar amounts of such claims have outpaced inflation and it is no longer rare to see a claim made in the millions of dollars. Some people have the idea that churches are wealthy even though most of their assets are held in land, church buildings, and schools which require additional capital for operations rather than giving monetary return upon capital.

Most members of the clergy do not have substantial monetary resources. The claimants attempt to reach church organizations which hopefully have assets or are covered by insurance policies. The claimants are following a well-known technique known as "the deep pocket" recovery theory. A new development in this field is a fact that most insurance companies are now adding exclusions to their policies which state that such matters as alienation of affections and any type of sexual abuse or activity are not covered by the policy provisions.

Recent Cases

There are many older cases which absolve church and church figures from liability because of lack of foreseeability, denial of agency and lack of duty. There are two recent cases which illustrate some of the problems in this area. A district court judge in El Paso County, Colorado, in July of 1984, dismissed a number of claims filed in the lawsuit of Robert Destefano, Plaintiff v Dennis Grabrian, Edna Destefano, and The Diocese of Colorado Springs, under Civil Action No. 84CV0773. The claims alleged that the defendant priest engaged in a course of intimate sexual relationship with a wife who had come to him for marriage counseling. The case was dismissed on the grounds that the First Amendment to the United States Constitution and some Colorado Statutes indicated that there should not be claims made in a civil court, but

that the parties should have filed claims in the Catholic Church court systems. The case is presently under appeal. The initial result seems contrary to present law.

A trial judge dismissed after close of the plaintiffs' case a lawsuit in Nally v Grace Community Church (1984, 2d Dist) 157 Cal App 3d 912, 204 Cal Rptr 303. This is a case wherein a pastor of the Grace Community Church had given counsel over a period of time to a young man who had suicidal tendencies and who later committed suicide. The parents sued on the basis of clergy malpractice, negligence, and outrageous conduct. The defendants had initially received a summary judgment in their favor on the basis of separation of church and state. The case was appealed.

The appellate court in a lengthy decision determined that the plaintiffs had stated a cause of action and that the case should be sent back for trial. There was a 16 page majority opinion and a 37 page dissenting opinion authored by Justice Hanson. The dissent in this case stated there were insufficient facts to show that this former Catholic was intentionally or recklessly damaged and stated,

> To hold otherwise, under the facts of this case, could have the dilatorius effect of opening a virtual Pandora's box of litigation by subjecting all of the various religious faiths and their clergy (e.g., ministers of the numerous Protestant denominations; priests of the Roman Catholic faith and the various Eastern Orthodox religions; rabbis of the Jewish faith, orthodox, conservative and reform; etc.) to wrongful death actions and expensive full-blown trials simply because they were unsuccessful in their sincere efforts through spiritual counseling to help or dissuade emotionally disturbed members of their congregations, who may be suicide prone, from carrying out such a predisposition.

The Nally case went to the California Supreme Court which refused to issue a written opinion and under a peculiar provision of California law stated that the appellate court decision could not be quoted as authority. It did, however, send the case back for trial. It appears that after the recent dismissal at the trial court level, the case again will climb the appellate ladder.

Many of the church malpractice cases have to do with sexual misconduct, molestation of children, and improper counseling. These are on top of the former cases which were well known to lawyers such as drunken driving, car accidents, fall downs in church buildings and excessive discipline in schools. In addition to the exposure for large money damages, there is the spector of scandal to the church and the possibility of punitive damages for outrageous conduct. There is always the accompanying problem as to how to deal with the news media and what help should be offered to both the victim and the transgressor.

Conclusion

It appears that an open disclosure and discussion of problems is preferable to secrecy. It also appears that immediate help should be offered to any damaged individual. Preventive measures such as careful selection and continuing education of church personnel is indicated by the extraordinary number of tort wrongs committed by church personnel. We are looking at an emerging field of tort law which is expanding at far too rapid a rate. The problem demands a consortium of professions to give help and assistance, both to take care of wrongs and to set up systems and procedures to avoid wrongs in the future. IIII