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M.H. Ogilvie*

Limiting the Legal Liability of Religious
Institutions for their Clergy:
Cavanaugh v. Grenville Christian College

The purpose of this article is to explore the case law relating to the potential legal liability of ecclesiastical institutions for the conduct of their clergy and lay employees in the tort of negligence, vicarious liability and breach of fiduciary duty. While a number of cases have resulted in findings of liability, especially in those relating to the Indian residential schools, a recent decision from the Ontario Court of Appeal, Cavanaugh v. Grenville Christian College, suggests ways of thinking about the limits and scope of liability for institutions whose charitable purposes are occasionally betrayed by rogue persons over whom they may have little control.

Cet article a pour objectif d'examiner la jurisprudence sur la responsabilité légale potentielle des institutions ecclésiastiques pour la conduite de leurs membres et de leurs employés laïcs dans les délits de négligence, dans les affaires de responsabilité du fait d'autrui et de manquement à l'obligation fiduciaire. Quoique de nombreux jugements, en particulier ceux qui ont trait aux pensionnats autochtones, ont conclu à la responsabilité des institutions, une décision récente de la Cour d'appel de l'Ontario, Cavanaugh v. Grenville Christian College, suggère des pistes de réflexion sur l'ampleur et les limites de la responsabilité pour les institutions dont les objectifs caritatifs sont parfois trahis par des délinquants sur qui elles peuvent n'avoir que peu de contrôle.

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Introduction

I. *Cavanaugh v. Grenville Christian College*

II. *Discussion*

Conclusion

Introduction

The legal liability of ecclesiastical dioceses for the misconduct of clergy acting within the geographical boundaries of a diocese has been considered by a handful or two of cases over the past two decades in the context of the tort of negligence, vicarious liability and breach of fiduciary duty. In most cases, the courts have found, on the facts, that the diocese bears liability for the harms done to children and other vulnerable persons, but in a few cases the diocese has been found not to be liable on the facts. An important example of the latter result is the recent decision of the Ontario Court of Appeal in *Cavanaugh v. Grenville Christian College*.¹ The Diocese of Ontario (whose cathedral is in Kingston) in the Anglican Church of Canada (ACC) was found not liable to students who alleged negligence, vicarious liability and breach of fiduciary duty against the diocese for alleged acts by two priests, ordained but not licensed by the diocese, who were headmasters of a private school, Grenville Christian College, and several members of the school staff.² The reasons for this outcome were found in the facts relating to the extent to which the diocese could be said to be responsible for unlicensed priests operating a private school within a diocese, which was not an enterprise either authorized or recognized by the diocese. The case highlights the importance of facts in determining whether there is legal liability on the part of a diocese.

The purpose of this article is to distill the factual requirements for imposing legal liability on a diocese, with a view to assisting litigants and courts in future cases as well as assisting ecclesiastical organizations, which do not wish to harm vulnerable persons but rather to serve their best interests, to structure their internal affairs so as to avoid liability by

1. *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139, 360 DLR (4th) 670 [*Cavanaugh*].

2. Although the diocese is no longer a defendant in the action as a result of the decision by the Ontario Court of Appeal, the class action on behalf of the students continues against the school and the headmasters. This article is restricted to consideration of the issues involving the diocese which have been resolved finally.

rogue persons over whom they have little control. Religious institutions which ordain persons should no more be liable by that fact alone than are professional licensing bodies of lawyers, doctors, dentists, etc. for the misfeasances of the persons whom they approve to provide professional services to the public—at least, at this time!

At the outset, it is important to make several assertions so as to frame the discussion that follows and to define its limits. First, the legal principles relating to negligence, vicarious liability and fiduciary obligation at issue in these cases are no different in content than in other cases in other areas of the law. Thus, the content of these principles will not be expressly discussed, but rather, following the example of the courts, will be assumed and applied in the contexts at issue. The content of vicarious liability is a partial exception because it was further developed in this context specifically beyond its original formulation in tort law generally; negligence and fiduciary duty do not require separate consideration of their constituent principles. Secondly, since the cases before *Cavanaugh* have been analyzed elsewhere,³ the discussion will again assume and work from earlier analyses, so that there will be no separate discussion of these cases except insofar as they illuminate the discussion below. Thirdly, the focus of this paper, like that of the preponderance of the cases, will be on episcopal polities, that is, churches which are internally organized around a bishop in a diocese. Virtually all of the cases are concerned with the two main episcopal polities in Canada, the Roman Catholic Church and the Anglican Church of Canada. There are no relevant cases concerned with other episcopal polities, for example, the various Lutheran, Methodist and Orthodox churches. Nor are there any cases about churches organized solely on a congregational basis. There are a few cases about one church organized on a presbyterian basis, that is, the United Church of Canada, which follows the classical Reformed structure of organization based on tiered church courts (session, presbytery, synod, general council). There are no cases involving non-Christian religious institutions; however, because these are largely organized on a congregational basis with a single, local, not-for-profit incorporation, any future cases would likely treat the local organization as the liability bearing body. (Included in this statement would be Jewish, Islamic and the various “Eastern” religions.)

