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DIOCESAN LIABILITY FOR NEGLIGENCE OF A PRIEST

EDWARD D. HOTZ, ESQUIRE

INTRODUCTION

My father has been coming to these meetings for as long as I can remember and without exception he returns to the office with ideas which he applies to pending cases. I hope I can contribute something by virtue of our representation of the Archdiocese of Omaha in a case that gave rise to the topic of this talk—diocesan liability for negligence of a priest. The Nebraska case, *Ambrosio v. Price*,¹ arose out of an automobile accident involving the pastor of a Columbus, Nebraska parish. The plaintiff sued the priest individually, the parish, and the Catholic Archbishop of Omaha. After hearing Father Whelan's talk, I am relieved that the plaintiff stopped suing at the archdiocesan level. The problem encountered was a tug of war between the traditional agency analysis and what I refer to as canonical agency—an agency based upon the principles of Canon Law and Vatican II teachings. The plaintiff and her expert witness urged the court to accept and apply a canonical agency theory to a civil liability situation. There are no Supreme Court guidelines in this type of litigation. There are no time-tested procedures similar to those in Internal Revenue Service litigation or negotiations as referred to yesterday. My purpose is to discuss the general principles which we encountered and to discuss some specific cases with emphasis on the position taken by the plaintiff in the Nebraska case to support a canonical agency theory. Thereafter, I will offer suggestions about dealing with the problem.

There are few cases and little literature on the subject. Cooperation among diocesan attorneys is important in handling these cases in the future.

While I am talking I want you to think about two important considerations—insurance coverage and the corporate structure of your diocese. The gentleman from Phoenix talked about setting up separate corpora-

¹ Unpublished district court opinion.

tions for the diocesan nursing home. This concept of carefully structuring your diocese corporately is as important in negligence cases as it is in property cases. Another concept which bears on the question is which individuals or institutions are involved in this agency problem. Certainly, the relationship between a priest and his parish would be an agency recognized by civil law. A pastor and his parish is also an agency recognizable in civil courts. Paul McMahon of Pawtucket, Rhode Island, raised the question whether there is a civil agency relationship between a parish priest and the archbishop when there exists a separate parish corporation in the middle. The final question is whether a pastor and a bishop have a recognizable agency relationship in civil courts for civil disputes. These are questions which I cannot answer, but which some of you may have to litigate.

TYPICAL FACT SITUATIONS

The way our office got involved in the case probably is typical of what happens when a diocese is sued. One receives a call from either the Chancery office or the attorney representing the insurance company indicating that a claim or lawsuit has been filed naming the diocese as a party defendant. You could be confronted with a number of situations, but there are several typical fact situations:

1. A priest rushing to administer the last sacraments runs a red light or a stop sign and causes an accident which results in injuries.

2. A real case illustrates a second fact situation. A retired army chaplain was residing in a diocese. He had no assignment in the diocese. He was not attached to any parish. He was not drawing pay and was living in a boarding house. One day an old friend called and asked him to participate in confirmation proceedings at a local parish. The retired chaplain had no duties at the ceremony except being present. The retired priest went to the confirmation proceedings and after the services, left the church. On his way home, the priest passed another car and hit and killed a small child. The retired chaplain did not know that he hit the child and drove on to his home. He had no automobile insurance. The child's family looked to a party with insurance coverage and sued a Rhode Island diocese on an agency theory.

3. The third fact situation involves *Ambrosio*, the Nebraska case. The pastor of the parish completed his Sunday duties. Having seen an advertisement for a marriage encounter in another town, he attended the final mass and dinner of the session. The pastor's purpose was to greet one of the couples engaged in the encounter group with whom he was acquainted and whom he had married about 20 years earlier. On his way back to his own parish he decided to stop and see a family he had known for some years, but who were not his parishioners. As he drove west into

the evening sun he did not see an oncoming motorcycle. The male driver and the girl passenger, with her head resting on her boyfriend's shoulder, were driving east after a social gathering. Father Price, not seeing them, turned in front of them causing a collision. The lady sustained massive injuries. She filed suit for massive damages against Father Price, the parish, and the Archdiocese of Omaha. The pastor had \$100,000 of primary insurance coverage. I am going to go into more detail with this later because it presents difficulties you may encounter in similar litigation.

