

# JUSTICE FOR CHILDREN

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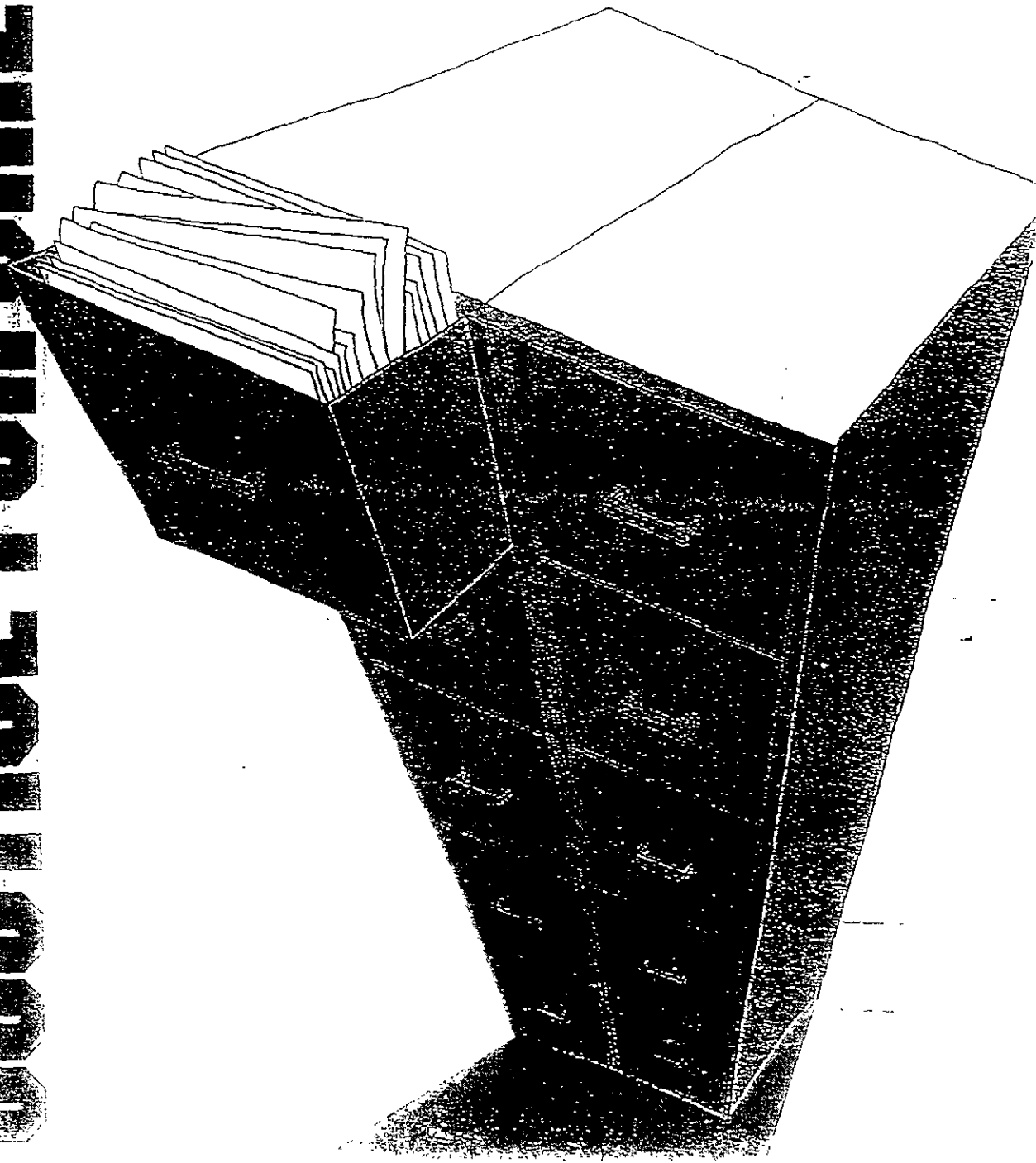
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# CLERGY MALPRACTICE: A NEW THEORY OF LIABILITY

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and John R. Hartnett



For many reasons, civil lawsuits against clergymen, teachers and other types of counselors who have sexually abused their victims are tough cases. Deep psychological and emotional trauma, always a difficult damage to quantify, is almost always present not only in the victim but in the victim's immediate family as well. In addition, such claims are almost always vigorously contested, if not by the perpetrator, then by his employer—i.e., a church, school district or treatment facility.