3. See generally Elizabeth KP Grace & Susan M Vella, *Civil Liability for Sexual Abuse and Violence in Canada* (Toronto: Butterworths, 2000). For a brief overview of the cases relating to religious institutions, see MH Ogilvie, *Religious Institutions and the Law in Canada*, 3rd ed (Toronto: Irwin Law, 2010) at 316-323 and the literature cited therein.

Fourthly, the particular, heart-rending details of the abuses at issue will not be discussed but assumed as the background to the discussion.

I. *Cavanaugh v. Grenville Christian College*

Five former boarders at Grenville Christian College (GCC) brought a motion to certify a class action against the two headmasters, the College and the diocese on behalf of other students, alleging physical, sexual and psychological abuse while at the College, and seeking damages of \$225 million. The action was framed in negligence, vicarious liability and fiduciary obligation. The students alleged that GCC and the two headmasters sought to indoctrinate the students in the teaching and practices of the Community of Jesus, a religious community based in Orleans, Massachusetts,⁴ and that the diocese failed to intervene to ensure that GCC promoted the teaching, practices and values of the Anglican Church. The motions judge refused to certify the claims against the headmasters and GCC because the students had not demonstrated that a class proceeding was the preferable procedure. This finding was appealed to the Divisional Court which overturned the decision of the motions judge and permitted the class action to be certified and to proceed against the headmasters and the College.⁵ The Ontario Court of Appeal upheld this decision.⁶ The action against the diocese was dismissed by the motions judge and upheld by the Ontario Court of Appeal, so that the case against the diocese has come to an end while that against the other defendants is proceeding.

Before the motions judge, the plaintiffs' claim in negligence against the diocese was based on the existence of a duty of care⁷ as alleged by them in the affiliation of the school with the diocese; the ordination and alleged licensing as priests of the diocese of the two headmasters, holding out of the school as an Anglican school and the bishop's knowledge of the practices of the Community of Jesus at the school.⁸ However, the court rejected the existence of a duty of care of the diocese to the students on the ground that the action was built on the false premise that because GCC represented itself as an Anglican school and the diocese knew about it, the diocese owed a duty of care. Rather, the diocese was not subject to a duty to intervene simply because the GCC claimed to be an Anglican institution.⁹

4. <www.communityofjesus.org>.

5. *Cavanaugh v Grenville Christian College*, 2014 ONSC 290, 237 ACWS (3d) 589.

6. *Cavanaugh*, *supra* note 1.

7. The court relied on the test for the existence of negligence in *Anns v Merton LBC*, [1978] AC 728, as applied in numerous cases by the Supreme Court of Canada: *Cavanaugh v Grenville Christian College*, 2012 ONSC 2995 at para 78, [2012] OJ No 2293 [*Cavanaugh* ONSC].

8. *Cavanaugh* ONSC, *supra* note 7 at para 88.

9. *Ibid* at para 89.

Moreover, even if a duty of care existed, it was not reasonably foreseeable that because the GCC purported to be Anglican that the diocese would owe a duty to the students.¹⁰ Nor was there proximity between the diocese and the students because there was no relationship between the diocese and the school; the diocese did not own or contract with the school; there was no employment relationship with the headmasters; there was no control by or corporate or organizational relationship with the diocese, nor any diocesan right or duty to intervene; nor did parents receive advice from the diocese about the GCC.¹¹ The relationship was too remote for there to be a cause of action against the diocese.¹² It was not enough to create a duty situation that the diocese had ordained the headmasters and that Anglican liturgy was celebrated in the chapel.¹³ The motions judge rejected the vicarious liability argument as well.¹⁴ There was no sufficiently close relationship between the diocese and the school to make the importation of vicarious liability appropriate or fair: there was no employment relationship; the school was not acting on behalf of the diocese but was an independent, autonomous institution founded prior to the ordinations; and again, the diocese exercised no autonomous power or control or legal right to intervene in the affairs of the school; nor did the diocese introduce the risks of harm to the students at the school. The motions judge made equally short work of the breach of fiduciary duty allegation: the diocese had no relationship of trust with the students; the students were not dependent on the diocese; the diocese had no direct relationship with the students; nor did the diocese undertake to act with loyalty to the students.¹⁵ The Ontario Court of Appeal agreed with these findings. In assessing the negligence claims, the court applied the two-part *Anns* test:¹⁶ (i) do the facts fall within a previously recognized category of cases so that a *prima facie* duty of care arises; but (ii) if they do not, should a new duty of care be recognized as determined by the foreseeability of harm and proximity of

10. *Ibid* at para 91.

11. *Ibid* at para 92.

