The Charity Law & Practice Review

EMERGING LIABILITY ISSUES IN NON-PROFIT ORGANISATIONS: AN OVERVIEW

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It is tempting to think of America of past years as a quaint pastoral place — the kind of America that lived in Norman Rockwell's pastoral and village eyes. But, as tempting as that image of American life might be, the reality is and was always far from it. Americans have always been a contentious people. Our institutions, our communities, and even our States all reflect disagreements.[1] It has been the great work of American political civilisation that we have been able to maintain the civic peace in the face of enormous differences of opinion and disagreements about how best to proceed. Possibly we have maintained the peace because we have confidence in the rule of law and an independent judiciary. Americans as a people express their displeasure through litigation.[2]

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This article is based on an address to an American Bar Association conference on liabilities of charities and religious institutions.

1 Massachusetts, for example, was founded by religious dissenters from England; Rhode Island was founded by a group that, in turn, broke with church leaders in Massachusetts. Bernard Bailyn, *et al.*, THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE, 45-46, 51-52, 58-59 (1977).

2 Nicholas P Cafardi, "Giving Legal Life to the *Ex Corde Ecclesiae* Norms: Corporate Strategies and Practical Difficulties," 25 JC & UL 751, 765 (1999) ("Lawsuits, after all, are the way that Americans show their dislike for institutional policy"). *E.g.*, *Woods v St. Charles Parish School Board*, 750 So.2d 1168 (La. App. 2000) (failure to hem pants of band member by volunteer was accident, not abuse of a child).

We have never been all that afraid to let the courts settle our differences whenever we have believed ourselves to have been wronged.

Most commentators would readily concede the enormous outburst of litigation in the last twenty to thirty years. The growth and size of the law reporters as they consume an ever increasing amount of shelf space in our libraries witness that trend. That is the nature of our culture. What is different about this explosion in litigation is that no one now is spared. The revered institutions in our own communities, churches, civic associations, schools, and the like that provide much of the glue for our neighborhoods, towns, and regions, all are now just as likely to be targets of litigation as profit-making enterprises. Certainly, the demise of charitable immunity and the growth of insurance is in part responsible for the ability of persons hurt by these institutions and their agents to sue.[3] However, the number, creativity, and reach of the claims filed against non-profit, community-based organisations is truly remarkable. It is not the task of this paper to debate why this shift has occurred in American society or even what we might be able to do about it. Rather, let us recognize this change in the behaviour of the people who are our neighbours, who attend our churches, send their children to our schools, and belong to the same civic and charitable associations. Let us examine where it is and where it is going.

This article will examine emerging liability issues at the beginning of the 21st Century. This evaluation of liability issues will occur across all kinds of non-profit institutions in our society. My own background is in examining, understanding, and attempting to limit the liability of religious institutions.[4] The trends in litigation against religious institutions in the United States are illustrative in every respect of the kinds of claims which are occurring in other non-profit, civic, and educational institutions. This paper will evaluate both direct liabilities, that is, claims against the institution for its own alleged misfeasance, and derivative responsibility, that is, responsibility alleged against an institution on account of its members, leaders, or other agents, or because of

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3 *See generally* Carl H. Esbeck, "Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations," 89 W. Va. L. Rev. 1 (1986). No one appears safe. *Hayden v University of Notre Dame*, 716 N.E.2d 603 (Ind. App. 1999) (duty to protect season ticket holder from actions of other fans). Interestingly, 20 years ago, *Trial* magazine reported that ministerial "malpractice," the idea that a minister or preacher could be sued for giving someone what turned out to be bad advice, was ludicrous. Maury M. Breecher, "Ministerial Malpractice: Is it a Reasonable Fear?," *Trial* (July 1980). Oh well ....

4 Mark E. Chopko, "Ascending Liability of Religious Entities for the Actions of Others," 17 Am. J. Trial Adv. 289 (1993).

actions of a coordinate or subordinate group in some way affiliated with the institution.[5] The paper will not examine liability against associations based on labour and employment claims, antitrust law, or any number of possible intellectual property claims. It will focus mainly on tort and contract theories, but especially tort theories.

This article will evaluate three kinds of liability cases. First, it will look at general tort liability for the regular activities of non-profit groups, especially associations. These liabilities are normally seen in routine activities or occurrences such as policy-making, accidents, or setting standards. Second, it is seen in novel, liability-spreading theories such as conspiracy, or even broader claims against a range of actors and activities, which may only share a common name. Third, because of the size of the claims and the rapidity with which the law is changing in this area, the paper will give special attention to claims involving sexual misconduct against institutions on account of their own failures, as well as the conduct of members, leaders, or coordinate institutions.

