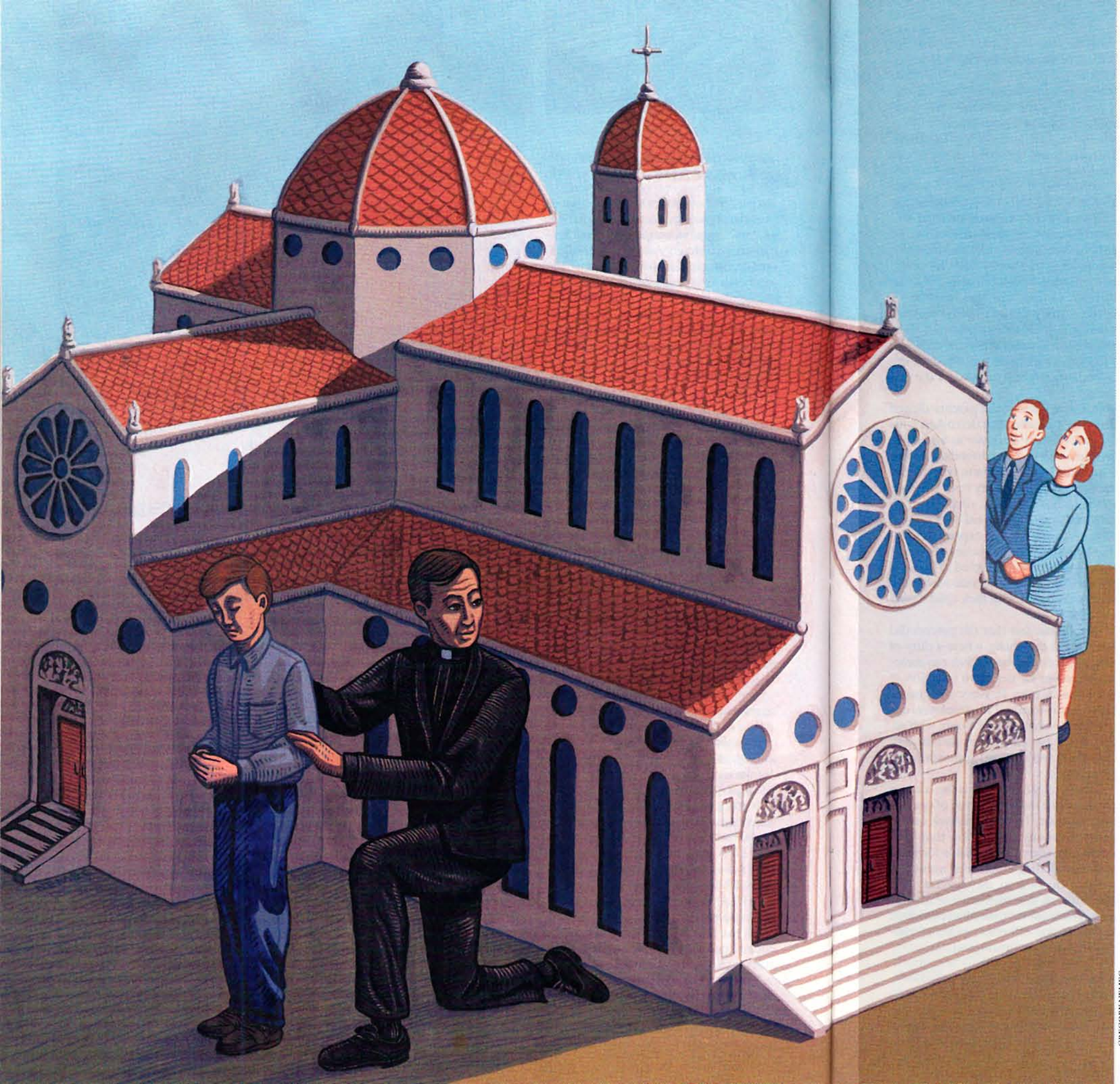

GREGORY NEMEC

People at Risk

# Suffer the Parents: Clergy Sexual Abuse of Children

**Stephen C. Rubino**

Thanksgiving was an eagerly awaited Harrison family reunion.[1] The festive mood was shattered shortly after dinner. A sobbing 32-year-old son began to tell a shocking story. The patriarch, a retired immigrant stonecutter, heard for the first time that his trusted friend, his confessor, the man who blessed and presided over his 40th wedding anniversary and baptized his children, his priest for the last 30 years, had sexually assaulted his son for more than two years while he was in the sixth and seventh grades at St. Michael's school.