12. The motions judge rejected the analogy with *Re Residential Indian Schools*, 2002 ABQB 667, 222 DLR (4th) 124 [*Residential*] on the ground that there was diocesan control in that case.

13. *Cavanaugh* ONSC, *supra* note 7 at para 97. In addition to ordination, an Anglican diocese only asserts control over priests who are also licensed to exercise their powers in the diocese by appointment of the bishop: see canons 17(1), (b), (c); 17(2)(a); 17(5)(a), (b); 17(7) of the Constitution of the General Synod, *Handbook of the General Synod of The Anglican Church of Canada*, 17th ed (2013) at 76-78 <www.anglican.ca/resources/handbook> [*Handbook*].

14. *Bazley v Curry*, [1999] 2 SCR 534; *Jacobi v Griffiths*, [1999] 2 SCR 570; *B(KL) v British Columbia*, 2003 SCC 51, 230 DLR (4th) 513 [*B(KL)*]; *G(ED) v Hammer*, 2003 SCC 52, 230 DLR (4th) 554 [*G(ED)*]; *B(M) v British Columbia*, 2003 SCC 53, 230 DLR (4th) 567 [*B(M)*].

15. *Cavanaugh* ONSC, *supra* note 7 at paras 109-110.

16. *Cavanaugh* ONSC, *supra* note 7.

relationship? Once a duty of care is made out, a court should proceed to any policy considerations that justify negating that duty, so there is no legal liability.¹⁷ The students' argument that the facts constituted a recognized duty situation was premised on several cases in which the courts found that a diocese is liable in negligence for priests working within that diocese.¹⁸ However, Doherty J.A., for the court, rejected this broad reading of these cases because in them the diocese appointed and controlled the priests in question whose relationship with the diocese was akin to an employment relationship. That was not the case on the facts in *Cavanaugh*.¹⁹ Turning to the issue of whether a new duty situation could be found on the facts, the court addressed two allegations relating to foreseeability of harm, that the diocese knew the two headmasters were members of the Community of Jesus and followed its teachings at GCC, and that the diocese was or should have been aware of staff abuse and ought to have reported it to the appropriate authorities and parents. The court concluded that the pleadings did not disclose sufficient detail to determine the foreseeability of harm to the students.²⁰ Nor did the court find sufficient proximity between the diocese and the students to warrant a duty of care: there was no direct relationship, no representations or reliance, and no contact at all between diocese and the students.²¹ Nor was there any direct relationship set out in the pleadings between the diocese and the school and its headmasters: there was no control or supervision, no employment or disciplinary relationship, and no evidence that ordination made any difference at all at the school.²² In fact, in the absence of a duty of care, the negligence claim failed.

The Ontario Court of Appeal did not expressly address vicarious liability. It could be argued that the court's analysis of negligence assimilated some elements of vicarious liability, in particular, with respect to the relationship of the diocese to the school and the two headmasters. The court relied on cases about vicarious liability and placed emphasis on those factual elements which are required for a successful vicarious liability claim, such as enterprise, control, employment and discipline. Otherwise it is not clear why the court ignored the issue since it is an excellent way to link a diocese with a priest where the diocese is not itself at fault in relation to the victims but is in relation to the priest.

17. *Cavanaugh*, *supra* note 1 at paras 45-46.

18. *K(W) v Pornbacher*, 32 BCLR (3d) 360 [*Pornbacher*]; *Swales v Glendenning*, 237 DLR (4th) 304 [*Glendenning*]; *John Doe v Bennett*, 2004 SCC 17, [2004] 1 SCR 436 [*Bennett*].

19. *Cavanaugh*, *supra* note 1 at paras 64-68.

20. *Ibid* at paras 71-73.

21. *Ibid* at paras 74-75.

22. *Ibid* at paras 76-78.

The court, however, did dismiss quickly the fiduciary duty issue. If there was insufficient proximity between the diocese and students to found a claim in negligence and if the diocese was not in a position to exercise power over the diocese, there could be no basis for a fiduciary claim.²³ Thus, the case against the diocese failed at both the certification motion and appeal of that motion, with the result that the case will now proceed against the school and the two headmasters only.

On the assumption that there are no further allegations about the role of and relationship of the diocese to the school, headmasters and students, and that those allegations would have been found as facts at a trial of the substantive issues, some observations may be made about what facts may be required generally to make dioceses liable in negligence, vicarious liability or fiduciary obligation. To do so, it is useful to review the allegations in *Cavanaugh* in relation to the diocese as a baseline for discussion: (i) the two headmasters were ordained as priests in the diocese; (ii) the two headmasters were not appointed to any position in the diocese nor to the position of headmaster of the private, autonomous school; (iii) the school was not a school, parish, church, or any other enterprise of the diocese; (iv) the diocese did not own, direct, fund, manage, operate, supervise or administer the school, nor did it appoint, approve or have power to discipline or dismiss any of the staff; (v) the diocese did not advise parents to send children to the school or give any advice of any kind about the school whatsoever; (vi) the school was founded independently of the diocese and about nine years before the ordination of the headmasters; (vii) the diocese had no official representation to the school; (viii) diocesan bishops attended occasional functions at the school but so too did representatives from other religious institutions as well as secular officials; (ix) the school represented itself as an Anglican school but not as being part of the ACC; (x) school chapel services, which were voluntary for non-Anglican students, used Anglican liturgy; (xi) the school flew the flag of the ACC; and (xii) the diocese claimed that it had never received complaints about alleged abuses at the school and had no direct involvement in or knowledge, nor ought to have knowledge, of alleged abuses.