4. The fourth factual setting resulted in *Stevens v. Roman Catholic Bishop of Fresno*.² *Stevens* involved a French priest sent to California as a missionary. He was assigned to the Diocese of Fresno for the sole purpose of ministering to the needs of the Basque population. One day he received a call to visit a Basque family and on the way back from the visit was involved in an automobile accident. Two people were killed.

5. The last typical situation is a simple matter of a priest on a golf course driving into a group in front of him when he should have known that his drive had a longer range than the distance allowed. Your thoughts after receiving a call from the Chancery or the insurance company lawyer are first, who are the parties, and second, is there sufficient insurance to cover the risk or the claimed damages. Each of the cases discussed has resulted in serious injuries. Imaginative plaintiff's lawyers will look for the deepest pocket. If there is not sufficient primary insurance coverage, plaintiffs will use every legal theory imaginable to extend liability from the priest level to the parish level to the diocesan level and perhaps further. It is important that no stones be left unturned to avoid the extension of liability based upon theories other than the traditional civil agency rules.

TRADITIONAL AGENCY VS. CANONICAL AGENCY

In the example where the priest rushes to administer the sacrament, runs a red light or stop sign and negligently causes injury, I think civil courts, following the traditional agency rules, will extend liability to a parish or a diocese. The court easily could find that the priest was an agent of the parish or the diocese at the time of the accident and that he was acting within the scope of his employment—administering to the needs of Catholic people. In a case like this, all you can hope for is that sufficient insurance exists to cover the claim.

The traditional agency rules will not support the extension of liability to the diocese in cases similar to the Nebraska case. The pastor was outside his parish, on his own time at the time of the accident and, though he was visiting Catholics, he was not visiting his parishioners. The

² 49 Cal. App. 3d 877, 123 Cal. Rptr. 171 (1975).

business purpose requirement was not present. As a result, the plaintiff's attorney did some research, found the *Stevens* case, and came up with the canonical agency theory for the extension of liability to the diocese. In *Stevens*, the court discussed and praised the qualifications of Dr. John Noonan as a canon lawyer. The California court accepted Noonan's position that canonical agency was applicable to civil liability situations. The plaintiff in Nebraska hired John Noonan as an expert witness to analyze the case from an agency standpoint. Dr. Noonan, relying heavily on Vatican II teachings and canon law, concluded that at the time of the injury, Father Price was an agent of the parish and of the archbishop, and was acting within the scope of his agency.

In *Stevens* and *Ambrosio*, the position of the plaintiff's expert witness, John Noonan, on the issue of agency was as follows:

When a priest is ordained he is incardinated to a specific diocese. The incardination means that he, in a sense, belongs to the diocese. The priest takes the vow of obedience or the promise of obedience to his Ordinary and is subject to the command of the Ordinary. The Ordinary has the right to control the actions of the priest; to assign him, to reassign him, and generally to tell the priest what to do. A priest's duties require his attention twenty-four hours a day, seven days a week. John Noonan takes the position that the obligation of the priest extends to all men through meetings of every kind with Catholics and non-Catholics alike and that no matter what the priest is doing, he is on the business of the Bishop and the business of the Catholic Church.

We recognized the implication of the plaintiff's position and immediately proceeded to meet the argument. The facts in *Ambrosio* presented the worst possible situation in which to raise the issue of canonical agency. They would not support a finding of agency based upon the traditional agency rule. The injuries went far beyond the \$100,000 of primary coverage. In addition, the most extreme view of canonical agency was presented by John Noonan.