I. Minding Your Own Business

Just the normal activities of associations and non-profit organisations in society create trouble for them. Volunteers driving to school field trips have accidents. Playgrounds may not always be adequately maintained. Child care sometimes goes awry. This is the stuff of an ordinary day's business, and the kind of situation that can occur for any organisation, profit or non-profit. In our work, bad things happen despite our best efforts. That is why we have insurance![6]

For purposes of examining emerging liability issues, however, one needs to look outside the "normal" kinds of risks that occur because of the nature of human involvement, and look to the risks that occur, in some ways, *despite* the best efforts of human involvement. Simply by performing our own operations, our associations and organisations — national, regional, and local — manage to get themselves into trouble. There are now numerous claims that our organisations

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5 Notwithstanding the title of the paper cited in note 4, I believe the term "derivative responsibility" or "derivative liability" is a more accurate description of the liability potential.

6 I would be tempted to diverge here into the numerous problems exacerbated by the failure of our own insurance carriers but I would like to try to confine the paper to a reasonable length.

have failed to have an adequate policy or set proper standards. When we offer evaluations or comment on an aspect of our business or our communities, we now know that someone might claim to be defamed. One example might suffice.

The Motion Picture Association of America rates films. The parents of a fourteen year old boy sued the Association after their son was killed by a thirteen year old who had just viewed (without his parents and without permission) the R-rated film "Dead Presidents". The parents claimed that because of the Association's R rating for excessive violence, the Association owed them a duty when underage children view such films, especially because of the danger of copy-cat violence. The Association prevailed, as the courts found that there was no duty to the plaintiffs. The court held that the benefits of the ratings system, rather, flowed, if at all, to the parents of the young person who saw the movie unaccompanied by an adult, not to "society at large" including the plaintiffs and their decedent.[7] Query — what should be the result when these plaintiffs sue the parents of the shooter, who, in turn, implicate the Association?

Here is a situation where the Association is trying to do good. Its job is to rate films. It offers guidelines and suggestions to society at large. In doing its job, it gets blamed for a tragic death. One might suppose also that, if the makers of "Dead Presidents" or any other film thought that the Association was excessive, they might consider bringing a defamation action against the Association. After all, a rating can make or break business. Welcome to the United States, circa 2000.

Non-profit associations are bound to the same level of care and reasonableness in their actions as are any other kinds or classes of human activity. Let us examine two general examples of the kinds of association actions that might trigger either direct or derivative liability in tort. Both kinds of liability are illustrated in the above example, standard setting (and its failure) and the potential for commercial defamation.

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7 *Delgado v American Multi-Cinema*, 72 Cal.App.4th 1403, 85 Cal.Rptr.2d 838 (Cal. App. 1999).

Standard Setting — Offering Rules, Policy, Guidance, or Recommendations

The case law seems to divide around the degree to which an Association's works are binding versus advisory, intended to convey (or not) a sense of certitude to the consuming public, and was, in fact, relied upon (or not) to the plaintiff's detriment. There is a split of authority at this time whether an association, especially a trade association or other standard setting enterprise, can properly be sued along with a manufacturer, installer, or contractor for harms that are created or occur in the ordinary course of human activity.[8] Suppose a person falls from a ladder doing voluntary work. The volunteer will certainly sue the church or school, perhaps the regional governing body or school board, and maybe the ladder manufacturer. Today, however, the list might include even the association that proposes standards for ladders. The institutional defendants might be called upon to respond to alleged failures to offer adequate supervision, guidance, or recommendations that should prevent situations like this example from occurring. The ordinary law of tort would seem to cover the liabilities of the local entity or even a local association, based on duty and control. But a trade association and its liabilities is an area in which the courts continue to debate.