With the exception of the twelfth point, the truth or falsity of which was never confirmed because no fact findings were ever made, the other eleven assertions neither simply nor collectively amount to an official institutional connection between GCC and the Diocese of Ontario. At most, if there was fault on the part of the diocese, it consisted in ordaining

23. *Ibid* at paras 79-80.

the two headmasters in the first place and of not insisting that the school make clear in its publications, website, brochures, and so on that it was not a part of the diocese or an official institution of the diocese or the ACC. Since the two headmasters had previously been ordained by other Christian churches and had satisfied the additional educational and other suitability requirements for Anglican ordination without raising concerns, it is difficult to fault the diocese on the ordination issue. In any case, licensing by the diocese and appointment to a diocesan position would also be required to connect an Anglican priest and bishop in Anglican canon law, so that mere ordination should count for nothing in the assessment of fault. Moreover, it would have been difficult to stop the school from presenting itself as an Anglican school short of a judicial order analogous to a trademark or trade name enforcement to ensure a clear distinction between the school and the church is publicly evident. It would be especially difficult to ensure that the Anglican liturgy was not used in the school chapel since people are generally free to worship as they wish. Everyone is free to use whatever modes of worship drawn from whatever sources, including organized religious institutions, in their devotions. To seek a judicial restraint order would have been a most unusual thing to do at the time, especially as there was apparently no diocesan knowledge of alleged abuse at the school, although to do so would likely have resulted in making litigation against the school unthinkable on the basis of the absence of connections between the school and the diocese. In addition, had there been diocesan knowledge of alleged abuses, then the diocese would have been under the same legal duty as everyone else in society to report to the appropriate authorities.²⁴ Had the Ontario Court of Appeal decided that the diocese was liable, at least vicariously, because it did not take steps to disassociate itself from the school, a huge step would have been taken in the law not taken in other contexts. The common law does not attribute liability to a party simply because a wrongdoer has associated itself with that party. Otherwise those engaged in wrongful activities could cheerfully associate themselves with innocent others in possession of deeper pockets from which to pay any assessed damages or fines. Thus, in the absence of any culpability on the part of the diocese either directly (negligence, fiduciary obligation) or indirectly (vicarious liability), *Cavanaugh* in relation to the diocese is undoubtedly correct. But it is salutary to compare this outcome with previous cases in which dioceses have been found liable in order to decide which outcome is appropriate on the facts. The question is important for religious institutions because many become involved in varying degrees

24. Every province now has some requirements. See on a province-by-province basis.

with various charitable or educational activities in their communities, and are too often naive to their potential detriment when wrongdoing occurs. When, then, does a diocese or equivalent ecclesiastical body cross the line into legal liability for the wrongdoing of others?

There are a number of constituent elements in any answer to this question: (i) the nature of a diocese or equivalent ecclesiastical body considered in the context of its internal law, (ii) the nature of a diocese in the common law, (iii) the types of relationships it may have to various persons who carry out its works, (iv) the common law categories of liability that may arise from these relationships, and (v) how a diocese might control or limit its legal liability when persons whom it has authorized in some sense engage in wrong doing. Each of these topics has been or could be the topic of entire books, but the present purpose is to show how they fit together and have been assessed by the courts in the contexts of the cases to date in Canada. Most of these cases come from the Indian residential schools litigation or involve foster parents or other situations in which children can be subjected to abuse.

II. *Discussion*

The first issue in these cases is to establish whether there is a link between the diocese or other ecclesiastical body and the perpetrator of the alleged wrongful conduct. Without a factual link there can be no legal liability either directly in negligence or breach of fiduciary duty, or indirectly in vicarious liability. To ascertain a link, it is necessary to understand the internal law and governance structure of the religious institution to the extent of understanding the jurisdiction to appoint, supervise and discipline in relation to officially recognized positions. As stated at the outset, most cases have involved religious institutions that are episcopal in nature, that is, divided into geographical jurisdictions called dioceses led by a bishop.²⁵ Christian religious institutions that are presbyterian in organization are also organized on a geographical basis but governed by a hierarchy of representative bodies (session, presbytery, synod, general assembly). Those that are congregational are governed locally by designated leaders within the local assembly. Almost all non-Christian religious institutions are governed at the local level by designated leaders of individual synagogues, mosques, temples, and so on.