Dr. Noonan supported his position with an extensive recitation of his qualifications. Some of you questioned yesterday whether John Noonan is qualified to testify as a canon lawyer. A specific degree in canon law is not listed among his qualifications, but the California appeals court in *Stevens* recited Dr. Noonan's qualifications, list of publications, service on papal commissions and his authorship of various treatises. The California court's discussion of Dr. Noonan's qualifications ends with the following sentence: "[O]bviously Dr. Noonan was qualified to testify as an expert witness on canon law."

Luckily, Judge Urbom of the United States District Court for the District of Nebraska was as unimpressed with John Noonan's position as

the court in California was impressed. In discussing Dr. Noonan's position, Judge Urbom states:

John T. Noonan, Jr.'s affidavit, filing 49, states that although the "language from the constitution on the Church" indicates that the priest represents the Bishop before his particular parish, "it is plain from a more specific discussion of priestly duties in the Decree 'On the Ministry and Life of Priests' that the priest's responsibilities to represent the Bishop go beyond the territorial limits of his parish." It is not necessary to detail his interpretation of this decree; the implications of his interpretation are that all of a priest's associations with those Catholics—if not all persons—who reside in his diocese are all, by necessity and due to his priestly obligations, business. The law of agency in Nebraska does not reach this far.

Our attempts to refute John Noonan's assertions included a strong opposing opinion and a strategic presentation of the issue to the court. Father Price and his parish were represented by counsel for the primary insurance carrier. The diocese was represented by insurance counsel for the Catholic Mutual Companies and our office. We decided to present our position in the form of a motion for summary judgment supported by a strong affidavit of Omaha Archbishop Daniel E. Sheehan. Archbishop Sheehan holds a doctorate degree in canon law, JCD (juris canonicis doctor), from the Catholic University of America. We did not believe that summary judgment would be granted because of the federal court's displeasure with such pretrial motions, but we wanted to raise and present the issue to the court before trial. Archbishop Sheehan prepared a concise two page affidavit which clearly outlined the canon law applicable to the duties, functions, rights, and obligations of parish pastors, and the relationship between a pastor and his bishop. The affidavit stated in part:

The canon law theory which covers the relationship between pastors and bishops is accountability. Pastors are accountable to bishops while engaged in parochial functions related to the specific welfare of the parishioners in the definite area of their parishes. This covers all matters involving the parish, parish facilities and the carrying out of functions related to the spiritual welfare of the parishioners. A pastor is not accountable to the bishop in his private recreational and secular activities unless these actions would be detrimental to his effective functioning as a pastor and would make it difficult for him to carry out his responsibility as a spiritual father of his parishioners. These activities over which there would be some supervisory authority of the bishop are outlined in the Code of Canon Law.

In practice, direction from the Archbishop to individual pastors involving pastoral duties and obligations is minimal. Most communications are general correspondence directed to pastors of all parishes in the Catholic Archdiocese of Omaha.

Judge Urbom directly quoted this portion of Archbishop Sheehan's affidavit in granting summary judgment in favor of the Archdiocese of

Omaha and dismissing the Archdiocese from the lawsuit. The court stated that, as a matter of law, no agency existed between Father Price and the Archdiocese of Omaha at the time of the accident.

An interesting aside is that Father Price's counsel and parish joined in the motion and requested summary judgment on behalf of the parish. Judge Urbom granted summary judgment for the parish stating that no agency existed between Father Price and his parish at the time of the accident. The plaintiff was left with a single defendant, the individual priest and his \$100,000 of liability insurance. The trial was scheduled for the Monday following the summary judgment opinion. The plaintiff was faced with proceeding to trial against Father Price only and with the possibility of appealing the summary judgment. The plaintiff settled for the \$100,000 and a few thousand dollars from the Archdiocese to eliminate the possibility of an appeal on the agency issue.