One of the most difficult aspects of these cases for plaintiffs and other observers to understand is that you can win the battle against the perpetrator and still lose the war. A victory against an employee with little or no money or other assets may very well be a hollow victory if no liability is found against his employer and/or the claim is not covered by insurance. As to insurance coverage it should be noted that over the last five years most (if not all) insurance companies doing business in the United States have simply terminated coverage for sexual abuse by clergymen, teachers and other counselors.

When the facts allow it, the best way to obtain liability against the employer is to establish vicarious liability by employing the *respondet superior* doctrine. However, the majority rule in the United States is that the employer will not be held liable for misconduct of the employee that was outside the scope of employment, and courts have been loathe to find sexual assaults as being within the scope of employment of a clergyman, teacher or other counselor. Consequently, in most of the sex abuse cases in which liability has been found against the employer, liability has been predicated upon some *direct* (opposed to vicarious) theory of liability such as negligent hiring, negligent supervision or some other willful cover-up or failure by the employer to protect the public against predilections of the perpetrator that were known (or should have been known) by the employer.

Proving the liability of the employer directly is usually a daunting task in these kinds of cases since the employer (and frequently its insurance compa-

ny) is typically very well financed and tactically committed to a war of attrition. To make matters worse, the evidence needed to prove liability against the employer is almost always solely within the possession and knowledge of the employer and its higher level employees and consequently very difficult to obtain.

## Changing the Balance of Power

The new clergy malpractice theory drastically alters the balance of power in cases in which the defendant has used his or her job-created power or authority to confuse and/or seduce a victim. In such cases, a far easier route to liability against the employer may be followed simply by shifting the emphasis from the physical aspects of the abuse to its emotional and psychological aspects.

For example, in the typical clergy malpractice case, the defendant has used his job-created power and authority to induce the victim to participate in the desired conduct. Typically this is done by telling the victim that there is nothing improper about the activities proposed. The very nature of the clergyman's position as a teacher and interpreter of church doctrine clothes him with the apparent authority to make such judgments and the victim is thereby persuaded to permit the desired activity.

The awesome moral and religious power and authority of even the most humble parish priest or clergyman has been recognized for centuries. A child sees adults, including his parents, kneeling before this man and begging for his blessing, thanking him for his interest in them and his prayers, calling him "father," listening to his sermons, commenting on his goodness, righteousness, asking his forgiveness for their sins. If this authority is so manifest even in adults, how much more powerful is it in a boy of tender years?

This is the heart of the clergy malpractice theory: that the defendant has misused his job-created power and authority to betray the plaintiff and this misuse has caused psychological damage to the plaintiff. According to this theory, the misconduct which is the focus of the tort is not the physical abuse itself, but rather the clergyman's misrepresentation of the church's true positions on matters of faith and morals. In short, the clergyman has been a bad

teacher. He has performed badly one of the most important tasks he was employed to perform.

#### Basic Standards of Care

A defense is often made that the courts should not determine the appropriate standard of care for the performance of the duties of a priest or other pastoral counselor. Whatever the validity of this position might be at the fringes of the definition of an applicable standard of care, there are some elements common to any conceivable definition. And the overriding public interest in the protection of children from sexual abuse demands that at least these elements be recognized by the courts.

Certainly among these common elements is the requirement that a clergyman must refrain from misinforming (improperly teaching) minors that it is neither sinful or improper to engage in sexual conduct with an older man, whether he be a clergyman or otherwise. No matter who defines the appropriate standard of care, no credible expert is going to testify under oath that such conduct constitutes an acceptable standard of care.