Where a religious institution is episcopal, virtually all decisions about diocesan works are made at the diocesan level, occasionally on the basis

25. For a more extended discussion of those organizational arrangements, episcopal, presbyterian and congregational, see Ogilvie, *supra* note 3 at ch 3. See also Norman Doe, *Christian Law, Contemporary Principles* (Cambridge: Cambridge University Press, 2013).

of policy directions from a national church body, but always implemented and supervised by the diocesan bishop. While local parish decisions are made by the priest appointed by the bishop, assisted by lay leaders within the parish, the priest is responsible to the bishop for the conduct of parish affairs. Ultimately, the bishop is responsible for the affairs of the entire diocese. The canon law of the Roman Catholic Church (RCC)²⁶ and of the ACC²⁷ clearly posit responsibility, and therefore, liability with the bishop acting on behalf of the diocese. Since all dioceses are incorporated pursuant to the civil law, either by virtue of their own private acts or occasionally pursuant to general not-for-profit corporations legislation, the financial resources available for civil law damages awards are located in the diocesan corporation. In light of the extensive jurisdiction and power of a diocesan bishop, financial responsibility for civil wrongdoing ultimately resides with the diocese. Bishops ordain, license and appoint all priests as well as other categories of church workers in diocesan enterprises, although local parishes typically appoint musicians, administrative and custodial staff with ultimate responsibility to the bishop. However, as *Cavanaugh* indicates, mere ordination is not tantamount to a position of authority. Rather, the further steps of licensing to exercise priestly functions and appointment to a position where those functions are actually exercised is also required. Thus, to engage diocesan liability, it is necessary that the alleged wrongdoer also be validly appointed to a position by a bishop.

In religious institutions organized on a non-episcopal basis, it is necessary to go through the same process of identifying which person or body has internal authority to appoint and to ensure that the process has been followed if civil liability is to result for wrongdoing. In presbyterian structures, this is typically the presbytery²⁸ and in congregational structures, the local congregation in accordance with its own constitution.²⁹ Since a diocese is also part of a larger national or international church, it may also be involved in activities determined by that larger body such as missions, both domestic and foreign, colleges, schools and eleemosynary endeavours. Thus, a court may have to determine which church entity is responsible for appointment, supervision and discipline. The difficulties in doing so were demonstrated in several cases concerned with both the ACC

26. Ernest H Caparros, Michel Theriault & Jean Thorn, eds, *Code of Canon Law Annotated*, (Montreal: Wilson & Lafleur, 1993) at canons 375-402.

27. *Handbook*, *supra* note 13 at canons 17-18. For the specifics of the role of a bishop within a diocese, see also diocesan canons available online at diocesan websites.

28. For the United Church of Canada, see *The Manual* (2013) s 6.4 at 34 <www.united-church.ca/files/handbook/manual-2013.pdf>; for The Presbyterian Church in Canada, see *The Book of Forms* (2013) ss 198-250 at <www.presbyterian.ca/resources>.

29. Each congregation must be considered separately.

and the RCC. In relation to the ACC, in *B.M. v. Mumford*,³⁰ the complainant alleged sexual and physical assault against two Anglican priests, one also a bishop, and sued the diocese, the synod of the diocese, the ACC and the General Synod of the ACC. Both synods were incorporated pursuant to their own respective legislation. The British Columbia Supreme Court dismissed the case against the ACC and its General Synod on the ground that they had no role in the licensing, employment or general supervision and control over the priest,³¹ nor over the ordination as bishop of the bishop who was selected by the diocesan synod. Rather, the diocese and the diocesan synod respectively exercised the necessary control over the two men. The Ontario Superior Court came to the same conclusion in *Lariviere v. Hilton*,³² dismissing complaints of sexual assault by a priest against the ACC and its General Synod because they had no legal relationship with the priest against whom the complaints were made.

Two other cases involving the ACC were more complex because they involved Indian residential schools, and therefore also involved potential liability of the Crown and Anglican missionary societies involved in the schools. In *F.S.M. v. Clarke*,³³ the complainant had been repeatedly assaulted by a dormitory supervisor at a residential school who was a layperson. The defendants were the ACC, the General Synod of the ACC, the diocese in which the school was located, the synod of the diocese and the Crown. The ACC was alleged to be implicated through a missionary society created by the ACC to administer the schools on its behalf. Clarke was employed by the principal of the school and paid from the school's budget, but subsequent reorganization of the respective roles of the church and the government resulted in Clarke becoming a public servant. The principal subsequently reported to the government in respect of secular matters and to the diocesan bishop in respect of spiritual matters at the school. The court expressly noted that the various Anglican defendants did not differentiate among themselves at the trial,³⁴ and no reason was given for this. The court found the "Anglicans" and the government to be vicariously liable and negligent, and the "Anglicans" to be in breach of a fiduciary duty because they undertook to look after the students to the exclusion of the government. Although the court allocated liability 60 percent to the Anglicans and 40 percent to the government, it permitted the

30. *M(B) v Mumford*, 2000 BCSC 1787, 84 BCLR (3d) 146.