The cauldron of emotions present in the room riveted all who heard into stunned silence. The father instinctively recognized the ring of truth in the words spoken but fought with every fiber not to believe that these events could have happened.

What happened to the Harrison family has happened in a significant number of other families as well. Practitioners in this difficult area can readily confirm that sexual abuse by a Roman Catholic priest—or any person formally authorized to perform the rites of an organized religion—is a tort that devastates the entire family unit. This is particularly true when the family is devout and regularly participates in weekly services and other religious gatherings.

The cause of action on behalf of the parents for experiencing their child's emotional distress and enduring injury in their own right is the focus of this article. Courts generally do not favor this cause of action unless it is specifically related to a minor's loss of services, loss of earnings, or incurred medical expenses. In general, the parent, rather than the child (unless the child is emancipated), is entitled to recover for all expenses necessarily incurred in healing or attempting to heal the damage the abuse caused.[2]

The more difficult question presented by the Harrison family scenario is under what, if any, circumstances do parents have a direct cause of action against the abuser or the abuser's employer for injuries inflicted on the child. At present, the majority rule is that civil liability does not attach to the abuser or someone vicariously liable for emotional distress suffered by the parents. While there are exceptions, cases allowing for recovery are still in the minority.[3]

The consistent thread running through

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all the majority decisions barring recovery is the parents' failure to witness the outrageous conduct directed at the child. That reasoning can be shown to be flawed when the pleading and discovery reveal the nature of the relationship between a priest/parish and a parishioner.

Most courts, while sympathetic to the mental anguish suffered by these parents, implicitly or explicitly apply the rule set forth in the *Restatement (Second) of Torts* §46(2) that only those who witness outrageous conduct directed at an immediate family member may recover. The *Restatement* does, however, contain a caveat. "The institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress."[4]

Courts that have denied recovery of a parent's claim for emotional distress have typically done so in cases involving a negligence setting and the perception of injury or lack of it as opposed to an intentional sexual assault. In *Portee v. Jaffe*, the New Jersey Supreme Court found that tortfeasors are liable for the severe emotional distress suffered by family members who witness the injury of loved ones.[5] The court's reasoning in that case was as follows:

> Our inquiry has led us to conclude that the interest in personal emotional stability is worthy of legal protection against unreasonable conduct. The emotional harm following the perception of death or serious injury of a loved one is just as foreseeable as the injury itself, for few persons travel through life alone.[6]

Thus, the principal basis of liability in these cases is foreseeability.[7] Foreseeability is the beginning point for tort liability in every jurisdiction. The next step relates to policy considerations underlying the proposed solution or remedy. If the key to liability is reasonable foreseeability, there is no question that the intentional torts committed against minors would have direct and dramatic consequences for their parents and loved ones. These consequences are far more serious than those from negligent injury.

Close examination of the Harrison scenario reveals two injuries. Parents hurt when they see their child—of any age—hurt. This is a specific, direct injury related exclusively to what the parents perceive through watching their child's emotional pain and suffering and hearing the facts of the sexual assault.

The second injury is the breach of trust and faith between the parents and the perpetrator and whom he represents. If duty is rooted in foreseeability, a fact-sensitive pleading should thoroughly explore the intensely personal relationships among the church, the perpetrator, and the child who was a parishioner and loyal follower of the Catholic Church as represented by his local parish. This analysis must include the parents' role during the religious training of their children and the role of church in the parents' lives.

Our founders allowed for the progression of the common law. In every U.S. jurisdiction, courts have observed that the common law can expand the scope of the tort of negligent infliction of emotional distress. If this tort can expand, in light of public policy development concerning child sexual abuse the related tort of intentional infliction can also expand.

Either through exceptions to the majority rule or extension of liability, a few courts have recognized a cause of action for parents' recovery of damages from the abuser for emotional distress caused by the sexual abuse of their child.

In *Schurk v. Christensen*, the Supreme Court of Washington recognized an exception to the general rule denying recovery for mental anguish and distress where the parents did not observe the abuse.[8] The court held that the parents had stated a cause of action against the abuser for mental distress and anguish. The court reasoned that since their claims against him were based on his intentional acts, they were outside the rule denying recovery where there has been no actual invasion of the parents' persons or security or a direct possibility of this.[9]

In *Croft v. Wicker*, the Supreme Court of Alaska extended the doctrine of liability for outrageous conduct causing extreme emotional distress to cover a third person foreseeably harmed by the conduct.[10] Although the parents did not observe the visitor's sexual molestation of their daughter, they were in close proximity to her and the visitor when the incident occurred and observed her extreme distress just after. The court concluded that the parents stated a cause of action for intentional infliction of emotional distress because it was reasonably foreseeable to the abuser that the parents, being near their child, would be harmed by his actions.[11]

The court also recognized a cause of action for negligent infliction of emotional distress. The justices held that the defendant's reasonable foreseeability of harm to the plaintiff generates a duty to exercise reasonable care.[12] Where this duty is shown, some courts have been willing to recognize a parental cause of action for negligent infliction of emotional distress caused by sexual abuse of the children.