A recent decision illustrates the potential difficulties. In that case, a minor who developed AIDS after receiving a transfusion of HIV-infected blood during surgery sued the blood bank and the American Association of Blood Banks, as well as the hospitals, the doctors, and everyone associated with this tragedy. The new liability issue is whether the Association should be responsible for its alleged failure to have adopted as its standard, a series of tests and standards that, it was claimed, would have allowed the medical professionals to detect the tainted blood and eliminate it from the supply. The California court held there was no liability.[9] In doing so, it rejected a 1996 New Jersey case on identical facts. The New Jersey court found that blood banks have ceded their responsibility to make individual evaluations of blood to the Association and deferred to the standards set by the Association. Thus, when the Association was promulgating standards, it should have expected those standards to be used

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8 Negligence cases will turn on the question of whether a duty was owed to a consumer or end user. That issue, in turn, reflects the degree of control delegated to an association by its members. *Compare Snyder v American Association of Blood Banks*, 676 A.2d 1036 (N.J. 1996) (duty), *with Meyersv Donnatacci*, 531 A.2d 398 (N.J. Super. Ct. Law Div. 1987) (no duty). *See also King v National Spa and Pool Institute*, 570 So.2d 612 (Ala. 1990).

9 *NNV v American Association of Blood Banks*, 89 Cal.Rptr.2d 885 (Cal. App. 1999).

by individual blood banks and medical centres. It could therefore be held responsible for the failure of those standards.[10]

The California court found, however, through a multi-factor analysis that the Association was simply *proposing* standards, to try to make sense out of a situation on which medical science itself disagreed. Perhaps those peculiar facts explain the result. At the time of the plaintiff's operation, medical science did not agree on what tests should be performed and what procedures should be followed to keep tainted blood out of the blood supply. The California court gave the Association the benefit of the scientific doubt. It evaluated the situation based on the state of knowledge that existed at the time of the plaintiff's surgery, rather than in hindsight.[11] Given the state of uncertainty in scientific knowledge, it was not clear that the protocols contended for by the plaintiff, even if adopted by the Association, would have prevented the harm from occurring.[12] Absent from the California court's analysis was explicit consideration of the fact found determinative in New Jersey, the degree of control ceded by individual members to the association.[13] Rather, implicit in the California decision is the notion that the Association only proposed the standards. Individuals, blood banks and hospitals made their own decisions. Given the number of other claims that involve standard setting or policy setting, the California decision actually points a way toward a more rational response to this area of growing responsibility in tort.

A number of cases target associations (church groups, school boards, playground associations, and the like) for their failure to have adequate standards. By adequate standards, plaintiffs mean standards that would be adopted today, especially in light of their own injury. Most of the time when claims are made for injuries that occurred remote in time to the actual filing of the lawsuit,

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10 *Snyder*, 676 A.2d at 1048-50. *See also Weigand v University Hospital of New York*, 659 NYS 2d 395 (N.Y. Sup. Ct. 1997); Hope Viner Samborn, "Guilt by Association(s)?," 85 ABAJ 38 (March 1999).

11 *NNV*, 89 Cal.Rptr.2d at 898, 901-04, 908. The factors examined were (1) foreseeability of harm, (2) degree of certainty that plaintiff suffered an injury, (3) closeness of the connection between action and injury, (4) moral blame, (5) prevention of future harm, (6) burden on defendant, (7) the consequence to the community, and (8) availability and cost of insurance. *Id.* at 896-905.

12 *Id.* at 900-01.

13 *Snyder*, 676 A.2d at 1041, 1048-50 (association had effective control over members; harm was foreseeable).

plaintiffs contend for current practices. This is especially true in the area of sexual misconduct where claims are often filed ten, twenty, or more years after the misconduct. Claims will persist that associations did not do enough to prevent harm, by failing to adopt adequate safety or other standards. The New Jersey result would seem to say that the liability question would turn on the degree to which the action of the group is binding on others. The California result would turn on the degree of certainty associated with the standard.

Related to this question are a number of claims based on "failure to warn" of a dangerous situation. Those claims generally are not as easy to maintain by plaintiffs as the failure of standards.[14] There are numerous questions that would need to be evaluated in examining a failure to warn claim, in any event. Associations may or may not have assumed an obligation to make information available about a dangerous situation.[15] One would have to evaluate the degree to which the association or group assumed the responsibility to advise *everyone else* about a special risk and whether, by implication or expression, that duty extended to the general public.[16] One would also have to evaluate whether there was any express detrimental reliance on the action or inaction of the association or group.[17] Nonetheless, real persons, suffering real physical injury may sometimes recover, even when those claiming only economic harms may not.[18]

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14 *See Meyers*, *supra* note 8.

15 *Friedman v F.E. Myers Co.*, 706 F.Supp. 376, 382-83 (E.D. Pa. 1989) (voluntary activity created no duty to public).

