

**SEXUAL ABUSE AND THE CATHOLIC CHURCH:
AN INSURANCE VIEWPOINT**

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Background

The purpose of this paper is to provide some insight into the problems experienced by the Catholic Church regarding sexual abuse, from an insurance perspective.

Priests/ministers, doctors, policemen, firemen traditionally have been examples of positions considered to deserve unquestioning respect. In the Catholic Church, the priest has always been considered someone who was called by God to do God's work, possessing special qualities to do that work.

Society has changed greatly over the last thirty years. There is less respect for authority figures. Sexual matters, formerly deemed taboo, are now spoken of freely.

Sexual abuse cases against priests are somewhat analogous to medical malpractice cases against doctors. Medical malpractice was virtually nonexistent until our social attitudes changed. Like priests, doctors were usually revered, looked up to by people who would not dare question their judgement. However, doctors too are now seen as fallible people capable of mistakes. The Catholic Church is in a similar situation today with sexual abuse and, in particular, with child sexual abuse.

In addition to the vanished social attitudes that prevented people from seeking to make a claim against a religious organization, historically the Church also enjoyed protection against lawsuits through what is termed the charitable and religious immunity doctrine. Now, however, not only are individuals allowed to sue and are not reluctant to do so, but the Church is actually becoming a very large and visible target for plaintiffs and plaintiffs' attorneys.

Legal arguments have been made against the Church in essentially three ways. First, the legal doctrine of respondeat superior has been argued in a number of jurisdictions. Essentially, this term means that the master (employer) is responsible for the actions of the servant (employee). Fortunately, in cases involving the Church the courts that have heard this argument have ruled against its applicability.

The second and third theories of liability advanced are that the Church is liable due to negligent hiring and/or negligent supervision of an employee or agent: that the individual's superior either failed to ascertain the background of the individual at the time of hiring or became aware of some possible problems while in their employment, thereby giving cause to allege that the perpetrator was being improperly supervised. The real issue here is foreseeability. Did the employer know of,

or should the employer have known of, the alleged perpetrator's propensity to commit such acts?

In the commercial or non-church world, most employers would not be held responsible for employees' actions that are clearly outside the scope of their duties. However, this too is changing with the advent of sexual harassment claims. Also, sexual abuse claims are not limited to the Catholic Church. There are probably as many, if not more, claims being experienced by other denominations.

The Church is also vulnerable due to the previous ways of dealing with the abusers, based on the medical and psychological knowledge of the past. Modern medicine, especially in the area of mental health, has improved immensely. Prior to this modernization, it was believed that through prayer and counseling, the individual could be cured. Those recoveries were often not as complete as was thought to be possible, and this led to more problems. What we know today about the nature of pedophilia and its treatment is different and vastly improved from what was known even a decade ago, and vastly more than two or three decades ago.

The pedophile is also perceived now as a very successful manipulator, capable of duping individuals into believing that there has been a cure and that there can be a return to active ministry. What we have found is a history of repeated offenses. Unfortunately, many cases being reported today are from acts committed 20 to 30 years ago. Therefore, the Church is at the substantial disadvantage of being judged for action or lack of action long ago, while it is expected to have performed as if it had the knowledge of today. This expectation is the basis for much unjust criticism of the present day Catholic Church.

In any event these are the circumstances and legal obstacles which must be faced. However, the outlook is not totally bleak. The remainder of this paper will deal with issues surrounding proper claims handling, preventative measures, and risk management of this exposure.

Claims

When an incident is reported, the action taken within the first 72 hours is probably the most critical. Not all cases will be reported directly to the bishop or chancellor. Some cases will become known through the authorities after an arrest or when a lawsuit is filed. Whatever the situation, the reaction and procedures followed should be basically the same.

All cases should be handled at the chancery level. If a committee is in place (committees will be discussed in the Risk Management section), then this group should go into immediate action. Its actions should always be cooperative and never interfering with the investigation by authorities. The Church should begin its own internal investigation which should be held in extreme confidence. Immediate notification to the insurance carrier should be made and assistance and guidance from the carrier sought. Working as a team will result in the best possible outcome of a claim.

If media contact is necessary, then an individual who has experience in this area should be designated as the only person authorized to talk to the media ¹. Plaintiff's attorney will often appeal to the court of public opinion in a client's favor. Appropriate contact with the media can see to it that the media is not used solely to the Church's disadvantage.

Each case must be judged on its own merits. Parties involved should not jump to conclusions or attack or defend the alleged perpetrator until all of the facts have been obtained and reviewed. The sooner the claim is evaluated from a liability and value standpoint, the better the chances will be to resolve or defend it appropriately.

Whether a complainant is represented or not, it is advisable never to judge or question whether what is being reported is true or false. Rather, as much factual information as possible should be obtained, including possible witnesses (those who may be aware of the incident or have knowledge of the alleged perpetrator's problems). Complainants should be listened to intently and assured that a thorough investigation will be conducted and that they will be contacted at the conclusion of the investigation. Coordination with the carrier is most important. Whatever spiritual assistance a complainant will accept should be offered, as well help with the payment of reasonable counseling services with no strings attached. However, caution should be exercised so as not to give the appearance that unlimited help is available.

When the first reports of sex abuse came to the Church, the victims seemed to be looking for two things to happen: validation and prevention. First, the victims wanted to be validated by the Church's acknowledgment that what happened to them was terrible and was not the victim's fault. Second, they wanted to make sure that these same terrible things did not happen to others, and they usually asked for the removal of the perpetrator. This validation-prevention attitude did not change until the mid 80's. At that point, the victims began no longer to accept the then current methods for handling these cases. They began to seek, through legal means, to punish the perpetrator and the Church for seeming to allow the acts to occur. At the same time, they also sought monetary compensation for the damage they felt was caused by these acts of abuse.