In *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, the psychotherapist who treated both mother and child sexually molested the child. Breaching the duty of care owed to the mother gave her standing to assert a claim for negligent infliction of emotional distress.[13] In *Bishop v. Callais*, a minor child was allegedly sexually abused while he was confined for psychiatric treatment. The parents stated a cause of action for negligent infliction of emotional distress, since the defendants might have owed a duty to them.[14]

In *Doe v. Cuomo*, the parents alleged that they entrusted the defendant with the care of their daughter as a guest in his home and that the defendant sexually assaulted her. The parents, who alleged the defendant had a duty to care for her and breached that duty, sued for negligent infliction of emotional distress.[15] Although there was no express understanding between the parties, the court recognized a contract implied in law with the condition that someone whom the parents entrusted with their child would not assault her.[16]

Despite the fact that the parents did not witness the abuse, where a duty of reasonable care is shown they can sometimes recover for negligent infliction of emotional distress. In every case against a clergy member and his employer, duty must be examined not only with regard to the perpetrator but also the diocese that employs and supervises the perpetrator.

Closely aligned to duty is the concept of vicarious liability by virtue of respondeat superior. Typically, church defendants resist any suggestion that they might ultimately be held liable for sexual abuses by their employees, agents, or servants. In doing so, they reject any factual assertion that they knew or had any reason to know that they had permitted known sexual offenders access to children under their supervision.

**Case Preparation**

Preparing a case for parents is similar to preparing one for an abused child. The relationships among the parents, abused

child, perpetrator, and church organization must be studied to uncover possible transfers of the perpetrator to other parishes. Also, prior complaints, witness lists produced through the Official Catholic Directory, and the relationships among the bishop, perpetrator, and parishioners as documented in canon law must be considered.

But for the cloak of authority granted by the bishops and parishes employing the perpetrators, the betrayed children could not have been abused. But for the shroud of secrecy cast by church authorities in their attempts to conceal employees' acts, the acts could not have happened.[17]

In the words of one parent, "How could I be suspicious? I was proud that a Roman Catholic priest was taking his own time to be with my son. I felt privileged."

What is important to note is that the "grooming" so necessary to accomplish the unlawful sexual contact is by definition within the scope of a priest's employment. Unfortunately, the celibate faithful priest acts no differently in this period of contact than the one who wishes to sexually exploit a child.[18] It would be foolhardy to ignore the importance of trust as the fulcrum on which illicit sex and secrecy lie.

If the parents' relationship with the perpetrator, parish, and diocese was close and regular, support for the parents' independent claim can be garnered from several cases. In *Does v. Compcare, Inc.*, the Washington Court of Appeals considered the sexual abuse committed by a Roman Catholic priest of a Louisiana diocese.[19]

The defendant diocese placed the pedophile-priest in a Washington Jesuit facility to keep him away from young people in Louisiana and to avoid exposure while other litigation was pending there. The Louisiana diocese paid for his treatment and living expenses while he remained in Washington, purportedly serving nonpriestly functions, since his priestly duties had been suspended. While in Washington, further sexual abuse occurred, and litigation ensued.

The Louisiana diocese's defense was that the abuse was outside the scope of employment as a priest. The court rejected that argument, invoking as authority the *Code of Canon Law*. "The Diocese's argument ignores the scope of the relationship which existed between the Diocese and its priest. The duty of obedience which [defendant] owed the Diocese encompassed all phases of his life and correspondingly the Diocese's authority over its cleric went beyond the customary employer/employee relationship."[20]

A recent case is *Hutchison v. Luddy*.[21] The jury returned a verdict of $569,000 in compensatory damages and $1.05 million in punitive damages. What is interesting about the award, which was upheld in post-trial motions, is that the defendant-perpetrator, Father Luddy, was assessed $50,000 in punitive damages while the Diocese of Altoona-Johnstown was assessed $1 million in punitive damages.