16 *Arnstein v Manufacturing Chemists Ass'n*, 414 F.Supp. 12, 14 (E.D. Pa. 1976) (plaintiff stated claim against association that, among other things, sponsored research and recommended procedures for safe handling of chemicals).

17 *Collins v American Optometric Ass'n*, 693 F.2d 636 (7th Cir. 1982) (no reliance shown on any advertisement or publication). *But see Scardina v Alexian Bros. Medical Center*, 719 NE 2d 1150 (Ill. App. 1999) (triable issue existed whether patient justifiably relied upon hospital into which he had been admitted by his private physician).

18 *Cf. Hanberry v Hearst Corp.*, 81 Cal.Rptr. 519 (Cal. App. 1969) (recovery), *with Benco Plastics v Westinghouse Electric Corp.*, 387 F.Supp. 772 (E.D. Tenn. 1974) (no recovery on misrepresentation theory, dispute over causation).

In *Benco*, the court summarised policy considerations relevant to the liability considerations: "(1) the degree of closeness between the injured party and the endorser; (2) the nature of plaintiff's injury; (3) the causal connection between plaintiffs's injury and the endorser's representation; (4) the evidence of reliance on the endorser's representations; (5) the moral culpability attached to the endorser's conduct; (6) the policy of preventing future harm; and (7) the nature of the endorser's business". 387 F.Supp. at 786.

Defamation Claims

Defamation is a new and growing area of concern for non-profit associations. Defamation, of course, is a false or misleading statement to a third party about some person, product, service, or entity, absent a privilege for the communication. It is very common in employment-related disputes. Defamation claims are now becoming more commonly extended to non-profit associations and community groups through their newsletters, publications, public statements, or opinion letters.[19] In addition, corporate defamation — a special kind of defamation claim — is a growing area of potential liability where one organisation alleges that it was defamed by another. These claims may be brought by a former member of the association, a competitor of the group, or even an antagonist in the public policy arena.[20] Associations, with their numerous activities of informing the public, will have to give special attention to the potential for defamation.

A response to this potential liability is to ensure that statements are made *only* to members and *only* based on a need to know certain kinds or classes of information. How many people in a community need to know why the auditor for a school district was terminated? Nonetheless, in this society, it is also true that an association truly is between the proverbial rock and a hard place. A failure to give adequate information by way of a newsletter or other publication about someone could give rise to a failure to warn claim. Excessive information could give rise to a defamation claim.[21] In many instances, associations have chosen to err on the side of providing information especially when a physical harm hangs in the balance.

II. Risk Spreading Devices

A new kind of risk-shifting claim has become more common in the last several years. Filed against associations or corporate entities, these claims are based on

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19 Jerald Jacobs and David Ogden, "Defamation," *Legal Risk Management for Associations*, 27-32 (1995). Statements made in association or board meetings can also create exposure. *Id* at 107.

20 *Metastorm v Gartner Group*, 28 F.Supp.2d 665 (D.D.C. 1998) (action against information technology reporter).

21 *Marshall v Munro*, 845 P.2d 424 (Alaska 1993).

affiliation. The claimant is a person injured by one employee or volunteer answerable to a local or regional group that is affiliated with a national entity. In this society, plaintiffs now routinely sue everyone connected with the incident. The defendants themselves sort out the liabilities and point toward potential recovery. By trying to limit their own exposure, they identify the real culprit.

One variation on these claims is what is styled "nameplate cases." By nameplate cases, I mean the following theory of recovery. "All of these defendants have 'Lutheran' or 'Red Cross' or 'Boy Scouts' or [insert your organisation] in their names. They must have been acting in concert, usually through the national or regional association, to do some unspeakably expensive thing to my client." These claims rest on a broad definition of association, as a group whose members share a common purpose and function under a common name under circumstances where fairness requires the group to be recognised as a legal entity.[22] In many instances, there really may be some kind of group known by that name, that perhaps never thought of itself as a civil legal entity subject to liability. For plaintiffs, the association is alleged to be made up of the various defendants because they all have the same common name in their title. In those circumstances, an alleged association trying to extricate itself from litigation would have to evaluate how it, in fact, has operated. Has it ever asserted rights in its own name before? Has it ever filed briefs, provided testimony, answered correspondence in its own broad name?[23] In addition, acting in concert through an association may create special problems for personal jurisdiction because an association has citizenship everywhere its members have citizenship.[24]