Until recently, the majority of the claims reported were valid ones. However, from an insurance perspective the last several years have seen more cases being reported that are of a questionable nature. The repressed memory syndrome adds to these complications and makes it even more difficult to evaluate the merits of a case.

When evaluating sexual abuse claims, a distinction should be made between two types:

1) Those involving adult relationships: In insurance terms, claims involving relationships between consenting adults are defensible. Where the adult relationships do not involve any issues

¹ See "The Media and Sexual Abuse Cases: Elements of a Media Plan" by Msgr. Francis Maniscalco, Media Relations, NCCB

of counseling, there has been success in defending these cases in the courts or by not having them pursued. Evaluating cases can be very difficult. Therefore, all factors should be reviewed carefully before a formal position on liability is stated and/or settlement negotiations are begun.

2) Child sexual abuse: Defenses available to these cases are limited, but can be asserted, if the Church can demonstrate an active participation through the hiring and supervision process. An affirmative defense can be made if favorable documentation of background and reference checks can be produced and it can be demonstrated that proper supervision was carried out through evaluations and proper handling of problems when identified. Also, a statute of limitations defense should be researched and argued where applicable. Given the state of the question today, repressed memory claims must be resolutely defended.

Risk Management

Ideally, the objectives from the risk management standpoint should be to try to prevent these types of losses, to mitigate the damages from losses that do occur, and to ensure that the religious organization remain financially solvent even in the event of catastrophic or worst case scenarios. The following discussion will deal with each of these areas, some of which are intermingled or overlap.

First and foremost, each diocese and religious order should have a sexual misconduct policy that is written, distributed, and followed. Essential elements of this policy should include the following items:

- * a letter from the bishop or religious superior
- * policy statement²
- * distribution and acknowledgment of receipt
- * procedures for investigation of alleged cases
- * procedures for reporting of alleged cases including a copy of the state statutory reporting requirements
- * background and reference checks
- * education
- * employment application

² See Report on Diocesan Policies by the NCCB Ad Hoc Committee on Sexual Abuse 1994

Most dioceses do have a written and implemented sexual misconduct policy.³ These types of policies pose inherent challenges from an administrative standpoint. They need good administration and professional human resources to make the policy a viable and functioning document. Limited resources in these areas will prevent the maximum achievement of this goal.

Second, the formation of a committee to deal with issues of a sensitive nature is strongly recommended. Although this committee is advisory in nature, and not a decision-making body, it is a valuable resource to the bishop for investigating and handling matters in a professional and confidential manner.

Third, anyone working closely with a vulnerable population should undergo psychological assessment if there is any reason to believe that they are experiencing "problems" which may result in abuse of minors. This approach would be very proactive and would benefit an employer faced with potential claims.

Fourth, recent federal legislation (i.e. child protection act) may result in providing the Church with a valuable resource. As it is a difficult problem to conduct background and criminal record checks on individuals nationally, the child protection act might provide the vehicle to obtain the needed information. Being able to access this information could result in effectively preventing a perpetrator from moving from diocese to diocese without being discovered.

Insuring the morality exposure is no longer an easy or inexpensive method. Prior to the mid 80's commercial carriers did not exclude claims involving morality issues. However, the landmark case probably most responsible for a change in underwriting policy was the McMartin Day Care case in California. This case, more than any other, brought these issues to national prominence. On top of that, the cases in the Diocese of Lafayette, Louisiana, brought specific adverse attention to the Catholic Church. As a result there was a period of time when many dioceses were uninsured for the morality exposure. Catholic Mutual Relief Society of America stood alone in providing first dollar coverage to its membership. Also, through its pooling efforts, additional coverages were afforded to the members of the Catholic Umbrella Pool (an excess liability pool which is administered by Catholic Mutual).

Since that time when, other than what was described above, morality coverage was essentially unavailable in the traditional insurance marketplace, now, through efforts of the various dioceses to formulate and implement sexual misconduct policies, the marketplace has opened up again in providing coverage, but on a limited basis. For example, members of Catholic Mutual can purchase up to two million dollars in coverage. This coverage is written on a claims-made basis with an annual aggregate. The aggregate includes all settlements, judgements, verdicts and defense costs. Other groups have been successful in providing coverage through each diocese self-insuring the lower limits of liability with a large deductible and then pooling the excess coverage.

³ Attached to this article is a list of sample material (policy, employment forms, suggested cover letter) available on request from Catholic Mutual Group.

But there is no cause for complacency, for several reasons. First, this coverage continues to be costly. Second, the threat of the reinsurance market withdrawing coverage is always present. The incidents involving several high ranking officials of the Church added to this risk. Third, effective risk management is a must if continuing progress is to be made in minimizing and adequately financing this exposure.

The future of the insurance market for this type of coverage is tenuous at best. Commercial carriers do not hesitate to change underwriting standards as a result of poor experience, or of legal proceedings, or when adverse reaction is perceived to exist in the public sector. Therefore, it is of the utmost importance that the Church look at alternative ways of dealing with this risk.

Conclusion

The solution to these problems is rooted in a consistent approach by the Church. Where possible these issues and problems should be addressed in a collaborative fashion. There are resources available for this approach locally, regionally, and nationally. The NCCB Ad Hoc Committee that has been formed is a positive step in this direction. The time has come for the whole Church to work on this problem together and develop models and programs that will produce the most successful results.

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Sample Material Available

- Sample policy relating to sexual misconduct
- Sample forms for implementing the sample policy
- Sample employment questionnaire
- Incident report form for report of suspected sexual misconduct
- Suggested cover letter for policy regarding conduct for personnel serving in the (arch)diocese

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