The awards were based on the jury interrogatory noted by the trial court in its opinion denying post-trial motions: "Do you find that Bishop Hogan and/or the Diocese of Altoona-Johnstown had a policy or practice of ignoring or failing to investigate or otherwise handle claims that priests assigned within the diocese engaged in pedophilic activities with minor males?"[22]

This was answered in the affirmative. Judge Hiram Carpenter, specifically addressing part of the evidence presented in the case, noted,

> Additionally, there was introduced at trial a letter from Monsignor Madden dated as far back as February 17, 1975, which discusses Father Luddy's behavior, in particular, his drinking problem, his hit and run car accidents, and "a *deeper malaise*." Father Luddy was immediately transferred to St. Therese's. This letter alone, even without all the other evidence in this case, supports an inference that Bishop Hogan and the Diocese of Altoona-Johnstown had knowledge that Father Luddy was engaging in conduct unbecoming a priest and/or acting in a manner dangerous to others.[23]

Further, to this author's knowledge, no other appellate court has yet ruled on this issue in the context of the employer's de facto policy of fostering, ignoring, facilitating, or concealing sexual abuse as part of a larger pattern and conspiracy. The Texas courts are considering a similar scenario in *Doe v. Kos*,[24] as are the New Jersey courts in *Smith v. McIntyre*.[25]

**Arguments**

Notwithstanding the church's general position of shock at being called to account for the crimes of its employees, duties arising from the dangerous propensities of employees are not new.[26] The

defense argument can be generally summarized using the common law principle that absent a duty, one cannot be liable. The argument is an old maxim and has certain appeal but is an oversimplification of the issue of the relationships among the parties in these cases. More to the point, the existence of a duty is "largely a question of fairness or policy. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solutions."[27]

Sexual contact between clergy and child parishioners does not fall within the category of voluntary relationships. There is an unequal distribution of power in this relationship, and this is the precise reason why children and their families have been so grievously injured.

The widely used analogy characterizing the priest as the shepherd and the parishioners as his flock attests to the power imbalance between the two. The priest often is not only a close family friend but revered by the child's parents. The priest is the congregation's leader, while the parishioner is the follower, placing respect and trust in the cleric.

The defendant-perpetrator's role as emotional and spiritual leader of other parishioners with whom an abused child had contact also heightens the power imbalance, making the parishioner more vulnerable and dependent on the relationship with the perpetrator. This type of reverence is common knowledge within the church.

Indeed because the bishop is also aware of his close relationship with his priests, he can hardly absolve himself of responsibility for what a cleric under his authority does, whether or not the action takes place while the priest is actually engaging in ministerial duties such as performing the liturgy.[28]

Foreseeability is the touchstone of duty. The court in *Johnson v. Usdin Louis Co.* said, "The foreseeability essential to the creation of a legal duty . . . focuses on whether [defendant] should have foreseen that its conduct unreasonably enhanced a hazard that would be injurious to those coming in range of such a hazard."[29]

Pleadings must allege that the risk of harm that occurred was not only foreseeable but probable. The complaint must be specific on the point that the diocese created the atmosphere of tolerance for the sexual exploitation of children. Plaintiffs in clergy sex abuse cases should recite facts suggesting willful, knowing, and reckless conduct by defendants in connection with placing known pedophiles among children.

**Practice Pointers**

In any of these claims, careful consideration should be given to a tolling agreement for both parties. These agreements have long been used by commercial, regulatory, and insurance lawyers to suspend the running of statutes of limitations or repose. Attorneys are increasingly able to file sexual abuse claims due to the judiciary's willingness to apply delayed discovery principles to abuse occurring years before the claim is filed.[30]

Also, depending on the breadth of discovery allowed against the perpetrator's employers, counsel can expect a full-blown First Amendment challenge. These arguments typically center on the constitutional prohibition regarding interference with religious discipline or decision making. Advocates couch their actions in terms of internal disciplinary procedures, thus attempting to bring them within constitutional protection.

Counsel should be aware that several courts have used canon law plying neutral principles to determine that there was in fact a duty owed to a sexually abused person. In preparing a claim for parents, attorneys should explore all aspects of canon law that discuss the nature of the relationship between the parishioners (parents) and the religious organization. This will help in countering any argument that a finding of negligence would be invading the constitutional shield of religious autonomy.[31]

Despite what civil law or civil agencies may consider the appropriate relationship of a priest to the church and to his bishop, the canon law and general discipline of the church are fairly clear that it is a close, all-inclusive relationship. This description of the relationship requires no standard setting and can be used in a neutral principle analysis of negligence.

The First Amendment prohibits any religion's compelling its acceptance by a person and embraces the free exercise of any chosen religion. But conduct involving intentional torts and in some cases conduct involving negligence remain subject to regulation.[32]

Adult survivors of early childhood sexual abuse and their families are pursuing legal remedies in increasing numbers. Practice in this area is emotionally charged for both the attorney and the client and presents daunting procedural issues, social policy arguments, and expensive factual investigation.