31. The court applied the standard control test in relation to employees at the time: *Robitaille v Vancouver Hockey Club Ltd* (1981), 30 BCLR 286.

32. *Lariviere v Hilton* (2002), 207 DLR (4th) 765.

33. *M(FS) v Clarke*, [1999] BCJ No 1973.

34. *Ibid* at paras 118-119.

government to claim third party relief against the diocese because there was a breach of contract with the diocese whereby the diocese had promised to provide pastoral care for the students and did not do so properly. Thus, insofar as possible, given the collective defence of the Anglican entities, the court attempted to distinguish them for liability purposes.

In the final ACC case, *Re Residential Indian Schools*,³⁵ involving some 500 claimants who attended residential schools, two of the dioceses, Calgary and Athabasca, and the General Synod of the ACC, moved to have the actions against them dismissed because they were not involved in Anglican residential schools situated in those dioceses geographically. Rather, they argued liability should lie with the missionary society of the ACC, a federally incorporated body, which operated the schools. The diocese of Calgary was responsible for schools located in the diocese prior to 1919 and the diocese of Athabasca was responsible prior to 1923. However, the missionary society was responsible after these dates and until 1969 when the federal government took over responsibility for the schools. The General Synod was never directly responsible and the court dismissed the case against it. In relation to the diocese of Calgary, the court limited the case to the periods before 1919 and after 1969 because the diocese may have played a limited role by providing chaplains on a contractual basis, although the existence of the contracts had yet to be proven. In relation to the diocese of Athabasca, the court also limited the case to the periods before 1923 and after 1969 for the same reasons, but in this case, there was a contractual arrangement after 1969 for the diocese to run a student residence in one of the schools located in the diocese and there was a claimant in relation to that school. The court also dismissed claims that the corporate veil among the various Anglican entities should be pierced, applying the standard three-fold test of fraud, agency and alter ego or fiction,³⁶ to conclude that none of those factors was present in the relationship among the Anglican corporate entities.

Similar care is shown by the courts in establishing whether there is a link between a diocese and an alleged perpetrator of wrongful acts in cases involving the RCC. In some cases, this link was clear because the priest was appointed by the bishop to the positions in which the wrongful act occurred,³⁷ and the courts have found that the relationship between a priest and a bishop within a diocese is “akin to” an employment

35. *Residential*, *supra* note 12.

36. *Ibid* at paras 146-169.

37. *Bennett*, *supra* note 18; *Glendining*, *supra* note 18. *Cf Pornbacher*, *supra* note 18.

relationship.³⁸ Therefore the necessary control requirements are present. On the other hand, a priest working within a parish who was found guilty of abusing young boys in a completely different context, that is, while organizing camping activities for a non-church institution run by a province, resulted in vicarious liability for the province but no liability for the diocese because the link in relation to the wrongful conduct was with the provincial institution and not the church.³⁹ Somewhat more difficult cases are concerned with lay employees of ecclesiastical enterprises. In *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*,⁴⁰ the claimant was repeatedly assaulted by an Aboriginal baker at a residential school who lived in a dormitory for employees at the school. The Supreme Court of Canada found that there was no liability on the part of the school or the order which ran the school and appointed the baker because there was no strong connection between his work as a baker and the wrongful conduct. The baker was not permitted to be with the students, the residence was off-limits to the students, the acts did not further the employee's aims, and no power or responsibility was conferred on the baker in relation to the students. The fact that the school appointed the baker and required him to live at the school appears not to have been considered by the court, although these offered him ample opportunity for contact with the students.⁴¹ With the exception of *E.B.*, appointment by a bishop, or other ecclesiastical authority, such as an order, to a church-sponsored position is the key factor linking the perpetrator to the religious institution for potential liability or negligence, vicarious liability or breach of fiduciary duty. *Cavanaugh* confirms this trajectory. These cases also confirm that by virtue of incorporation as civil law entities, financial liability for wrongful acts by those lawfully appointed pursuant to the internal law of a religious institution will be met from the civil law assets of those religious institutions. The legal nature of a diocese *qua* diocese from the perspective of the common law is irrelevant because by also adopting a civil law persona, a diocese has become a civil law person like any other corporate person.

38. Bennett, *ibid* at para 27. See also MH Ogilvie, "Are Members of the Clergy Without the Law? *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston*" (2014) 39 Queens LJ 441, for an analysis of recent Canadian and English jurisprudence on the issue.

39. *Rich v Bromley Estate*, 2013 NLCA 24, 336 Nfld & PEIR 107.

40. *B(E) v Order of the Oblates of Mary Immaculate (British Columbia)*, 2005 SCC 60, [2005] 3 SCR 45.