The kinds of claims which are generally seen in "nameplate" cases are conspiracy claims and a failure of standards and policy. By conspiracy is meant a meeting of the minds of two or more members to do an unlawful act or a lawful act in an unlawful way. For the purposes of these complaints, it could mean any number of possible combinations, for example action between a local

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22 *See Coscarart v Major League Baseball*, 1996 WL 400988 (ND.Cal. July 11th, 1996). Anything in the underlying chain of events that leads to an accident might be enough to get one sued. *Rogers v Crossroads Nursing Service*, 1999 WL 1277471 (Tex. App. Dec. 30th, 1999).

23 In *Coscarart*, for example, an entity asserting it lacked legal capacity in fact had previously appeared before courts as a legal entity.

24 *United Steelworkers of America v Bouligny*, 382 U.S. 145 (1965). Membership alone does not trigger the kind of purposeful contact that would support personal jurisdiction, but the bar is low. *National Industrial Sand Ass'n v Gibson*, 897 S.W.2d 769 (Tex. 1995).

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court noted, over 10 million adherents) for specific performance of their contracts or, in the alternative, for damages. The plaintiffs argued that all these defendants were somehow responsible for the single corporation's breach of duty.[26] A California court held that there was enough semblance of common purpose to hold the "United Methodist Church" potentially responsible, even though the court, in doing so, impressed upon the church a structure utterly foreign to its beliefs.[27]

Given the novelty and potentially far-reaching negative consequences of these claims, organisations must understand how to deal with them. First, one must understand the kinds of liability assertions that are made in these cases. Many times plaintiffs are simply asserting claims against a class of people that may or may not be responsible for the harm. It is incumbent upon co-defendants to try to identify plainly where in the alleged "association" the risk is in fact located. To identify the repository of, or authority over, the risk, one must evaluate the articles of incorporation and bylaws, mission statements and management policy manuals, and the actual operations of the various entities.[28] This concept is labelled corporate or denominational responsibility.[29] Where a group of entities are in fact related, especially if they share a name, those entities must clearly recognize which one of them is responsible for the risk. In some associations, it might be a state-wide governing unit. In others, the local entity has complete autonomy. If, in a group of related alleged co-conspirators, the "association" lodges responsibility for the risk in one particular place or with one defendant, it would be difficult, unless the actions of the entities prove otherwise, to establish liability in entities whose relationship to the risk is in name only.[30]

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26 *Barr v United Methodist Church*, 90 Cal.App.3d 259, 153 Cal.Rptr. 322 (Cal. App.), *cert. denied*, 444 U.S. 973 (1979).

27 Every other case in similar circumstance rejects such a based reading of responsibility. *N.H. v Prebyterian Church*, 1999 Ok. 88, 1999 WL 1013547 (Okla. Nov. 2, 1999); *Hope Lutheran Church v Chellew*, 460 N.E.2d 1244 (Ind. App. 1984); *Folwell v Bernard*, 477 So.2d 1060 (Fla. App. 1985); *Eckler v General Council of Assemblies of God*, 784 S.W.2d 935 (Tex. App. 1990). *Cf. Olson v Magnuson*, 457 N.W.2d 394 (Minn. App. 1990); *Roman Catholic Archbishop v Superior Court*, 93 Cal.Rptr. 338 (Cal. App. 1971).

28 *Wilson v United States*, 989 F.2d 953, 959 (8th Cir. 1993); *Ponessi v American Gold Star Mothers*, 725 F. Supp. 201 (SDNY 1989) (citing cases).

29 Chopko, *supra* note 4, at 300-07.

30 *See Owens v American Nat'l Red Cross*, 673 F.Supp. 1156 (D. Conn. 1987) (separate incorporation, separate risk).

Unfortunately, for community-based non-profit organisations, the temptation to act outside the limitations of their corporate responsibilities is often great. For this reason, one must evaluate the "situational" responsibilities of the alleged actors.[31] When a community-based non-profit or charity acts in the absence of authority to respond to a problem, it can create liability notwithstanding the absence of authority. Such actions might be called ratification in extreme cases.[32]

In anticipating these kinds of situations, some preventive steps are appropriate. There should be clarity in organisation documents about the allocation of authority. In understanding how community-based non-profit organisations function, one should be clear about the kinds of authority that that group will exercise as opposed to other related groups, such as a state affiliate or a national association. A separate corporation would seem to be an adequate defence to the kinds of broad claims that one might see illustrated above.[33] In addition, there should be consistency in responding to claims. In other words, if the responsibility for dealing with allegations of misconduct by individual members in a local charity or school lies with the local authority, persons in state or national organisations should defer to that authority.[34] If so, it should be fairly easy to establish that the persons responsible for the state or national groups did not act outside that authority in individual cases. Consistency might be the hobgoblin of little minds but it is the soul of a successful defense in a situation such as this.