The sexual assault of a child causes alienation and isolation for the child and the immediate family. Its illicitness consigns the survivors to unhealthy secrecy and pseudo-maturity. Many survivors, embraced by sadness and depression, turn away from family and peers. That the sexual violation was done by someone who is an earthly representative of God makes trusting anyone—on any level—impossible.

Words fail to describe the isolation, loneliness, and pain caused by childhood sexual abuse. When a mentor figure is a priest, the injury to the family is compounded. The sexual exploitation of a child by one who stands before the child in a parental or almost godlike role is a crime that should be compensated by wrongdoers if this is at all possible.

The struggle to survive abuse is fraught with difficulty. The same can be said for parents' realization that their family priest has committed egregious acts.

Extensive investigation of the relationships between priests and parishioners

will lead to reclamation of part of a child's lost innocence or a rational closure if the law cannot provide a remedy. □

Notes

1 Harrison is a pseudonym for an actual client.
2 *See, e.g.*, H.L.O. v. Hossle, 381 N.W.2d 641 (Iowa 1986); Brauninger v. Ducote, 381 So. 2d 1246 (La. Ct. App. 1979) (superseded by statute as stated in Ferguson v. Burkett, 454 So. 2d 413 (La. Ct. App. 1984) (before amendment, statute was construed as barring recovery by a parent for his own mental anguish and anxiety resulting from a tort committed against his child)); Lauver v. Cornelius, 446 N.Y.S.2d 456 (App. Div. 1981); Schurk v. Christensen, 497 P.2d 937 (Wash. 1972).
3 Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988).
4 RESTATEMENT (SECOND) OF TORTS §46 (1965).
5 417 A.2d 521 (N.J. 1980).
6 *Id.* at 534.
7 *See, e.g.*, Dillon v. Legg, 441 P.2d 912 (Cal. 1968); D'Amicol v. Alvarez Shipping Co., 326 A.2d 129 (Conn. Super. Ct. 1973).
8 497 P.2d 937.
9 *Id.* at 940.
10 737 P.2d 789 (Alaska 1987).
11 *Id.* at 793.
12 *Id.* at 792.
13 770 P.2d 278 (Cal. 1989).
14 533 So. 2d 121 (La. Ct. App. 1988), *cert. denied*, 536 So. 2d 1214 (La. 1989).
15 649 A.2d 266 (Conn. Super. Ct. 1994).
16 *Id.* at 273.
17 For an overview of the complex issues and personalities surrounding the still emerging 10-year sex scandal in the Catholic Church, *see generally* JASON BERRY, LEAD US NOT INTO TEMPTATION (1994); A.W. RICHARD SIPE, A SECRET WORLD (1990).
18 A.W. RICHARD SIPE, SEX, PRIESTS AND POWER, ANATOMY OF A CRISIS 9 (1995).
19 763 P.2d 1237 (Wash. Ct. App. 1988).
20 *Id.* at 1242.
21 No. 1175 CP 1987 (Pa., Blair County Ct. Common Pleas Mar. 14, 1994).
22 *Id.* at 14.
23 *Id.* at 14-15.
24 No. 93-05258-G (Tex., Dallas County Dist. Ct. filed Sept. 19, 1993).
25 No. ATL-L-004059-94 (N.J., Atlantic County Super. Ct. filed Oct. 31, 1994).
26 *See, e.g.*, Abraham Used Car Co. v. Silva, 208 So. 2d 500 (Fla. Dist. Ct. App. 1968); Buckel v. Nunn, 883 P.2d 878 (Or. Ct. App. 1994).
27 Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984).
28 *See, e.g.*, Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993), *cert. denied*, 114 S. Ct. 2153 (1994) (describing the fiduciary relationship). *See also* CODE OF CANON LAW 241, 281, 381, 384, 519, 523.
29 591 A.2d 959 (N.J. Super. Ct. App. Div. 1991), *cert. denied*, 599 A.2d 163 (N.J. 1991).
30 *See generally* Russell G. Johnson, Annotation, *Running of Limitations Against Action for Civil Damages for Sexual Abuse of Child*, 9 A.L.R. 5th 321 (1993).
31 *See, e.g.*, Stevens v. Roman Catholic Bishop of Fresno, 123 Cal. Rptr. 17 (Ct. App. 1975) (adopting the theory of canonical agency that every action of a priest is attributed to a bishop).
32 Hester v. Barnett, 723 S.W.2d 544 (Mo. Ct. App. 1987); *see also* STEVEN B. BISBING ET AL., SEXUAL ABUSE BY PROFESSIONALS: A LEGAL GUIDE 278-82 (1995).