The efforts expended by the plaintiff's attorney in this case are similar to what all of you might expect in similar litigation. For instance, in Archbishop Sheehan's deposition, he admitted that priests and individual parishioners are equal members of the church. This is based on Canon 107 which states that clergy are not fuller members of the church than are lay members. The plaintiff's attorney stated that he planned to use this admission in support of a motion to exclude all Catholics from the jury.

This case presented strong efforts to exclude the priest-bishop relationship from the traditional civil agency rules and to apply, in civil cases, a canonical agency theory. We must recognize that civil torts committed while performing ecclesiastical functions are going to be subject to liability based upon the traditional agency rules. Asserting that the diocese can never be sued for torts of priests is unrealistic. The best position to take when dioceses are sued for torts of priests is to urge courts to apply only the traditional civil agency rules applicable in that state. Canonical agency has no place in civil courts.

DEFENSE TECHNIQUES

An important aspect of dealing with diocesan liability concerns how to meet and defend these claims. During the Nebraska litigation I spoke with Father Adam Maida from Pittsburgh. He advised that we should try to negotiate the removal of the diocese from the case. Counsel for the Archdiocese and the priest and parish went to the plaintiff's attorney to present the insurance picture. Father Price had \$100,000 of primary coverage for himself and the parish. The parish and the diocese had a \$1 million umbrella policy. If the plaintiff established liability of the priest and the parish, the umbrella would cover any excess over \$100,000. We advised the plaintiff that he did not need to establish agency against the

Archdiocese. If he established agency against the parish this would be sufficient to trigger the umbrella coverage. The plaintiff's counsel refused. As a result he did not receive the coverage of the parish or the Archdiocese and recovered only \$100,000. I suspect that the lawyer representing both Father Price and his parish did not raise the agency issue at trial. A possible conflict existed. A dismissal of the parish would have meant leaving the individual priest with primary coverage and personal responsibility for the excess over the policy limit.

If the plaintiff voluntarily had dismissed the Archdiocese and proceeded against the priest and parish, the agency issue might never have been raised. The umbrella coverage would have provided excess coverage and possibly a larger settlement or verdict.

This story illustrates the first defense technique: attempt to negotiate the diocese out of the case either before the case is filed or before trial. Sometimes, however, this is not possible.

The next consideration is the corporate structure of the diocese. There are two corporate systems used in this country. The first is one in which the diocese is a corporation and beneath the diocese are individual parish corporations. This provides a separate corporate existence for each parish or diocesan organization. The other system is the corporation sole. The corporation sole is only one corporation which owns and operates all the parishes and runs all the diocesan organizations. There are no separate corporations. I urge you to look at your corporate structures and think about establishing separate corporations for parishes and church-related organizations. These corporate structures will be recognized by civil courts when you defend claims against the dioceses for liability based upon the doctrine of *respondeat superior*.

The third area of attention is insurance. I spoke with Jack Vail, head of claims at the Catholic Mutual Companies in Omaha, to obtain ideas on how to structure an insurance program. Catholic Mutual writes an umbrella policy for covered dioceses to provide comprehensive liability coverage for all priests. The policy excludes automobile negligence claims. Individual priests are responsible for their own insurance. These priests should be educated with respect to the insuring of their cars. These insurance programs should be reviewed irrespective of whether self-insurance or insurance placed on the open market is available.

The final advice with respect to defending these claims is to cooperate. A pool of qualified canon lawyers should be maintained to testify in civil actions in opposition to John Noonan or anyone else interpreting Canon Law and Vatican II teachings as stating that a priest is always an agent of his bishop. Lawyers defending these claims must be aided by qualified expert witnesses in this area. The United States Catholic Conference would be a good clearing house for these expert witnesses.

I offer these suggestions as guidelines only. The unlimited imagina-

tions of practicing lawyers certainly will yield other effective methods of defending "canonical agency" claims.

CONCLUSION

The ramifications of civil courts applying canonical agency to secular disputes are wide ranging. Tort litigation is only a part of the problem. There are numerous situations where a claim of agency between a priest and his diocese can be made. Cooperation among all of us will help to meet these claims.