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31 Chopko, *supra* note 4, at 308-09.

32 *Eckler*, 784 S.W.2d at 941.

33 *Owens*, *supra* note 30; *Hope Lutheran Church*, *supra* note 27; *Plate v St. Mary's Help of Christians Church*, 520 N.W.2d 17 (Minn. App. 1994).

34 *Doe v Cunningham*, 30 F.3d 879, 884 (7th Cir. 1994) (undisputed facts showed responsibility vested in non-defendant entity). *See Ramirez v University of Miami*, 739 So.2d 1240 (Fla. App. 1999) (court respects separate operating agreement and does not make joint sponsor liable).

III. Sexual Misconduct, a Brief Review of Claims and New Developments

Developments in Liability Theory

This section will review the kinds of claims now commonly seen in sexual misconduct cases. It will illustrate new developments and emerging trends.

Negligent selection has always been part of the law dealing with the responsibility of organisations when those they hire cause foreseeable harm. Where there is probative information about misconduct in the background of an individual employee and that information was not obtained, the organisation may be responsible for subsequent misconduct.[35] For purposes of misconduct, the information must be probative on the misconduct in question and not about some other issue such as alcoholism or financial improprieties.[36] Because of the renewed emphasis on negligent selection in claims in the last several years, reference checks, criminal background checks (especially in education), and other kinds of follow up would seem to be standard procedure. A failure to give a truthful evaluation to a prospective employer might implicate the entity in litigation for future misconduct.[37] Giving such a response might cause a defamation action, but the failure to ask is the kind of risk that no organisation should tolerate.

Negligent supervision remains the heart of sexual misconduct claims against institutions. A successful plaintiff must be able to show that there was probative information in the prior actions of an individual that was ignored or not addressed.[38] It is very difficult to defend comfortably against this claim because it requires an accused organisation to divulge files and other information that

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35 *Focke v United States*, 597 F.Supp. 1325, 1345-46 (D. Kan. 1982); *Evans v Morsell*, 395 A.2d 480 (Md. 1978). *See Doe v Gonzaga University*, 992 P.2d 545 (Wash. App. 2000).

36 *F&T Company v Woods*, 594 P.2d 745 (N.M. 1979); *Williams v Feather Sound*, 386 So.2d 1238 (Fla. Dist. Ct. App. 1980) (discussing increased burdens on employers as employee's duties changed).

37 *But see Shrum v Kluck*, 85 F.Supp.2d 950 (D. Neb. 2000).

38 *See Andrews v United States*, 548 F.Supp. 603, 611 (D.S.C. 1982), *aff'd*, 732 F.2d 366 (4th Cir. 1984); *Beach v Jean*, 746 A.2d 228 (Conn. Super. Ct. 1999).

organisations are reluctant to give to plaintiffs.[39] Nonetheless negligent supervision is a fact-based claim and requires a fact-based defense. The institution must be able to show that it did not have information available to it or that the information that was available was not probative on this kind of risk.[40] The institution could also attempt to show the person receiving notice was in no position to respond.[41]

Respondeat superior claims had once been thought untenable in this area. Plainly, the sexual adventures of teachers, youth leaders, and clergy is far outside the scope of duty.[42] Nonetheless, recent cases in Oregon and Canada reject this bright line approach and move towards a broader definition of enterprise liability or mixed motivation. In the Oregon case, the court looked to see whether part of the motivation of the person who committed the misconduct was related to activities authorised by the employer. In a mixed motive situation, one would have to assess the degree to which serving an organisation, for example, legitimate duties, such as providing services to youth, were implicated in the activities of the individual who committed the misconduct.[43] If the misconduct arose, at least in part, out of actions authorised by the employer, some *respondeat superior* liability might be proper. This development is one that should give child caring organisations pause. Mixed motivation claims might require juries to assess the degree of fault as fact.[44]

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39 Complaints must be actively investigated. *Wilson v Tobiassen*, 777 P.2d 1379 (Or. App. 1989). Appropriate follow-up must occur. *Hutchison v Luddy*, 742 A.2d 1052 (Pa. 1999) (case involving vicarious liability under Restatement of Torts).