41. *Cf P(V) v Canada (AG)*, 1999 SKQB 180, 186 Sask R 161; *W(D) v Canada (AG)*, 1999 SKQB 187, 187 Sask R 21.

The case law generally in this area suggests that there can be a variety of relationships which religious institutions might have with those who carry out its mission. The most obvious is that between religious institution and clergy which is akin to an employment relationship, in which control is present from appointment to dismissal.⁴² But as *Cavanaugh* shows, liability for wrongful acts does not extend to clergy who are merely ordained but hold no formal appointment. Although there is no case law, it seems self-evident that clergy who hold appointments which are not pastoral positions within a parish or congregation, for example, as missionaries whether domestic or foreign, theological college faculty, institutional chaplains, or musicians, would be treated in the same way by virtue of formal appointment to institutional positions. More difficult to classify are administrators and custodial staff whose positions do not necessarily entail direct contact with vulnerable persons, although the opportunities for contact abound, as shown in *E.B.* These cases require case-by-case factual analysis to determine whether the legal requisites for liability in negligence, vicarious liability or fiduciary obligation are present.

But the Supreme Court of Canada has cautioned against automatic findings of liability in analogous fact situations to those in cases involving religious institutions. In *E.D.G. v. Hammer*,⁴³ the Court found that a school board was not liable for a janitor who assaulted a student because the board had no reason to believe the janitor would do so. There is no vicarious liability merely because an organization provides a person with an opportunity to commit a tort. Nor was the relationship between the board and the student fiduciary, so that the board was not required to act in the best interests of the student. Again, in *M.B. v. British Columbia*,⁴⁴ the Court found that a provincial government is not vicariously liable for torts committed by foster parents against children in their care because the foster parents are not acting on behalf of the government. In *K.L.B. v. British Columbia*,⁴⁵ which was also concerned with abuse by foster parents, the Court explained that there was no vicarious liability because the government deliberately leaves foster parents with responsibility for running their home so as to parallel family life as much as possible.⁴⁶ The court further found that while the relationship of government and child was fiduciary because the government is the legal guardian of the children, the government was not in breach of the fiduciary duty because it did

42. *Bennett*, *supra* note 38.

43. *G(ED)*, *supra* note 14.

44. *B(M)*, *ibid.*

45. *B(KL)*, *ibid.*

46. *Ibid* at para 23.

not put its interests ahead of the children nor commit acts which harmed the children in any way amounting to a betrayal of loyalty. These cases suggest that liability in tort or fiduciary obligation does not always follow from being in a position in which there is contact with vulnerable persons without some greater degree of authority or responsibility in relation to such persons. Therefore, it does not automatically follow that employees of religious institutions such as administrators or janitorial staff would trigger legal liability by their wrongful acts for their employers.

In light of the foregoing, it remains to suggest in what situations religious institutions, especially those organized on an episcopal basis, might be legally liable for the torts and breaches of fiduciary duty by those entrusted with carrying out their mission in some capacity. The cases to date show that only two categories of persons will be potential sources of liability: (i) clergy who have been ordained, licensed and formally appointed to recognized positions within the religious institution, including to parishes or congregations as well as other recognized positions in colleges, schools, missions, and eleemosynary enterprises which are part of the enterprise of religious institution; and (ii) other persons who are either employees proper or recognized volunteers, including musicians, teachers and pastoral care workers who have contact with vulnerable persons in the regular exercise of their appointed functions. Equally, the cases show that there are two categories of persons who will not, *prima facie*, be potential sources of legal risk for a religious institution: (i) clergy, by virtue only of having been ordained, but do not hold any formal appointments or voluntary positions within the religious institution by which they were ordained; and (ii) persons who are appointed to administrative or janitorial positions, or are independent contractors performing building or equipment maintenance or providing some other service, who are not in positions involving authority over or contact with vulnerable persons by virtue of the terms of their appointment. In the absence of knowledge or reasons for suspicion about their conduct, the religious institution is unlikely to be found legally liable for their wrongful acts.

The final problem is how religious institutions might protect themselves from liability for wrongful acts perpetrated in breach of their moral values and legal standards over and above the techniques employed by other organizations, which include exercising due diligence in the appointment process, appropriate oversight in the performance of appointed duties, clear employment guidelines, immediate investigation of complaints, a transparent and timely review process for a complaint, appropriate discipline, and, potentially, dismissal in accordance with the law. However, there are some distinctive features of religious institutions

and the persons they ordain or otherwise appoint to leadership roles to carry out their mission which suggest consideration of additional steps to limit legal liability for unauthorized wrongful acts. These distinctive features include the fact that ordination alone does not entail appointment to a formal position, whether paid or voluntary; that ordained clergy relatively frequently find other forms of employment either interspersed with ecclesiastical appointments or after deciding to move permanently into purely secular employment; that religious institutions tend to be very forgiving places where personal failings can be overlooked, sometimes wrongly; that close supervision of the conduct of parish or congregational life is rarely undertaken while opportunities to cover up wrongful acts abound; and that much of the life of religious institutions depends on the good will of those involved because perpetrators of wrongful acts remain very rare (notwithstanding the widespread publicity when they occur).