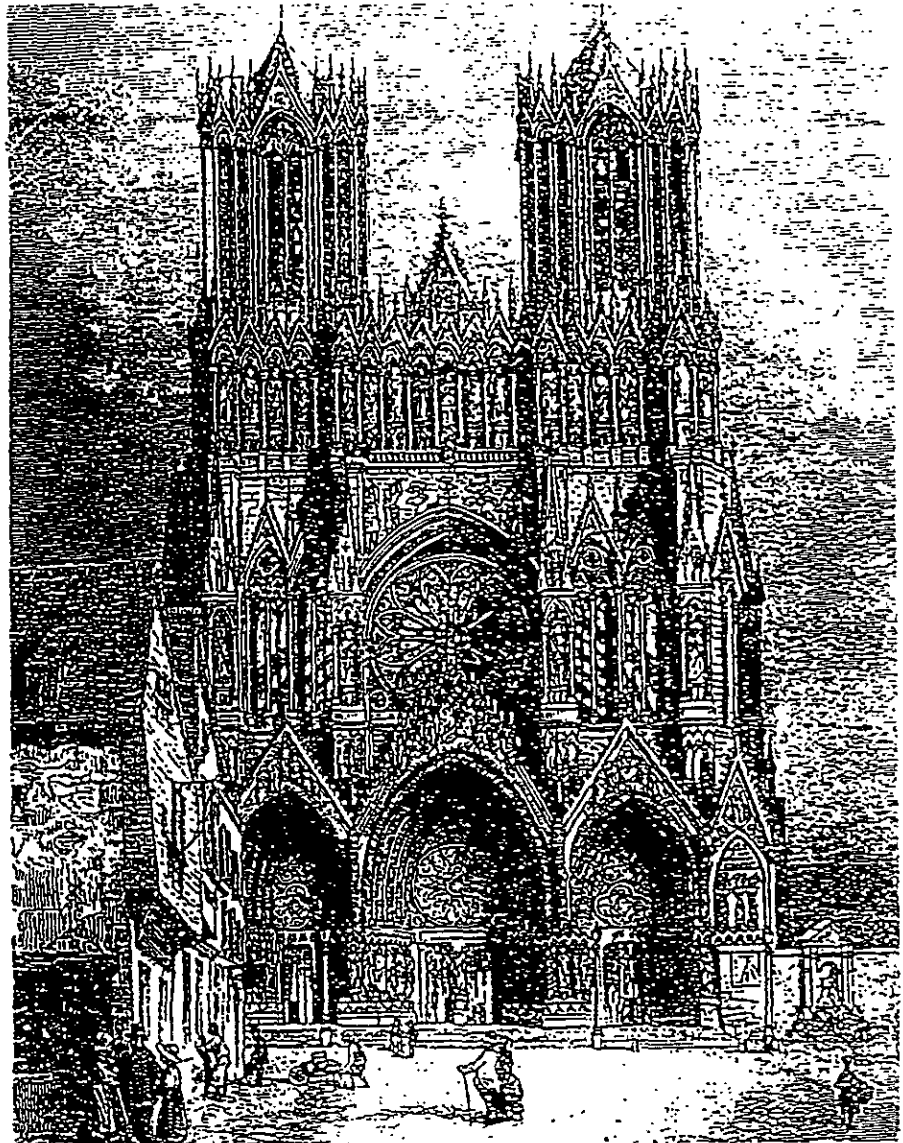
If this is true, then one need not be concerned about the complete definition of the standard of care in all its particulars. It is enough simply to know that this misconduct breaches every conceivable standard of care that might be applied. If the defendant wishes to say otherwise, let him put an expert on the stand who will so testify under oath.

Assuming that the duty and its breach have been established, one should not have too much difficulty in finding an appropriate expert witness to testify regarding the extent of the damage caused by the clergyman's malpractice. Loss of faith in God and the church, distrust of all clergy, and loss or respect for authority figures (including teachers, police, etc.) are all common and perhaps unavoidable consequences of clergy malpractice. Viewed in this light, the physical sexual abuse that typifies clergy malpractice is not the central focus of damages but an exacerbation of the emotional damage already caused by the bad teaching.

Similarly, the casual nexus between the clergyman's malpractice and the plaintiff's damages should not be difficult to establish with proper testimony

#### Mee's Tort Requirements

In analyzing the tort of clergy malpractice, whether it is in the preliminary evaluation of a case or in argu-



ment before the court in response to the inevitable motion to dismiss, all of the classic requirements for a tort are satisfied. There is a clear duty owed by the defendant to the plaintiff. There is a sufficiently well defined standard of care for a jury to determine there has been a breach of duty. And the specific breach complained of has caused quantifiable damages to the plaintiff.

The tremendous value of this new tort to the plaintiff is most evident when one examines what it does to the "scope of employment" defense. It vaporizes it. By virtue of the very definition of the tort, the misconduct complained of is within the clergyman's scope of employment. He has conducted himself improperly in the performance of the very duties that are central to his occupational identity as a priest. And the vicarious liability of the church is assured by the dual realities

that the misconduct was not only performed within the scope of the priest's employment, but the defendant was able to cause the damage specifically because of the power conferred upon him by the church, his employer.

Therefore, if an employer clothes a clergyman, teacher, counselor or similar employee with the psychological power to control the conduct of another, the employer must accept the legal consequences if the employee misuses that power.

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