40 *Christopher B. v Schoeneck*, 1999 WL 1102901 (Wis. App. Dec. 7, 1999); *Moseley v Second New St. Paul Baptist Church*, 534 A.2d 346, 349 n.6 (D.C. App. 1987); *Scott v Blanchet High School*, 747 P.2d 1124, 1128 (Wash. App. 1987).

41 *Turner v McQuarter*, 79 F.Supp.2d 911, 915-16 (ND Ill. 1999) (no Title IX liability where coach was not official whose knowledge could be attributed to university), *opinion clarified*, 2000 WL 135055 (ND Ill. Jan. 31st, 2000).

42 *Tichenor v Roman Catholic Church of Archdiocese of New Orleans*, 32 F.3d 953, 959-60 (5th Cir. 1994); *Dausch v Rykse*, 52 F.3d 1425, 1429 (7th Cir. 1994) (Coffey, J., concurring); *id.* at 1436 (Ripple, J., concurring in part and dissenting in part in the judgment); *Alma W. v Oakland Unified School District*, 123 Cal.App.3d 133, 176 Cal.Rptr. 287 (Cal. App. 1981); *see also Hoover v University of Chicago Hospitals*, 366 N.E.2d 925, 927 (Ill. App. 1977).

43 *Fearing v Bucher,* 977 P.2d 1163 (Or. 1999).

44 *Id.* at 1166-67 (generally a fact question for a jury).

In addition, the Canadian Supreme Court rejected the bright line approach on scope of duty and asked whether a portion of the activities of the perpetrator were, in fact authorised by the employer. In two cases, the Canadian Supreme Court divided the liability, finding it in one and not the other. Where the Canadian Court found liability, it found that the child caring organisation had in fact, authorized the perpetrator to have intimate physical contact with the children in an institutional school. Those persons were acting, in the Court's view, in the place of parents and providing the kind of care that might be provided ordinarily by a parent. In that set of circumstances, the Canadian Supreme Court found that such organisations bore a greater responsibility to see to it that harm did not come to the institutional population.[45] In the second case no liability was found where a director of youth recreation used his position to begin seduction of young people who had come to the organisation for after-school activities. Although the perpetrator's position as a recreation director for young people gave him access to youth and a basis on which he could appeal to their sense of trust, the activities occurred outside the work of the recreation department.[46] In response to these kinds of cases, will we have to give detailed instructions to our volunteers, agents, and employees as to what is or more importantly is not, authorised?

Failure to warn is an area of special concern because the courts have held that a special or fiduciary relationship may trigger a duty to warn.[47] Some courts have gone so far as to indicate that if there is a special target of the person's attention

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45 *Children's Foundation v Bazley*, No. 26013 (Can. June 17th, 1999) (indexed as *Bazley v Curry*), *reprinted at* <www.droit.umontreal.ca/doc/csc-scc> (visited 7th April, 2000).

46 *Jacobi v Boys and Girls Club of Vernon*, No. 26041 (Can. 17th June, 1999) (indexed as *Jacobi v Griffiths*), *reprinted at* <www.droit.umontreal.ca/doc/csc-scc> (visited 7th April, 2000). In evaluating the degree of connection between the creation or enhancement of risk and the wrong complained of, the courts henceforth will look to five factors: (a) the opportunity that the enterprise afforded the employee to abuse his or her power; (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee); (c) the extent to which the wrongful act was related to friction, confrontation, or intimacy inherent in the employer's enterprise; (d) the extent of power conferred on the employee in relation to the victims; and (e) the vulnerability of potential victims to the wrongful exercise of the employer's power.