In light of these factors which point toward being alert to the rare perpetrator of wrongful acts, religious institutions might consider some additional safeguards beyond those of secular employment to limit their legal liability. First, as *Cavanaugh* suggests, because mere ordination can raise the possibility of liability, some greater scrutiny may be warranted at that time for clergy who are not immediately appointed to a formal position or who subsequently vacate a formal position, because they are not subject to the supervision associated with such positions. The implication that ordination amounts to a seal of approval can be difficult to rebut but some steps such as online listings of clergy and their positions on official websites should suggest to a court that not being listed means no formal supervision or appointment. It may also be appropriate to establish a register and annual reporting system for ordained persons not holding formal appointment as to their employment or volunteer positions similar to those required for lawyers and many other professionals by their professional societies. Keeping track of such persons could be construed as a form of control bringing possible legal liability, but could also be construed as a method of segregating them from ordained persons under formal appointment and supervision. By making clear at the outset that the latter reason is the purpose, the religious institution should be in a better position than with the former reason in relation to any litigation. Those who voluntarily seek ordination should not find this requirement overly offensive because its purpose is to ensure that there is no responsibility for the conduct of an ordained person not under some measure of control.

Secondly, it may be appropriate for dioceses or their equivalents in non-episcopal religious institutions to take steps to disassociate themselves from the activities of those they have ordained when they

learn of inappropriate identification by those persons with the work of the religious institution. This could be effected in a fact-specific way, including direct requests to the person to refrain from inferring association, direct communication with those who may be impacted by the association, or statements on an official website setting out clearly and explicitly those enterprises associated with the diocesan mission, with the implication that all others are not. In a few circumstances, an injunction or other legal step to restrain identification might also be required. Thirdly, religious entities might generally consider having clear and explicit statements on their websites and in the other published material about who is or is not involved officially in the enterprise; this might include appropriate responses to telephone inquiries as well.

Finally, religious institutions themselves might consider limiting in some way the significance of mere ordination for those who do not work within the organization. This suggestion is theologically very controversial because all have a theological understanding of ordination and most consider ordination to be for life regardless of whether the ordination is exercised by the ordained person. Withdrawal of ordination—defrocking—is understood as the final disciplinary measure for very serious misconduct, and for that reason is rarely an option. Withdrawal of a licence is also inappropriate because licensing is normally associated with approval to hold a formal position. However, requiring an application for or a renewal of a licence wherever appointment to a position is imminent could suggest that those who are ordained, but do not presently hold a licence to function as a member of the clergy, are not currently approved to do so and are not persons for which the religious institution should be currently responsible. Most Christian denominations use the distinction between ordination and licensing, so that the distinction could be made more meaningful, if more formalized, as a means for distinguishing those under supervision from those who are not at the appropriate time. For other religious institutions, whether Christian or non-Christian, organized on a local, congregational basis, there are no equivalent difficulties because either the clerical or lay leader is employed or not employed by the local organization that is responsible. Undoubtedly there are other institution-specific solutions beyond the competence of the author to devise which would reflect the need to differentiate those holding formal appointments from those who do not.

It remains to add that a failure by a religious institution to adopt some of these suggestions or some other method of distinguishing those who are subject to oversight from those who are not, should not be interpreted as an admission of oversight sufficient to attract legal liability. The factual

link must always be established between institution and the perpetrator of wrongful acts. Rather, these are simply suggestions to set out the links more clearly for litigation purposes. On the basis of the cases to date, the courts have shown considerable sensitivity to the internal structural organizations of the institutions which have appeared before them. Counsel should be encouraged to set out as clearly as they are able the internal governance structures of religious institutions and how alleged perpetrators of wrongful acts are or are not linked to that structure. There is no reason to suspect that courts will fail to continue to do so in the future so as to ensure that legal liability will only be attached to religious institutions when they are factually responsible.

Conclusion

Although the final outcome in *Cavanaugh* remains to be seen in respect to the class action against the headmaster and the college for alleged abuses against the students, the final adjudication of the decision against the diocese, dismissing the case against it, appears to be correct on the facts alleged in the certification motion. Nevertheless, the case raised important issues about the limits of liability of religious institutions in relation to vulnerable persons, and demonstrated that the trajectory of Canadian cases, of which it is a part, is sensitive to the complex relationship that religious institutions have with their clergy and other persons who carry out their mission. This is all the more remarkable since these relationships have deep theological and historical roots of over several millennia in length. While these cases are concerned with unfortunate and messy issues, the courts have treated the complexities of religious institutions with great care, so that religious institutions should continue to be confident in providing spiritual and pastoral services to their members and the wider community.