47 *Miller v Everett*, 576 So.2d 1162, 1164-65 (La. App. 1991) (citing cases).

there may be a duty to warn.[48] Occasionally courts have even found liability where a special at-risk population needs special protection.[49]

In the area of *fiduciary duties*, there is a new use of mission statements and community service documents to create an institutional fiduciary duty. Although courts generally resist the creation of a fiduciary duty based solely on membership, at least some courts are willing to concede that a special duty is created to protect children against such risks within the organisation.[50] In another startling development, courts are willing to use the organisation's own words against it as a way of showing that it has undertaken, voluntarily, a duty to protect persons against risk.[51]

Dealing with these claims

Recent scandals in the United States confirm that sexual misconduct claims are among the most difficult for organisations to plan for and resist. The above recent developments in the law illustrate the need for clear written policies against sexual misconduct, communicated to staff and volunteers. It must be understood by them and by the public that the entity will have no tolerance at all for misconduct. The heightened scrutiny that the courts give to these claims usually means organisations will not have the benefit of any doubt. Organisations must be increasingly vigilant about protecting themselves against these claims and must exercise care in conducting reference checks, evaluating the background and suitability of candidates, and following up allegations when made. Where necessary, organisations must be willing to consider guidelines as to what is or is not acceptable behaviour and should evaluate their own mission

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48 *Cf. Tarasoff v Regents of University of California*, 551 P.2d 334 (Cal. 1976) (psychologist must exercise reasonable care to protect third party from his patient), *with Thapar v Zezulka*, 994 S.W.2d 635 (Tex. 1999) (psychiatrist has no duty to warn third party of patient's threats). *See also Davis v Board of County Commissioners*, 987 P.2d 1172 (N.M. App. 1999).

49 *Eiseman v State of New York*, 489 N.Y.S.2d 957 (N.Y. App. Div. 1985), *rev'd*, 511 N.E.2d 1128 (N.Y. 1987).

50 *C J C v Corporation of Catholic Bishop of Yakima*, 985 P.2d 262, 273-77 (Wash. 1999) (three cases); *see also Schneider v Plymouth State College*, 744 A.2d 101 (N.H. 1999); *Marquay v Eno*, 662 A.2d 272 (N.H. 1995).

51 *Martinelli v Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (2d Cir. 1999). *Martinelli* was distinguished in a case involving adults, not a minor. *Doe v Baker*, 2000 WL 38445, at *8 (Conn. Super. Ct. 10th January, 2000).

statements and other documents to ascertain whether they have inadvertently created or accepted a higher level of risk in these cases. Most of all, organisations need effective policies for responding to these situations.[52]

Recall the situation discussed above concerning the claims against the Diocese of Dallas that resulted in the verdict of 119 million dollars including punitive damages. These 11 cases that went to a jury against the Dallas diocese and the defending cleric were only the first part of a series of 16 cases all involving sexual misconduct against minors filed against clerics in their diocese, two other dioceses with some connection to the claims, and the national associations of Catholic bishops. Certain behaviours in the case contributed to the exacerbation of damages. Some points to remember for future conduct of organisations considering these risks are worth noting.

1.Work for unity among co-defendants. The various defendants in those cases each had their own theories about how the cases should be defended. The absence of a consolidated legal strategy and understanding about respecting the way in which risk had in fact been allocated, worked against the defendants' abilities to limit the case at the outset to the few claims which were not novel and viable under the statutes of limitations.

2.If we intend compassion, make sure it gets communicated. It is not clear that the plaintiffs in these cases ever got any of the message of compassion and support through their lawyers the church in fact had directed to them.

3. We will continue to be judged not by our best cases, but by our worst. Some cases are not winnable. Those cases should be settled. However, where dispositive motions are available based on statutes of limitation, absence of duty, no proximate cause or other defences, those motions should be filed and vigorously pursued. In front of a jury, the worst set of facts is going to drive the best set of facts.

4.Be open. There always seemed to be more to the case than met the eye, which created suspicion in the post-Watergate America in which we live. Part of litigating novel, big, or expensive cases, is having to deal with public aspects of the strategy and tactical approach.

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52 See for example, Charter for the Protection of Children and Young People (United States Conference of Catholic Bishops 14th June, 2002) at www.usccb.org/bishops/charter.htm.

5. These cases are far too important to be left entirely to lawyers. Lawyers tend to do "trees" very well. Not every lawyer understands "forests". A case that threatens the integrity of an institution is one that demands something broader than daily litigation management. If an organisation faces such litigation, legal and non-legal approaches must go hand in hand.

Conclusion

Not every claim can be avoided in this society. However, we are at a point where we are dealing increasingly with complex and novel theories, usually expansions of old and familiar claims and complaints. In dealing with the novel and complex, we must respond in similar fashion or we will continue to lose cases that are winnable, lose the confidence of a public that is understandably concerned, and not bring adequate balance to the competing demand for justice in this society.